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THE LAWYERS REPORTS ANNOTATED

BOOK IX.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
ROBERT DESTY, EDITOR

BURDETT A. RICH, HENRY P. FARNHAM,
ASSISTANTS.

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LAWYERS' REPORTS,

ANNOTATED.

NEW YORK COURT OF APPEALS.

PEOPLE OF the State of NEW YORK,
Repts.,

NORTH RIVER SUGAR REFINING CO.,
Appt.

(....N. Y....)

1. To warrant the annulment of a corporate franchise, the corporation must be shown to have exceeded or abused its powers in such a manner as to threaten or harm the public welfare.
2. A deed made by a committee of a corporation and signed by the corporation secretary, under the authority of a resolution adopted at a stockholders' meeting by a unanimous vote of the trustees and stockholders, will be regarded as an act of the corporation.

3. The revocation of authority after it has been executed cannot avail to annul a contract made in conformity thereto.
4. There may be actual corporate conduct which will authorize the dissolution of a corporation, although there is no formal corporate action taken for the purpose of producing such conduct.
5. An attempted transfer of the stock of a corporation to a trust combination, in consequence of which the stock will be largely increased, is a corporate act although done by the united action of trustees and stockholders without any independent action of the board of directors as such.
6. The illegality of an act attempted to be done by a corporation will not deprive it of its corporate character.
7. In a proceeding to annul a corpo-

NOTE.—Corporation.

A corporation is a new creature of the law, deriving all its powers from the Act incorporating it, and can exercise the same only in the manner therein authorized. *Head v. Providence Ins. Co.* 6 U. S. 2 Cranch, 127, 2 L. ed. 229; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 820, 4 L. ed. 636.

There are three classes of corporations, to wit: public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of quasi public character, having in view some public enterprise in which public interests are involved, and corporations strictly private. *State v. Carr*, 9 West. Rep. 818, 111 Ind. 335.

A public corporation is one that is created for political purposes, with political powers to be exercised for purposes connected with the public good, in the administration of civil government,—an instrument of the government, subject to the control of the Legislature and its members, officers of the government for the administration or discharge of public duties; as in the case of cities, towns, etc. *Ibid.*

A corporation may be private and yet the Act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good. *Ibid.*

Carrying on business in a corporate name is not evidence of user which can be considered in aid of legal corporate existence where there is no law authorizing the members to file their articles of incorporation or to become incorporated. *Eaton v. Walker*, 6 L. E. A. 108, 76 Mich. 579.

Dissolution of corporation.

Corporations may be dissolved, either by statute, where the power to dissolve is reserved in the charter or in the general statute, by surrender of
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charter, by loss of members or by forfeiture of franchise for misuser or nonuser, declared by the judgment of a court of competent jurisdiction. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1; *New York Marble Iron Works v. Smith*, 4 Duer, 382; *Revere v. Boston Copper Co.* 15 Pick. 861; *La Grange & M. R. Co. v. Baine*, 7 Coldw. 420; *Hodsdon v. Copeland*, 16 Me. 814; *Penobscot Boom Corp. v. Lamson*, Id. 224; *Centre & E. Turnp. Road Co. v. McConaby*, 16 Serg. & R. 145; *Kincaid v. Dwinelle*, 59 N. Y. 548.

A corporation may be dissolved for a breach of trust, but not until it has been called upon to answer. *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43, 8 L. ed. 650; *London v. Vanacre*, 12 Mod. 271; *Slee v. Bloom*, 5 Johns. Ch. 386, 1 N. Y. Ch. L. ed. 1111; *Towar v. Hale*, 46 Barb. 361.

Improper acts do not themselves work a dissolution of the corporation. It continues to exist until the State creating it procures an adjudication and enforces a forfeiture of the charter. *West v. Carolina L. Ins. Co.* 31 Ark. 476; *State v. Fagan*, 22 La. Ann. 545; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 239; *Com. v. Fitchburg R. Co.* 12 Gray, 180; *State v. Commercial Bank*, 83 Miss. 474; *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 513; *Ormsby v. Vermont Copper Min. Co.* 65 Barb. 360; *Haight v. New York E. R. Co.* 49 How. Pr. 20.

The loss of an integral part works a dissolution only for certain purposes, the corporate franchise being suspended, but not extinguished. An entire dissolution, being the consequence of permanent incapacity to restore the deficient part, never happens where the legitimate existence of the part is not indispensable to a valid election, or other means of reproduction. *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.* 4 Rawle, 9, 26 Am. Dec. 112; *Phillips v. Wickham*, 1 Paige, 560, 3 N. Y. Ch. L. ed. 763.

Where the Act creating a company provides that,

rate franchise for abuse of powers, the substantial inquiry is: What has the corporation in fact accomplished; what has been its conduct and effective work?—and the manner in which the result has been reached is immaterial.

8. A manufacturing corporation cannot enter into any partnership arrangement, either directly or indirectly, through the medium of a trust, nor into any substantial consolidation which will avoid and disregard the statutory permissions and restraints; and any voluntary attempt by it to do so will be such a material violation of its charter as to justify its dissolution.

(June 24, 1890.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of plaintiffs in a proceeding brought for the purpose of vacating defendant's charter and annulling its corporate existence. *Affirmed.*

The case is fully stated in the opinion.

Messrs. James C. Carter and John E. Parsons, for appellant:

In the case of any corporation, the forfeiture of its charter is a very grave procedure, in which courts act with extreme caution.

State v. Commercial Bank, 10 Ohio, 535; *State v. Farmers College*, 32 Ohio St. 487.

The defendant corporation never became, by an attempted exercise of corporate power, a party to the supposed illegal deed or agreement. The sole management of the business and affairs of this corporation was vested by law

in its board of trustees. No authority from that board to execute, or enter into, such agreement is pretended.

Manufacturing Co's Act, § 8; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Hoyt v. Thompson*, 19 N. Y. 207.

The stockholders, as such, could not exercise corporate power. The circumstance that all the trustees happened to be present at the meeting was unimportant. All attempts to create corporate action out of the action of individual stockholders, acting in their individual capacity, have no support in law.

Conro v. Port Henry Iron Co. supra.

No case can be found which condemns the transaction in question as illegal. No one of them even ventures to pronounce any transaction illegal, as restraining trade or competition, which consisted simply in a consolidation of interests by way of sale or exchange, and in which no executory agreement remained directly and in terms restricting trade or competition. Even executory agreements directly affecting prices, or doing away with competition, are not necessarily unlawful.

Diamond Match Co. v. Roeber, 9 Cent. Rep. 181, 106 N. Y. 473; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Central Shade Roller Co. v. Cushman*, 3 New Eng. Rep. 505, 143 Mass. 853; *Wickens v. Evans*, 3 Younge & J. 818; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 851; *Whittaker v. Howe*, 3 Beav. 883; *Jones v. Lees*, 1 Hurlst. & N. 189; *Leather Cloth Co.*

upon failure of the company to commence the construction of the road within the time prescribed, it shall be dissolved, a mere failure to perform the condition will not work the dissolution without judicial proceedings and judgment. *Day v. Ogdenburgh & L. C. R. Co.* 9 Cent. Rep. 469, 107 N. Y. 126.

Mere insolvency will not work a dissolution. See *note to People v. O'Brien* (N. Y.) 2 L. R. A. 256.

Franchise construed.

A franchise is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchisees known to our law. *Bouvier*, L. Dict. 545.

A franchise is a royal privilege or branch of the crown's prerogative subsisting in the hands of a subject. 4 Bl. Com. 159.

Exemption from legislative interference, given by charter, must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377.

Grant of corporate right or privilege, strictly construed.

Public grants are to be strictly construed so as to operate as a surrender of the sovereignty no further than is expressly declared by the language employed. *Syracuse Water Co. v. Syracuse*, 5 L. R. A. 546, 116 N. Y. 167; *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 56 Hun. 67; *Rockland Water Co. v. Camden & R. Water Co.* 1 L. R. A. 888, 80 Me. 544; *Emerson v. Com.* 106 Pa. 111.

Every intendment not obviously in favor of the grant must be construed against it. *Emerson v. Com. supra.*

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The grantees take nothing by implication, either as against the power making the grant, or against other corporations. *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 453; *Thompson v. New York & H. R. Co.* 8 Sandf. Ch. 623, 7 N. Y. Ch. L. ed. 960.

Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. *Rockland Water Co. v. Camden & R. Water Co.* 1 L. R. A. 888, 80 Me. 544.

As between claimants under different grants, unless more is expressly granted, no more passes than is necessary for the beneficial enjoyment of the grants. *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. supra.*

A corporation has no implied authority to engage in any other business than the particular enterprise for which it is chartered. *Syracuse Water Co. v. Syracuse, supra.*

Corporate powers are such only as are conferred by statute. See *note to Cantillon v. Dubuque & N. W. R. Co.* (Iowa) 5 L. R. A. 726.

Conditions attached to the grant.

The exercise and use of the franchisees of a corporation for the benefit of the public is a condition on which it is allowed to be created and maintained; and when it voluntarily declines to fill this condition, or places itself in a situation as a consequence of its voluntary action in which that may be prevented, it may be annulled at the suit of the attorney-general. *People v. North River S. R. Co.* 5 L. R. A. 883, 54 Hun. 354; *Mobile & O. R. Co. v. State*, 29 Ala. 573; *Com. v. Blue-Hill Turnp. Corp.* 5 Mass. 420; *Com. v. Commercial Bank*, 28 Pa. 883; *Tarrett v. Taylor*, 13 U. S. 9 Cranch, 43, 3 L. ed. 650.

In addition to the implied condition that the privileges and franchisees of a corporation shall not be abused, the condition is also implied that the corporation shall be subject to such reasonable

v. Lonsont, L. R. 9 Eq. 345; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 23 L. ed. 315; *Morris T. D. & M. Co. v. Morris*, 103 Mass. 78; *Fosile v. Park*, 181 U. S. 88, 88 L. ed. 67; *Hare v. London & N. W. R. Co.* 2 Johns. & H. 80; *Skrainka v. Scharringhausen*, 8 Mo. App. 532.

Upon what ground could the doctrine rest that laborers have the right to combine together under rules designed to prevent the public from employing any but their own members, if the doctrine of the learned judges holding void any agreement designed to restrict supply, or raise price, is legal?

Com. v. Hunt, 4 Met. 111; *Snow v. Wheeler*, 113 Mass. 179.

Mr. John E. Parsons, also filed a separate brief for appellant:

Objections to combinations of capital upon the ground that they are opposed to the public interest are at variance with the views entertained by leading political economists and by distinguished jurists who in recent times have considered the subject.

Mr. Gladstone's address delivered on August 24, 1883, at the Haverdon Flower Show; Edinburgh Scotsman, Feb. 5, 1889, Trusts and Syndicates; Political Science Quarterly, September 1888; article by Mr. Gunton on the "Economic and Social Aspect of Trusts," December, 1888; article by Prof. Dwight on "The Legality of Trusts;" *Proctor v. Sargent*, 2 Scott, N. R. 289; *Palmer v. Stebbins*, 8 Pick. 188; Greenhood, Public Policy, p. 687; *Diamond Match Co. v. Roeder*, 9 Cent. Rep. 181, 106 N. Y. 478; *Leslie v. Lorillard*, 1 L. R. A. 456, 110

N. Y. 519; *Marsh v. Russell*, 66 N. Y. 288; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Central Shade Roller Co. v. Cushman*, 3 New Eng. Rep. 505, 143 Mass. 853; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 6 H. L. Cas. 118, 2 Macn. & G. 824, 17 Ad. & El. N. S. 652; *Hare v. London & N. W. R. Co.* 2 Johns. & H. 80, 7 Jur. N. S. 1145; *Wickens v. Evans*, 8 Younge & J. 818; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 W. Va. 617; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *National Provincial Bank v. Marshall*, 40 Ch. Div. 112.

A combination of stockholders to purchase the majority of the stock of a corporation so as to control the corporation or to effectuate the sale of the majority of the stock to a single person is valid.

Havemeyer v. Havemeyer, 11 Jones & S. 517; *Barnes v. Brown*, 80 N. Y. 537.

Where the owners of the majority of the stock of a corporation agree among themselves that they will in the management of the corporation act as a unit such a combination is valid.

Faulds v. Yates, 57 Ill. 416; *Folt's App.* 91 Pa. 334; *Barnes v. Brown*, 80 N. Y. 537.

To constitute an agreement binding upon the corporation requires the action of the trustees and officers. Neither a limited number, a large number nor all the stockholders constitute the corporation.

Cook, Stock and Stockholders, §§ 622, 625, and cases cited; *Conro v. Port Henry Iron Co.* 19 Barb. 27; *McCullough v. Moss*, 5 Denio, 567; *Cammeyer v. United German Lutheran*

regulations as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct the privileges the State has granted, and which serve only to secure the ends for which the corporation was created. *Chicago L. Ins. Co. v. Needles*, 115 U. S. 374, 23 L. ed. 1084; *Hill v. Merchants Mut. Ins. Co.* 184 U. S. 515, 38 L. ed. 904; *Reed v. Gettysburg B. F. M. Assn.* 129 Pa. 33.

The granting of a corporate right or privilege rests entirely in the discretion of the State, and, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. *Home Ins. Co. v. New York*, 184 U. S. 564, 38 L. ed. 1035.

Rights subject to the police power.

Although the rights of private corporations rest upon contract and are protected, they must yield when the great exigencies of the public and the government require it. *Conner v. New York*, 3 Sandf. 237; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 9 L. ed. 773; *Tuckahoe Canal Co. v. Tuckahoe & J. R. Co.* 11 Leigh, 43.

The Legislature cannot, by any contract, divest itself of the power to provide for the protection of the lives, health and property of citizens, and the preservation of good order and public morals. All rights, including those under charters, are held subject to the police power of the State. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 950; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 683, 24 L. ed. 1036; *Stone v. Mississippi*, 101 U. S. 514, 35 L. ed. 1079; *Butchers U. S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co.* 111 U. S. 74, 35 L. ed. 565.

Forfeiture of franchises.

A corporation violating the Organic Law forfeits its franchise, but does not thereby become subject § 1 R. A.

to the escheat or confiscation of its property. *Com. v. New York, L. E. & W. R. Co.* 7 L. R. A. 634, 129 Pa. 591.

To justify such forfeiture, the *ultra vires* acts must be so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfill the end for which it was created. *State v. Minnesota Thresher Mfg. Co.* 3 L. R. A. 510, 40 Minn. 213.

To warrant a forfeiture of franchise for misuser the misuser must be such as to work or threaten a substantial injury to the public. 184d.

Isolated acts of nonfeasance not willful nor productive of mischief, nor contrary to express requirements of the charter, are not grounds for forfeiture; a substantial compliance with the charter is all that is required. *Frederick Female Seminary v. State*, 9 Gill, 379; *Paschall v. Whitsett*, 11 Ala. 472; *People v. Williamsburg Turnp. R. & B. Co.* 47 N. Y. 586; *People v. Bristol & R. Turnp. Road*, 23 Wend. 222; *People v. Kingston & M. Turnp. Road Co.* Id. 193; *Atty-Gen. v. Petersburg & R. R. Co.* 6 Ired. L. 456.

The failure to discharge their duties to the public, and the nonuser or suspension of their principal business, are sufficient ground for an absolute forfeiture of the corporate rights of railroad companies. *State v. Minnesota Cent. R. Co.* 36 Minn. 250; *Ward v. Sea Ins. Co.* 7 Paige, 294, 4 N. Y. Ch. L. ed. 162; *Re Jackson M. Ins. Co.* 4 Sandf. Ch. 559, 7 N. Y. Ch. L. ed. 1208; *Atty-Gen. v. Petersburg & R. R. Co. supra*; *Heard v. Talbot*, 7 Gray, 112.

Forfeiture of franchises; how declared.

A corporation loses its franchises only by a surrender by the shareholders or its forfeiture by the State in a suit instituted for that purpose. *United States Electric Lighting Co. v. Leiter (D. C.)* 9 Cent. Rep. 655.

Churches, 2 Sandf. Ch. 186, 7 N. Y. Ch. L. ed. 558.

Messrs. Charles F. Tabor, Atty-Gen., and Roger A. Pryor, for respondents:

Corporate franchises are granted in trust, and upon condition—in trust, on the one hand, that they be exerted to the attainment of the object for which they are conceded, and on the other, that they be not abused to the public detriment; upon the condition, that for nonuser or misuser they may be reclaimed by the State in the appropriate judicial proceeding.

People v. Williamsburgh Turnp. R. & B. Co. 47 N. Y. 586; *Sir James Smith's Case*, 4 Mod. 58; 2 Bl. Com. 153; *Atty-Gen. v. Shrewsbury*, 6 Beav. 220; *London City v. Vanacker*, 1 Ld. Raym. 499; *Seranton E. L. & H. Co's App.* 1 L. R. A. 285, 123 Pa. 154, 9 Am. St. Rep. 81; *People v. Bristol & R. Turnp. Co.* 23 Wend. 235; *People v. Fishkill & B. Pl. Road Co.* 27 Barb. 445; *Slee v. Bloom*, 5 Johns. Ch. 380, 886, 1 N. Y. Ch. L. ed. 1115, 1117; *People v. Dispensary & H. Society*, 7 Lans. 806; *Ward v. Farwell*, 97 Ill. 593; *People v. Phoenix Bank*, 24 Wend. 433; *New York v. Twenty-third St. R. Co.* 113 N. Y. 811; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574 (28 L. ed. 1084); *Terrett v. Taylor*, 18 U. S. 9 Cranch, 52, 8 L. ed. 653; 2 Kent, Com. 812; *Com. v. Farmers & M. Bank*, 21 Pick. 542; *Ang. & A. Corp.* 9th ed. § 774; 2 Waterman, Corp. § 427.

Any act of a corporation, in violation of law and to the public detriment, forfeits its franchises.

State v. Milwaukee, L. S. & W. R. Co. 45 Wis. 590; *Chesapeake & O. Canal Co. v. Balti-*

more & O. R. Co. 4 Gill & J. 121; *People v. Fishkill & B. Pl. Road Co.* 27 Barb. 453; *Thompson v. People*, 23 Wend. 581.

Acts and contracts *ultra vires* the corporate authority are illegal, and where prejudicial to the public interests are grounds of forfeiture of the corporate franchise.

Head v. Providences Ins. Co. 6 U. S. 2 Cranch, 169, 2 L. ed. 243; *United States v. Arrendondo*, 3 U. S. 6 Pet. 738, 8 L. ed. 564; *Nassau Bank v. Jones*, 95 N. Y. 121; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 686, 24 L. ed. 1038; *Thomas v. West Jersey R. Co.* 101 U. S. 82, 25 L. ed. 952; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413; *Pratt v. Short*, 79 N. Y. 437; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 542; *Ashbury R. Co. & I. Co. v. Riche*, L. R. 7 H. L. 653.

An illegal and unauthorized act is sufficient ground of corporate forfeiture.

Rea v. London, 8 How. St. Tr. 1078; *Thompson v. People*, 23 Wend. 572; *People v. Oakland County Bank*, 1 Doug. (Mich.) 282; *People v. Geneva College*, 5 Wend. 211; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 432; *State v. Seneca County Bank*, 5 Ohio St. 171; *Com. v. Commercial Bank*, 28 Pa. 333; *State v. Commercial Bank*, 33 Miss. 474; *State v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 590; *People v. Dispensary & H. Society*, 7 Lans. 804; *Vincennes Bank v. State*, 1 Blackf. 287; *Atty-Gen. v. Petersburg & R. R. Co.* 6 Ired. L. 469; *People v. Utica Ins. Co.* 15 Johns. 558; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *People v. Albany & Vt. R. Co.* 24 N. Y. 261; *Re McGraw*, 111 N. Y. 111; 2 Kyd, Corp. 479 *et*

It is not dissolved by its failure to elect trustees. *Ibid.*

A corporation can be deprived of its franchises only by the sovereign power by which it was created. *Elizabethtown Gaslight Co. v. Green*, 46 N. J. Eq. 118.

Forfeiture of a franchise can only be determined in a direct proceeding, and not as a mere incident of an action in tort for the purpose of showing that the party injured was attempting to exercise rights which he had lost. *Billings v. Breinig*, 45 Mich. 70; *Harrell v. Ellsworth*, 17 Ala. 576; *New Albany & S. R. Co. v. Huff*, 19 Ind. 315; *Mackall v. Chesapeake & O. Canal Co.* 94 U. S. 308, 24 L. ed. 161; *Thompson v. New York & H. R. Co.* 3 Sandf. Ch. 626, 7 N. Y. Ch. L. ed. 980.

It must be forfeited by judicial proceedings before an individual can avail himself of its misuser or omissions. *Clow v. Van Loan*, 6 Thomp. & C. 461, 4 Hun, 186; *Adams v. Beach*, 6 Hill, 271.

A charter can only be forfeited by direct proceeding on the part of the attorney-general. *Grand Rapids v. Grand Rapids Hydraulic Co.* 10 West. Rep. 631, 66 Mich. 606.

At common law an information in the nature of a *quo warranto* is the proper proceeding against a corporation to forfeit its franchise. *Darnell v. State*, 48 Ark. 321; *State v. Southern Pac. R. Co.* 24 Tex. 80; *Newburgh & C. Turnp. Road v. Miller*, 5 Johns. Ch. 101, 1 N. Y. Ch. L. ed. 1023.

A cause of forfeiture can be enforced only by a *scire facias*, or upon information in the nature of a writ of *quo warranto*, issued at the instance of the government creating the corporation. *Scire facias* is proper where there is a legal body capable of acting, but which is guilty of abuse of power, and *quo warranto* is necessary where there is a corporate body *de facto*, but from some defect in the organization it cannot legally use its powers. 9 L. R. A.

Mackall v. Chesapeake & O. Canal Co. 94 U. S. 308, 24 L. ed. 161; *Gaylord v. Fort Wayne, M. & C. R. Co.* 6 Biss. 286; *Hammett v. Little Rock & N. B. Co.* 20 Ark. 204; *Baker v. Backus*, 22 Ill. 79; *Brookville & G. L. P. Co. v. McCarty*, 8 Ind. 392; *Planters Bank v. Bank of Alexandria*, 10 Gill & J. 846; *Taggart v. Western Maryland R. Co.* 24 Md. 568; *State v. Consolidation Coal Co.* 46 Md. 1; *People v. Bank of Hudson*, 6 Cow. 217; *State v. Cincinnati*, 23 Ohio St. 445; *Com. v. Small*, 26 Pa. 31; *Com. v. Bank of United States*, 2 Ashm. 349; *Com. v. Allegheny Bridge Co.* 20 Pa. 185; *Com. v. Farmers Bank*, 2 Grant, Cas. 392; *Gilman v. Green Point Sugar Co.* 61 Barb. 2, 4 Lans. 482; *State v. White's Creek Turnp. Co.* 3 Tenn. Ch. 163; *State v. Bradford*, 32 Vt. 50.

Quo warranto, or information in the nature thereof, is the proper remedy for inquiring into the legality of a corporation which exists under the forms of law. *Elizabethtown Gaslight Co. v. Green*, 46 N. J. Eq. 118.

The object of proceedings by *quo warranto* against a corporation being to protect public interests, to warrant a forfeiture of corporate franchises for misuser, the misuser must be such as to work or threaten a substantial injury to the public. *State v. Minnesota Thresher Mfg. Co.* 3 L. R. A. 510, 40 Minn. 213.

Courts do not resort to narrow or forced constructions in order to establish the forfeiture, but they seldom adjudge a forfeiture unless there is a manifest and substantial violation of the grant. *People v. Broadway R. Co.* 56 Hun, 45.

If the defendants or their predecessors have forfeited their rights under the statutes, such forfeiture cannot be tried or enforced in a collateral proceeding for an injunction. *Haight v. New York E. R. Co.* 49 How. Pr. 22; *Mechanics Bldg. Asso. v. Stevens*, 5 Duer, 676; *Vernon Society v. Hills*, 6 Cow. 23; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75;

seq.; *Ang. & A. Corp.* §§ 774-776; 2 *Waterman, Corp.* § 427; *Green's Brice*, 787; *People v. Bristol & R. Turnp. Road*, 28 *Wend.* 283; *State v. Atchison & N. R. Co.* 24 *Neb.* 143, 8 *Am. St. Rep.* 188.

Agreements tending to monopoly, *i. e.*, "any combination among merchants to raise the price of merchandise, to the detriment of the public," are illegal.

People v. American Sugar Ref. Co. 7 *R. R. & Corp. L. J.* 83; *Richardson v. Buhl* (Mich.) 6 *L. R. A.* 457; *People v. Chicago Gas Trust Co.* 8 *L. R. A.* 497, 130 *Ill.* 268; *Anderson v. Jett* (Ky.) 6 *L. R. A.* 390; *Leonard v. Poole*, 114 *N. Y.* 371; *Arnot v. Pittston & E. Coal Co.* 68 *N. Y.* 559; *Stanton v. Allen*, 5 *Denio*, 434; *Clancey v. Onondaga F. S. Mfg. Co.* 62 *Barb.* 395; *Hooker v. Vandewater*, 4 *Denio*, 349; *Texas & P. R. Co. v. Southern Pac. R. Co.* (La.) *Nov.* 18, 1889; *People v. Fisher*, 14 *Wend.* 9; *Colles v. Trow City D. Co.* 11 *Hun*, 397; *Watson v. Harlem & N. Y. Nav. Co.* 52 *How.* 348; *Morris Run Coal Co. v. Barclay Coal Co.* 68 *Pa.* 182; *Central Ohio Salt Co. v. Guthrie*, 35 *Ohio St.* 672; *Croft v. McConoughy*, 79 *Ill.* 349; *Santa Clara Valley M. & L. Co. v. Hayes*, 76 *Cal.* 387, 9 *Am. St. Rep.* 211; *Saratoga County Bank v. King*, 44 *N. Y.* 87; *Case of Monopolies*, 11 *Coke*, 640; *Raymond v. Leavitt*, 46 *Mich.* 447; *India Bag Asso. v. Kock*, 14 *La. Ann.* 164; *Ray v. Mackin*, 100 *Ill.* 246; *People v. Stephens*, 71 *N. Y.* 545; *Marsh v. Russell*, 66 *N. Y.* 288; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 8 *Robt.* 411; *Hilton v. Eckersley*, 6 *El. & Bl.* 47; *Central R. Co. v.*

Collins, 40 *Ga.* 582; *Hoffman v. Brooks*, 11 *Week. L. Bull.* 258.

The combination created by the "Sugar Refining Company" deed, being injurious to trade and commerce, is a criminal conspiracy, and an indictable offense.

Raymond v. Leavitt, supra; *Rea v. DeBenger*, 8 *Maule & S.* 67; *Rea v. Hibbers*, 3 *Chitty*, 163; *Rea v. Waddington*, 1 *East*, 143; *Atty-Gen. v. Starling*, 1 *Keb.* 650; *King v. Norris*, 2 *Kenyon*, 300; *Anonymous*, 12 *Mod.* 248; *People v. Melvin*, 2 *Wheeler, Cr. Cas.* 262; *Com. v. Carlisle*, *Bright* (Pa.) 36; 4 *Bl. Com.* 158; 2 *Bishop, Cr. L.* § 281; 1 *Russ. Cr. L.* 168; 8 *Inst. C. 89*; *Penal Code*, § 168, subd. 6; *Leonard v. Poole*, 114 *N. Y.* 371; *Pittsburg Carbon Co. v. McMillin*, 53 *Hun*, 67; *People v. Fisher*, 14 *Wend.* 9; *Morris Run Coal Co. v. Barclay Coal Co.* 68 *Pa.* 174; *Hooker v. Vandewater and Clancey v. Onondaga F. S. Mfg. Co. supra*; *Barbour, Cr. L.* 245.

The agreement constitutes a strict and absolute monopoly.

People v. Chicago Gas Trust Co. supra; *Lawrence v. Kidder*, 10 *Barb.* 642; *Dunlop v. Gregory*, 10 *N. Y.* 244; *West Virginia Transp. Co. v. Ohio River P. L. Co.* 22 *W. Va.* 600, 46 *Am. Rep.* 529.

It is an unwarrantable hypothesis to assume that the right of incorporation for legitimate business involves the right to incorporate for an unlawful purpose.

Clancey v. Onondaga F. S. Mfg. Co. supra; *North Carolina Endowment Fund v. Satchwell*, 71 *N. C.* 111; *State v. Atchison & N. R. Co.* 8

Com. v. Union F. & M. Ins. Co. 5 *Mass.* 230; *Boston Glass Mfry. v. Langdon*, 24 *Pick.* 49; *Petree v. Somersworth*, 10 *N. H.* 309; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 *Gill & J.* 1; *University of Maryland v. Williams*, 9 *Gill & J.* 365.

Where an act was done in contravention of the covenants, an injunction is the proper remedy, as, where franchisee of the toll-bridge company was violated by the defendants permitting persons to cross its bridge free. *Niagara Falls International Bridge Co. v. Great Western R. Co.* 59 *Barb.* 226.

The passage of an Act of the Legislature authorizing *quo warranto* proceedings against a corporation carrying on business in violation of the Constitution, to enforce penalties and an injunction against the violation, does not deprive the State of the right to enforce a forfeiture for the same acts under the previous laws and Constitution. *East Line & R. R. Co. v. State*, 75 *Tex.* 484.

Forfeiture of franchise; how declared. See note to *People v. O'Brien* (N. Y.) 3 *L. R. A.* 255.

Remedy by writ of *quo warranto*. See notes to *State v. Minnesota Thresher Mfg. Co.* (Minn.) 3 *L. R. A.* 510; *State v. Cincinnati, W. & B. R. Co.* (Ohio) 7 *L. R. A.* 219.

Forfeiture of charter.

To create a forfeiture of charter there must be some abuse of power by which the corporation fails to fulfill the design of its organization. *Ward v. Sea Ins. Co.* 7 *Faige*, 294, 4 *N. Y. Ch. L. ed.* 162; *Atty-Gen. v. Bank of Niagara*, 1 *Hopk.* 354, 3 *N. Y. Ch. L. ed.* 448; *Com. v. Franklin Ins. Co.* 115 *Mass.* 278; *Harris v. Mississippi Valley & S. I. R. Co.* 51 *Min.* 602; *Re New York Bridge Co.* 67 *Barb.* 206; *State v. Urbana & C. Mut. Ins. Co.* 14 *Ohio*, 6; *State v. Pawtucket Turnp. Corp.* 8 *R. I.* 182; *State v. Merchants Ins. & T. Co.* 8 *Humph.* 235; *People v. Royalton & W. Turnp. Co.* 11 *Vt.* 431.

A forfeiture for willful misuse cannot be taken 9 *L. R. A.*

advantage of incidentally or collaterally by individuals, but must be established by the State by proceedings for that purpose. *Frost v. Frostburg Coal Co.* 65 *U. S.* 24 *How.* 278, 16 *L. ed.* 637; *United States v. Williams*, 5 *Cranoh*, C. C. 62; *Hudgins v. State*, 46 *Ala.* 308; *Miners Ditch Co. v. Zellerbach*, 37 *Cal.* 548; *Spring Valley Water Works v. San Francisco*, 23 *Cal.* 424; *Union Branch R. Co. v. East Tennessee & G. R. Co.* 14 *Ga.* 387; *Hartsville University v. Hamilton*, 34 *Ind.* 506; *Heard v. Talbot*, 7 *Gray*, 120; *Bohannon v. Binns*, 31 *Miss.* 355; *Bank of Missouri v. Snelling*, 35 *Mo.* 130; *State Bank v. Merchants Bank*, 10 *Mo.* 123; *State v. Fourth N. H. Turnp.* 15 *N. H.* 163; *New Jersey S. R. Co. v. Long Branch Comrs.* 39 *N. J. L.* 23; *Buffalo & A. R. Co. v. Cary*, 26 *N. Y.* 75; *Johnson v. Bentley*, 16 *Ohio*, 97; *Dyer v. Walker*, 40 *Pa.* 157; *Re New York Elevated R. Co.* 70 *N. Y.* 337; *Crumph v. United States Min. Co.* 7 *Gratt.* 353; *Connecticut & P. R. Co. v. Bailey*, 24 *Vt.* 455.

Monopolies.

Although there may be no direct constitutional provisions against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the first section of which declares "that no man or set of men is entitled to exclusive public emoluments or privileges from the community," to render them void. The Statute of 21 James I., chap. 8, declares such monopolies to be contrary to law and void. 4 *Bacon, Abr.* p. 764, title *Monopoly*; 4 *Bl. Com.* 160; 3 *Coke Inst.* 151; *Hindmarch, Patents*, chap. 2, p. 7 *et seq.*; note to *Montgomery Gaslight Co. v. Montgomery* (Ala.) 4 *L. R. A.* 616; *Slaughter House Cases*, 83 *U. S.* 16 *Wall.* 102, 21 *L. ed.* 417.

So a manufacturing corporation which, instead of manufacturing its product and disposing of it to the public on what might be fair competitive

Am. St. Rep. 192, *note*; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268.

The North River Company, or its stockholders, have acted upon the provisions of the deed, have received and enjoy the benefits of it, and so are parties to it.

Sheldon H. B. Co. v. Eickemeyer H. B. M. Co. 90 N. Y. 607; *Union Bridge Co. v. Troy & L. R. Co.* 7 Lans. 240.

In *quo warranto* to dissolve a corporation, it is the misconduct of the corporators that operates a forfeiture of the corporate franchise.

Field, Corp. 449; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 636, 4 L. ed. 659; 2 Kyd, Corp. 476; Ayliffe, Civ. Law, 196; 1 Morawetz, Priv. Corp. §§ 1, 227, 474; *People v. Wattertown*, 1 Hill, 620; *McKinley v. Wheeler*, 180 U. S. 688, 82 L. ed. 1049; 1 Waterman, Corp. § 5; *Pembina Consol. S. M. & M. Co. v. Pennsylvania*, 125 U. S. 189, 31 L. ed. 658; 2 Morawetz, Priv. Corp. §§ 852, 865; Taylor, Corp. § 50; *Sanger v. Upton*, 91 U. S. 59 (23 L. ed. 222); *Glenn v. Soule*, 23 Fed. Rep. 417; *Pettibone v. Toledo, C. & St. L. R. Co.* 148 Mass. 411; *Bissell v. Michigan S. & N. I. R. Co.* 23 N. Y. 259; Cook, Stock and Stockholders, § 209; *London v. Wood*, 12 Mod. 689; *Clarke v. Rochester*, 24 Barb. 446; *Bank of United States v. Deveaux*, 9 U. S. 5 Cranch, 61, 3 L. ed. 88; *Louisville, C. & O. R. Co. v. Lelton*, 48 U. S. 2 How. 497, 11 L. ed. 858.

A corporation can make no contract which is not necessary, directly or incidentally, to enable it to answer the purpose of its charter.

Beach v. Fulton Bank, 8 Wend. 578; *Legrand v. Manhattan M. Asso.* 80 N. Y. 688; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 23; *Rock River Bank v. Sherwood*, 10 Wis. 281; *Abby v. Billups*, 35 Miss. 618; *Davis v. Old Colony R. Co.* 181 Mass. 258; *Pierce, Railroads*, 500; *Boone, Corp.* § 48.

The connection with the "Sugar Refining Company" is not necessary to enable the corporations to answer the end of their existence,

nor is the contract of connection made in the legitimate prosecution of their business; and hence the contract and connection are *ultra vires* and an abuse of corporate power.

People v. Chicago Gas Trust Co. 8 L. R. A. 497, 130 Ill. 268; *Hood v. New York & N. H. R. Co.* 22 Conn. 1; *Franklin County v. Lewiston Soc. Inst.* 68 Me. 43.

Corporations cannot consolidate their funds or form a partnership unless authorized by express grant or necessary implication.

New York & S. Canal Co. v. Fulton Bank, 7 Wend. 412; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604; *Whittenton Mills v. Upton*, 10 Gray, 596; *Charlton v. Newcastle & C. R. Co.* 5 Jur. N. S. 1096; *Pearce v. Madison & I. R. Co.* 62 U. S. 21 How. 443, 16 L. ed. 184; *Green's Brice*, 2d ed. 416, 425; 1 Morawetz, Priv. Corp. § 876; *Ang. & A. Corp.* § 272; *Parsons, Partu.* p. 29; *Marine Bank v. Ogden*, 29 Ill. 248; *Taylor, Corp.* §§ 419, 420; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; *Pierson v. McCurdy*, 83 Hun, 520; *French v. Donohue*, 29 Minn. 111; *Colman v. Eastern Counties R. Co.* 10 Beav. 1.

Defendant has forfeited its charter by the transfer of its control to the Sugar Refining Company.

Gould v. Head, 38 Fed. Rep. 888; *People v. American S. Ref. Co.* (Super. Ct. San. Fr.) 7 R. R. & Corp. L. J. 84; *Central R. Co. v. Colliene*, 40 Ga. 583; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5; *Chicago Gas Light Co. v. People's Gas Light Co.* 121 Ill. 530, 2 Am. St. Rep. 124; *Bradford, E. & O. R. Co. v. New York, L. E. & W. R. Co.* 48 Hun, 631; *Whittenton Mills v. Upton*, 10 Gray, 596; *Simpson v. Denison*, 10 Hare, 51; *Richmond W. W. Co. v. Vestry, L. R. 3 Ch. Div. 82*; *Winch v. Birkenhead, L. & O. J. R. Co.* 5 De G. & S. 567; *Beman v. Rufford*, 6 Eng. L. & Eq. 106; *Hafer v. New York, L. E. & W. R. Co.* 19 Abb. N. C. 454; *Vanderbilt v. Bennett*, 19 Abb. N. C. 460; *Thomas v. West Jersey R. Co.* 101 U. S. 68, 25 L. ed. 952; *Ohio & M. R. Co. v. Indianapolis*

prices, becomes a party to a combination in part at least designed to create a monopoly and exact from the public prices which could not be otherwise obtained, is liable to have its charter vacated and annulled for such subversion of the object for which it was created. *People v. North River Sugar Ref. Co.* 5 L. R. A. 388, 54 Hun, 354.

An agreement between corporations engaged in the manufacture of cotton-seed oil, to select a committee composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each company, to be managed and operated for a specified term by the committee, for the common benefit, the profits and losses to be shared in agreed proportions, is not a mere "traffic arrangement," but a contract of partnership, which is *ultra vires* and consequently void so far as it is unexecuted, even though it be authorized by both shareholders and directors. *Mallory v. Hanaur Oil Works*, 86 Tenn. 598.

Where, by an amendment to the charter of a gas company authorizing it to lay its pipes through the streets and public grounds of a city, it is provided that the rights shall be exclusive except as against such other persons as may be authorized by Legislature, such provision is held to constitute a monopoly which is not entitled to protection in equity, and an injunction will not be allowed to prevent 9 L. R. A.

another company from laying down its gas pipes. *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19; High, Inj. 883.

But where a corporation to avoid ruinous competition and litigation with a rival company, and to prosecute the business with more beneficial results to its stockholders under its own control, pursuant to an arrangement with the rival company, assigns its business and its patents to a new corporation organized for the same objects, and takes a majority of the stock therein, it cannot be deemed to have abandoned or suspended its ordinary and lawful business so as to afford ground for its dissolution under the statute. *Kelsey v. Pfaunder P. F. Co.* 19 Abb. N. C. 434, 46 Hun, 15.

A "sugar trust" being in effect the uniting of all the corporations concerned into a practical consolidation or partnership, not authorized by their charters, or effected under the statutes, is *ultra vires*, and warrants the forfeiture of corporate existence. See *notes* to *People v. North River S. R. Co.* (N. Y.) 2 L. R. A. 33; *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 453.

Monopolies in trade are illegal. See *note* to *People v. North River S. R. Co. supra*.

As to the power of the Legislature to create monopolies, see *State v. Haworth*, 7 L. R. A. 340, 123 Ind. 463.

& *C. R. Co.* (Cin. Super. Ct.) 5 Am. Law Reg. N. S. 733; *Pennsylvania R. Co. v. Com.* (Pa.) Oct. 4, 1886.

Defendant has forfeited its charter, by procuring and permitting its management to be conducted in another interest than that of its own stockholders.

Taylor, Corp. § 558; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 29; *Pearce v. Madison & I. R. Co.* 63 U. S. 21 How. 443, 16 L. ed. 185; *Berry v. Yates*, 24 Barb. 212; *East Anglian R. Co. v. Eastern Counties R. Co.* 7 Eng. L. & Eq. 505.

Finch, J., delivered the opinion of the court:

The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy, and the penalty invoked represents the extreme rigor of the law. Its inflictions must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the Legislature should debate the destruction of the corporate life by a repeal of the corporate charter, but it is beyond dispute where the State summons the offender before its judicial tribunals and submits its complaint to their judgment and view. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two of the charges preferred in the complaint have dropped out of sight. They were of little importance, and have been prudently dismissed from the inquiry for that reason, and we are left to consider the one grave and serious accusation to which alone the proofs and argument have been directed. That accusation is adequate to the purpose for which it was framed, but upon two conditions, which dictate the line of inquiry and limit the area of discussion. It appears to be settled that the State, as prosecutor, must show on the part of the corporation accused some sin against the law of its being, which has produced or tends to produce injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may and often do exceed their authority where only private rights are affected. When these are adjusted all mischief ends and all harm is averted. But where the transgression has a wider scope, and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty. The Code of Civil Procedure authorizes an action for that purpose when the corporation has "violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers."

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In *Thompson v. People*, 23 Wend. 583, the ground of forfeiture was tersely described as some "misdemeanor in the trust injurious to the public," and as recently as the case of *Leslie v. Lorillard*, 110 N. Y. 581, 1 L. R. A. 456, we said: "In the granting of charters the Legislature is presumed to have had in view the public interest, and public policy is concerned in the restriction of corporations within chartered limits; and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public."

Two questions, therefore, open before us: first, Has the defendant corporation exceeded or abused its powers? and second, Does that excess or abuse threaten or harm the public welfare?

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which draw into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for, as an unquestionable truth, we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much has lessened the supply upon the market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination, and in to stay. Indeed, so much is with great frankness admitted on the part of appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement, and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant Company, so far as such control can be secured by the voting power in that board."

But that proof does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordi-

nate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For if it has done nothing, if what has happened and all that has happened is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellants stand and which they submit to our examination.

On the other hand, it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation, necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained nevertheless its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because, when a choice is made between them, we have gone a long distance toward the end of the controversy.

In making that choice we must necessarily analyze and construe the deed or contract which formed the terms of the combination, and which not only dictated its character but brought it into existence. That contract, on the theory of a sale, is an unexpected and unaccountable document. A sale presumes vendors on the one side and vendees on the other, each having life and existence and the power and ability to contract. Here there was no joint-stock association existing or organized until the vendors themselves created it, and they were obliged to construct their vendee in the very act of transfer. A contract of sale implies some negotiation between buyer and seller, each consulting his own interest and acting independently and of his free choice. Here there were no negotiations with the board, but the vendors, having created their vendee, themselves alone dictated the terms on which they should sell and it should buy. The selling stockholder explicitly swears that the board had nothing whatever to do with fixing the price. In a contract of sale covering property valued at some fifty millions of dollars and containing a patient statement of the terms of the trade we should naturally expect that at least the buyer would give it his signature and bind himself to the purchase. This contract

of sale is not signed by the vendees at all, and their assent is left to be supplied by inference from their action. In an ordinary sale the vendee becomes owner, and has the rights of an owner, and may do what he pleases with his own; but this contract tells the owners what they shall do with the property bought and how they shall hold it, and, inferentially at least, forbids its further sale or transfer. As a general rule the vendor fixes the value or price of the property which he sells or sometimes submits the question to disinterested appraisers, but this contract of sale generously allows the value of the personal property, separate from the plant, to be appraised and fixed by five persons, all of whom are themselves among the purchasers.

These are general considerations which make one hesitate over the theory of a sale as distinguished from a trust; but the doubt increases as we come closer to the details of the agreement and scrutinize its exact terms.

It is observable that the selected transferees of the stock of the corporations was denominated simply a "board." That implied agency, —a committee of managers,—official servants charged with executive duties and acting for and in the interest of others. The idea of a joint-stock association, capable of buying and acting as purchaser, had not yet dawned. Explicitly the deed declares: "The shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants." If beyond the inference of agency, suggested by the name and description of the board, more was needed to indicate the real aim and intention, it is supplied by the frank declaration that the transferees shall take as trustees and hold in joint tenancy, which is the characteristic manner of a trust.

Other clauses in the instrument point significantly to the same construction. The purchase of stock in a corporation makes the buyer a stockholder. No such purchaser would think for a moment of requiring from the corporation a stipulation that he should have the rights of a stockholder, for those rights attach at once by force of his ownership. Yet we find, in the document under examination, following the provision which requires the board to take as trustees, a clause entirely superfluous, if a sale was meant, but a reasonable stipulation if a trust was intended, that "the board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations." The clause carries with it a distinct suggestion that no absolute sale was intended, but a transfer in trust which might leave the assignors who became the beneficiaries some equitable right over the voting power; and to make sure of the vesting of that right in the trustees a specific and broad covenant was adopted adequate for all emergencies.

The owners of corporate stock, by force of their ownership, may put a mortgage upon the corporate property when the statute permits. Nobody doubts that, and no buyer would demand that permission of the seller. But the contract in question explicitly authorizes the

board to raise money by mortgages upon the property of the corporations. It strikes one as odd to see an absolute purchaser requiring his vendor in the deed of conveyance to covenant that the grantee may be at liberty to incumber by mortgage his own property. The astute pen which framed the deed of association had a very different aim and realized that trustees, holding for trust purposes, should have power to mortgage given them, if that necessity was contemplated.

A vendor about to sell his property, and to a very large amount, naturally looks carefully to his pay. A merchant or manufacturer who should sell his wares to a corporation having no other capital than the exact property bought, and take his pay in the stock of such corporation, would scarcely be deemed sane in business circles. The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such, got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name and, as we shall see, heavily watered, and with its care and management intrusted to others, under an arrangement which might or might not add to its earning power.

If in truth the board was meant to be anything more than a trustee or manager of the combined corporations; if it was contemplated that it should become and be a joint-stock association at all,—it was put, by the very articles of its creation, under the most singular and oppressive restrictions. What shall we say of a joint-stock association without a dollar of actual capital, and yet forbidden to incur the least debt or obligation? It was commanded that "no action be taken by the board which shall create liability by it or by its members." Without a dollar, it could not borrow a dollar; without money, it could incur no debt; its cash resources were to come from a sale of its own certificates reserved over and above those allotted, or from mortgages made by the separate corporations, and yet this curious creation, viewed as a joint-stock association, was able to induce the sale to it of twenty corporations. The stockholders, with astonishing generosity, sold and transferred to it all their stock, allowed it to pocket 15 per cent of its agreed value, and took aliquot parts of the remainder of their own property for their pay. It seems to me that the theory of an absolute sale involves us in difficulties and complications on almost every page of the deed or combination agreement, and that it is an after-thought framed under pressure and mismatching the entire tenor and terms of the instrument which it was invented to sustain. Indeed, I notice, among the briefs submitted to our study, a reprint of an article from a distinguished pen, which traces the origin and history of economic combinations and monopolies, and ends with a determined defense of the one under review, but concedes it to be a trust, created by contract, and organized and existing as such.

The combination therefore framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results

would be certain to follow. But here we encounter the stronghold of the appellant's argument, which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own,—are there without corporate action on their part, and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators, as it were to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

On the 22d day of April, 1887, there was a meeting of defendant's stockholders at which all the trustees were present. At that meeting the following preamble and resolutions were adopted by a unanimous vote:

"Whereas, it is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

"Whereas, we deem it for the interest of the North River Sugar Refining Company to participate in the above said consolidation; therefore be it

"Resolved, That Peter Moller, Jr., George H. Moller and Gerd Martins be, and they are hereby, appointed a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Company, with full power to act and to sign all contracts and agreements in the name of the said North River Sugar Refining Company, of whatever name or nature, concerning the said consolidation.

"Resolved, That we authorize the president and secretary of the North River Sugar Refining Company to sign all contracts, agreements and papers which the above-named committee may make in relation to the said consolidation."

In September following the secretary of the corporation added its signature to the deed. He tells us under oath: "I made that signature by virtue of authority from the stockholders and the board of officers of the North River Sugar Refining Company, the stockholders and trustees." It follows that the committee to whom authority was given to make the agreement had made it. The stockholders, by a unanimous vote, decided to go into the proposed combination, and authorized their committee to agree on the terms. A trust of personal property may be created by parol. That the committee acted, that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee. It was therefore actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant Company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the

agreement to that effect which the signature of the secretary shows had been made by the authorized agency.

But it is said the corporation repented and withdrew from the agreement. I do not stop to discuss the question whether they could revoke without the consent of the board and their associates in the trust deed; for, assuming that they could, I prefer to analyze their revocation, and see the scope and range of their repentance. The corporation remained a contracting creator of the trust until November 4, 1887. By the deed the trust took effect on October 1 of that year, so that the defendant in its full corporate character became a party to it according to the terms of the deed, and remained bound by it for at least one month. But then there did come either repentance or fear. In November the stockholders again assembled and passed the resolution which is relied upon as a revocation. Its preamble recites a series of denials that the committee had made any agreement, or that the president and secretary had signed any; and then, after declaring, "It is deemed inexpedient at the present time to enter into any such consolidation," they revoked the powers conferred and the resolutions conferring them. That is to say, after the powers had been executed and had put the corporation into the combination, and it had become a constituent element of the trust, those powers were revoked upon a false assertion that they remained executory, and so their revocation could be effective. I say a false assertion, for we are not at liberty to believe that George H. Moller, who was secretary of the corporation and one of the very committee authorized to make the agreement of consolidation, signed the deed when he knew the committee had not agreed, and so in violation of his duty and without authority, and then positively swore that he signed by authority of the stockholders and trustees. His act and his oath heavily outweigh the resolutions of repentance. Let us not fail to observe that no signature is withdrawn, no notice is served upon the board or the associates, no consent of theirs asked or demanded, but the parties of one part to a contract come together and pass a resolution that they have not contracted and do not mean to, and rely upon that as releasing them from their obligation. All that they effectually did was to raise a question of veracity, which must be decided against them upon the act and the oath of their own officer.

That repentance proved to be only a prelude to the exact sin claimed to have been avoided. On the 25th of November, 1887, which was just three weeks after the resolutions of revocation, the stockholders of the defendant Company formally resolved to sell their capital stock for \$325,000 to John E. Searles, Jr. It is not unworthy of notice that the resolution to sell is prefaced by a recital that their secretary had signed a deed of consolidation "under the belief that he was authorized so to do," a matter which had nothing to do with the new agreement to sell unless the purpose of that agreement lay beneath the surface. The committee to deliver the stock consisted of the same three persons who had originally been authorized to make the agreement of consolidation which had already been signed by Searles, as

treasurer of the Havemeyer Sugar Refining Company. The stock was delivered to him, the price paid to the stockholders, and so Searles became the one sole and only stockholder of the defendant Company. He and the "legal entity" alone survived, and the latter apparently in a state of suspended animation. An effort was made to ascertain from what source the purchase money came, but was not altogether successful. Searles did not furnish it. A certain committee of three did, who were to transfer the stock to the board.

Searles adds: "These three gentlemen whom I have named as trustees of certain funds paid for the stock; funds received by them for mortgages and other matters connected with the organization. Q. What organization? A. The Sugar Refineries Company, the board."

Well, the board got the stock from Searles, sole owner and sole stockholder, and gave in exchange certificates for \$700,000, or a little more than double the purchase price, and which indicates the amount of water in the board's capital stock. From that, however, was deducted the 15 per cent retained by the combination. What Searles did with the certificates we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board, that Searles became president of the corporation, that its share of the regular dividend has been allotted to it for its certificate holders and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred as I have already described it furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There was corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action except by the trustees or directors acting formally as such, a proposition which, if sound, dominates the whole field of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious

may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation, organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise, and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger, and say, "This the corporation has done by the agency through which it is authorized to act." That is corporate conduct, which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct though there be an utter absence of directors' resolutions. It is asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed. The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial but the legal owners of the stock, and if the board (trustees) appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in willful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the State confers upon trustees and directors general authority to manage the stock, property and concerns of manufacturing corporations, and equally true that, as a general rule, and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock the corpo-

rate act is wholly that of the corporators, and in consolidating two or more companies into one there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law, and the substantial inquiry always is, What in a given case has been that collective action and agency? As between the corporation and those with whom it deals the manner of its exercise usually is material, but as between it and the State the substantial inquiry is only what that collective action and agency has done, what it has in fact accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away it is taken from them as individuals and corporators, and their legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively as an aggregate body, without the least exception, and so acting reach results and accomplish purposes clearly corporate in their character and affecting the vitality, the independence, the utility of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction.

As was said in *People v. Kingston & M. Turnp. Road Co.*, 28 Wend. 193, "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury; and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defend-

ant's action was to devert itself of the essential and vital elements of its franchise by placing them in trust: to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn and to give away to an irresponsible board its entire independence and self control. When it had passed into the hands of the trust only the shell of the corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends, whatever may be its net earnings, and must incur its property at the command of its master and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and, without any doubt, for the purpose of so far lessening the market supply as to prevent what is termed "over-production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust, which is in substance and effect a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 29 [17 L. ed. 604]; *Whitten-ton Mills v. Upton*, 10 Gray, 596.

The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied. Indeed, in one of the papers added to the appellant's brief it is not only admitted but asserted and defended. That paper shows quite clearly that by force of an arrangement there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation, which public policy does not forbid because

the Statute permits it. Laws of 1867, chap. 960; Laws of 1884, chap. 867. The refineries did not avail themselves of that Statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the Statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the Statute the resultant combination would itself be a corporation, deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the Statute the consolidated, taking the place of the separate, corporations, could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed, and not, as here, a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great, and serves further to indicate the inherent illegality of the trust combination.*

And here, I think, we get a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest, and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock, proudly defiant of actual values, and capable of unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished, that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is open to enormous combinations, vastly exceeding in number and in strength

and in their power over industry any possibilities of individual ownership; and the State, by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause, of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing; what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result it becomes needless to advance into the wider dis-

cussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created, or one under the Statute.

The judgment appealed from should be affirmed with costs.

All concur.

OHIO SUPREME COURT.

QUEEN INSURANCE CO., *Plff. in Err.*,
v.
LESLIE.

(....Ohio St....)

***1. The Act of March 5, 1879, "To Regulate Contracts of Insurance of Buildings and Structures"** (now §§ 3643 and 3644 of the Revised Statutes), applies to all policies issued since it went into effect, insuring any building or structure in this State, against loss or damage by fire. The neglect or omission of the agent to make the examination of the property and fix its insurable value, as the Statute requires, cannot prevent its application to a policy issued by the company, or defeat or affect the operation of the Statute.

3. The Statute is founded upon considerations of public policy, its purpose being to exact diligence and care on the part of insurance companies to avoid improper risks and over-insurance, by requiring them to cause their agents to make personal examination of the property, a full description thereof, and fix its insurable value, as well as to protect the insured against unreasonable forfeitures and defenses. The more effectually to accomplish these results, the Statute holds the company liable on its policy, unless, after its issue, a change occurs increasing the risk without its consent, or the insured has been guilty of intentional fraud; and in case of the total loss of the property by fire, the measure of the liability is fixed at the amount mentioned in the policy, upon which the insurer received a premium. The Statute cannot be regarded as conferring upon the assured a mere personal privilege which may be waived by agreement. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability.

3. Conditions of the policy providing for a different rule or measure of liability, being in conflict with the Statute, are without any binding force. Of this character are stipulations to the effect that the amount of the loss or damage shall be estimated according to the actual value of the property at the time of the fire, and not more than it would cost the insurer or insured to restore the same; and that no

*Head notes by the Court.

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action on the policy shall be commenced until an award of arbitrators, chosen for that purpose, shall be obtained.

4. Where there has been no intentional fraud on the part of the insured, a condition or situation of the property at the time of the insurance, which the examination the agent is required by the Statute to make should have reasonably discovered, cannot avail to defeat a recovery on the policy; nor, in such case, if the loss be total, is it competent for the insurer to prove that the value of the property is less than the amount mentioned in the policy. And statements in the application concerning such condition or value are immaterial, and cannot be fraudulent.

(June 17, 1890.)

ERROR to the Circuit Court for Ashtabula County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due under a policy of fire insurance. *Affirmed.*

Statement by **Williams, J.:**

On the 1st day of June, 1883, the plaintiff in error, a foreign Insurance Company doing business in this State, issued and delivered to the defendant in error, a resident of the County of Ashtabula, its policy of insurance, whereby, in consideration of the payment of the premium therein mentioned, it agreed and undertook to insure him to the amount of \$700 on his frame building situated in that county, against loss or damage by fire for the term of one year. The building is described in the policy as a "frame building belonging to insured and occupied as private dwelling and store building;" and the policy contains among others the following conditions: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, and not more than it would cost the insurer or insured to replace or restore the same. This policy shall be and become void . . . in case the assured shall have made any false or fraudulent representation, or concealed any fact material to the risk;" or if the premises

"shall be or become vacant." It further provides that in case of loss, the value, and damage to the property, shall at the written request of either party be submitted to arbitration, and that no suit against the Company "shall be sustainable in any court of law or chancery for the recovery of any claim by virtue of this policy until after an award shall have been obtained."

On the 4th day of June, 1888, the building so insured was totally destroyed by fire, and on the 4th day of April, 1894, the assured brought his action against the Company in the Court of Common Pleas of Ashtabula County, to recover the amount of the insurance specified in the policy.

The petition contains all the necessary allegations to entitle the plaintiff to recover. The answer of the Company denies that the assured rendered a particular account of the loss or made proof thereof in accordance with the policy, and alleges that in his application for the policy the assured "falsely and fraudulently stated, represented and warranted that the building mentioned in the policy was of the value of \$1,000, whereas the same did not exceed in value the sum of \$250, as he well knew;" and further, that in the application "the plaintiff falsely and fraudulently stated, represented and warranted that the building was then occupied as a private dwelling and storeroom, whereas the building was then unoccupied, as he well knew;" and also, that the agent of the Company did not examine the property, and such examination was waived by the plaintiff. The answer also avers that the plaintiff ought not to maintain his action, because no arbitration was had concerning the loss, or award made, fixing the amount. The reply denies each of the allegations of the answer except those averring there had been no arbitration and award. The case was tried to a jury, and a verdict rendered for the plaintiff, for the amount claimed. A bill of exceptions was taken, from which it appears that on the trial the plaintiff gave evidence tending to prove the issues on his part, and the defendant gave evidence tending to prove that the actual value of the property was less than the amount named in the policy, and also that, at the time the policy was issued, the property was unoccupied, and had been for a considerable time before. Upon the close of the testimony the plaintiff moved the court "to take from the jury all evidence of the value of the property insured." The bill of exception states that "the defendant objected," but the court sustained the motion.

To all of which defendant excepted.

Thereupon defendant requested the court to charge the jury as follows:

1. "That as it is admitted by the pleadings that the building insured was not examined by an agent of the insurer (the defendant) the plaintiff can recover no more than the actual loss or damage sustained by him by the destruction of his building by fire as shown by the evidence."

Which the court refused to give, and did not give, and defendant excepted.

2. "That as it is admitted by the pleadings that no award was had or obtained fix-

ing the amount of plaintiff's loss and damage, the plaintiff cannot recover."

Which the court refused to give, and did not give, and the defendant excepted.

3. "If the jury find from the evidence that the plaintiff stated in his written application that the building insured was occupied as a dwelling and storeroom at the time it was insured, when in truth, and in fact, the building was then vacant, and plaintiff then knew that it was vacant, plaintiff cannot recover."

Which the court refused to give, and did not give, and defendant excepted.

In the general charge, the court, among other things, instructed the jury that if they found for the plaintiff upon the issues, their verdict should be "for \$700, and interest thereon from the time when the same became due and payable, according to the terms of the policy."

To which the defendant excepted.

A motion for a new trial having been overruled, and judgment entered on the verdict, the case was taken on error to the circuit court, where the judgment was affirmed, and the reversal of both judgments is now sought in this court.

Messrs. Henry Haus and Theodore Hall for plaintiff in error.

Messrs. Northway & Fitch for defendant in error.

Williams, J., delivered the opinion of the court:

The plaintiff in error contends for the reversal of the judgment below, on the grounds: (1) that, as the pleadings admit no award was made by arbitrators fixing the amount of the loss, as provided by the policy, the plaintiff could not maintain the action: (2) that the false statement of the plaintiff, in the application for the insurance, that the building was occupied as a dwelling and storeroom, when in fact it was unoccupied, vitiated the policy; and (3) that the plaintiff, in the application, falsely represented and warranted the property to be of a value grossly in excess of its actual value, which avoided the policy, and if not, by its terms, the plaintiff could recover no more than the actual value of the property at the time of the loss.

The questions raised are so intimately connected, they may be considered and disposed of together.

The policy expressly provides that the amount of the loss or damage is to be estimated according to the actual cash value of the property at the time of the fire, and no suit shall be commenced therefor until after an award of arbitrators chosen for that purpose shall have been obtained, fixing the amount; and that the policy shall be void if the property should be or become vacant.

It is not doubted that when not controlled by statutory regulation the conditions contained in a policy of insurance are as obligatory upon the assured as any other part of the contract; and it has been held that when the policy provides that it is issued upon the condition that if the statements made in the application are false, it shall be void, state-

ments therein contained known to be untrue will avoid the policy, whether material to the risk or not. *Jaffries v. Economical Mut. L. Ins. Co.* 89 U. S. 23 Wall. 47 [23 L. ed. 838].

It therefore becomes necessary in the decision of this case to determine the effect of the legislation of this State on the policy in question.

The conditions contained in policies of insurance, both life and fire, and the exceptions to the risk, and the contingencies upon which the company would be relieved from liability, became so numerous and complicated, usually printed in small type on the back of the policy, in terms which persons unlearned in the law or business of insurance would not readily understand, that it became a matter of no little difficulty for the assured to tell whether the policy afforded him any indemnity or not; and when the event insured against happened, the uncertainty of his claim against the company constrained him to abandon, compromise or litigate it. The Legislatures of several of the States enacted statutes designed to give greater certainty to the contract of insurance, and protect the assured against unreasonable forfeitures and defenses; which statutes, it is generally held, apply to and control all policies issued subsequent to their enactment. Of this character is the Act of the Legislature of this State passed March 5, 1879, entitled, "An Act to Regulate Contracts of Insurance of Buildings and Structures." This Act, with some unimportant verbal changes, was carried into the Revision of 1880 and is now sections 8643 and 8644 of the Revised Statutes, which read as follows:

"Sec. 8643. Any person, company or association hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and full description thereof to be made, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk, without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid; in case of partial loss, the full amount of the partial loss shall be paid, and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy; but in no case shall the insurer be required to pay more than the amount mentioned in its policy.

"Sec. 8644. A person who solicits insurance and procures the application therefor shall be held to be the agent of the party hereafter issuing a policy upon such application or renewal thereof, anything in the application or policy to the contrary notwithstanding."

These sections were in force when the policy in suit was issued, and entered into and became part of the contract of insurance,

fixed the measure of the obligation created by it and control its construction and operation. The contract of insurance is evidenced by the policy, and like all other contracts is governed by the laws in force when made; and the policy in question having been delivered in this State, to a citizen thereof, insuring real property there situated, is an Ohio contract, and governed by the Statute referred to. The purpose and scope of the Statute are not doubtful. It was designed, as its title declares, "to regulate contracts of insurance of buildings and structures." Its terms are plain and unambiguous, and the evil it was intended to remedy is apparent. It makes the person soliciting the insurance the agent of the company issuing the policy, and puts it out of the power of the company to avoid its liability thereon, by stipulating in the policy, as was sometimes done, that he shall be considered the agent of the assured. The duty is expressly enjoined upon the company taking the risk to cause the building to be examined by its agent and full description thereof to be made by him, and the insurable value of the building to be fixed by such agent. The performance of this duty will enable the company to ascertain for itself the condition of the building, the nature of the risk, and determine the amount for which it is willing to write the policy. The responsibility is thus cast upon the insurance company, of determining by such examination whether it will insure the building, and if so, for what sum; and when it so chooses to take the risk, issue its policy and receive premiums upon it, there is no reason why it should not be bound by its own examination and valuation. Hence the Statute, we think, very wisely provides, that, "in the absence of any change increasing the risk without the consent of the insurer, and of intentional fraud on the part of the insured," the company shall be liable; if the loss be total, then for the whole amount named in the policy; if partial only, then for the full amount of the partial loss; and in case there is more than one policy upon the property, each shall contribute to the payment of the whole or partial loss in proportion to the amount of insurance mentioned in each policy.

If, after the policy is issued, there be any change in the condition or surroundings of the property which increases the risk, without the consent of the insurer, or if there be intentional fraud on the part of the insured, these are regarded by the Statute as matters of substance, and may defeat a recovery on the policy; but where there has been no intentional fraud on the part of the insured, a condition or situation of the property at the time of the insurance, which the examination the agent is required by the Statute to make would have reasonably discovered, cannot, we think, be made available for that purpose; nor can the insurer, in case the property is entirely destroyed, be allowed to show that the value of the property is less than the amount mentioned in the policy.

It is contended by counsel for the plaintiff in error that the Statute does not apply to this policy, because: (1) the policy contains an agreement essentially different from the terms

of the Statute, which, it is claimed, it was competent for the parties to make, and by which they are mutually bound; and (2) no examination of the property was made by the agent of the Company. And they further contend that, if the Statute governs the policy, the statements in the application, of the value and condition of the property, constituted an intentional fraud.

The Statute rests upon considerations of public policy, one of its purposes being to exact of insurance companies doing business in this State reasonable diligence and care to avoid improper risks, and over-insurance, by requiring their agents to make personal examination of the property and fix its insurable value before writing the insurance. Well-regulated companies, after such examination, would not take the risk if not a proper one, nor write a policy for an amount greater than the actual value of the property. The more effectually to accomplish this purpose, the Statute has provided that the company shall be liable on its policy, unless a change subsequently occurs increasing the risk, without its consent, or the assured has been guilty of intentional fraud; and that, in case of total loss, the company shall abide by the valuation it has placed upon the property. Under the rule of liability thus established by the Statute, responsible companies are less likely to take risks recklessly, or for a sum greater than the value of the property; and persons whose buildings are insured receive protection against the injustice resulting from merely technical defenses, founded upon the many conditions inserted in the policy, formerly resorted to. The Statute cannot be treated as conferring upon the assured a mere personal privilege which may be waived or qualified by agreement. It has a broader scope. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. Terms and conditions in the policy inconsistent with the provisions of the Statute are subordinate to it, and must give way. The stipulations of the policy, that the loss or damage shall be estimated according to the true value of the property at the time of the fire, and that no suit shall be maintained until the amount shall be fixed by an award, are in conflict with the Statute, and therefore inoperative; and evidence in support of the defenses founded on them was inadmissible. And, since the loss of the property was total, and the Statute fixes as the measure of damages the amount mentioned in the policy, and makes the Company liable therefor in the absence of any change increasing the risk, or of intentional fraud, it follows that the statements in the application, of the value of the property and its condition, were immaterial, upon which the insurer had no right to rely, and could not be fraudulent.

Nor do we think the operation of the Statute can be defeated by the neglect of the agent to make the examination, or fix the insurable value of the property, as it requires. The duty of the Company is to obey the law, and its disregard of that duty can give it no

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greater rights than the observance of it would. It is obvious that if insurance companies were exempted from the operation of the Statute by the omission of their agents to comply with its provisions, the Statute would be practically annulled and its object defeated.

Authorities are not wanting in which statutes of a similar nature have been given construction, which sustain, in principle, the views here expressed. A statute of Missouri enacted that "no misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due; and whether it so contributed in any case shall be a question for the jury. In answer to a suit upon a policy issued by a foreign company to a citizen of that State, after the Statute went into effect, it was alleged that the policy contained a provision that the answers of the assured to the questions contained in the application should constitute warranties, and that if the policy should be obtained through fraud, misrepresentation or concealment, it should be absolutely void. It was further alleged that the answers in several particulars were false, but not that the matters in regard to which they were false contributed to the death of the assured. The plaintiff demurred, and the demurrer was sustained, the court holding that the Statute applied to all policies delivered in that State after it went into effect, and, where the provisions of the policy conflict with the Act, the latter controlled. In the opinion of the court, after referring to the case of *Jeffries v. Economical Mut. L. Ins. Co.*, *supra*, and other cases, in which it was held that where a policy contained the provision that if the statements in the application were not true, the policy should be void, the false statement of a fact avoided the policy, although it was not material to the risk, it was said by Dillon, *Ch. J.*: "The Legislature of Missouri conceived, and we think wisely, that the promises held forth to the assured in the policies in general use were too often a delusion and a snare, and as the courts were powerless to correct the evil, it ought to be corrected by statute." The learned judge further says: "We are of opinion that policies issued and delivered in Missouri after the Act took effect fall within its protective operation, and as to such policies, the Act is to be treated as if incorporated in them. The general rule is that laws in existence are necessarily referred to in all contracts made under such laws, and that no contract can change the law."

White v. Conn. Mut. L. Ins. Co., 4 Dill. 177, and *Wall v. Equitable L. Assur. Society*, 82 Fed. Rep. 278, involved the construction of a Missouri statute which provides that no policy on life hereafter issued by a company authorized to do business in this State shall, after payment of two full annual premiums, be forfeited or become void by reason of non-payment of premiums, and also provides for temporary insurance, and that upon the death

of the insured during the term of temporary insurance, and where no condition of the policy is violated except nonpayment of premiums, the company shall be liable for the full amount insured, as if there had been no default in payment. It was there held that a provision in a policy which required the payment of three full annual premiums before the insured was entitled to temporary insurance, was void. The opinion of the court is by Brewer, J., in the course of which he says it is insisted by the defendant that the Statute "merely gives a right or privilege to the insured, which, like any other personal right or privilege, he may, for a sufficient consideration, waive; and that such waiver, not being forbidden by statute, is not contrary to public policy in any such sense as that the courts should refuse to enforce it." But the learned judge, in answer to the claim of the defense, said: "It is notorious that many insurance companies were rigorous in insisting upon forfeitures, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many Legislatures to interfere, and seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri Legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because, if applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing."

Chamberlain v. New Hampshire F. Ins. Co., 55 N. H. 249, was a case where the plaintiff, a mortgagee, insured the buildings on the mortgaged premises, against loss by fire, in the defendant company. The policy provided that in case of loss the insurance should be paid to the mortgagee, to the amount of the mortgage, and contained a condition that the policy should be void if the premises should become vacant without immediate notice to the company, and its consent indorsed thereon. The mortgagor afterward removed from the premises, and they remained vacant for several months, when they were destroyed by fire. A statute of New Hampshire then in force provided "that no policy should be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made; but the party insuring, in any action brought against them on such policy, may show the facts, and the jury shall reduce the amount for which such party would otherwise be liable, as much in proportion as the premiums ought to have been increased if no mistake or misrepresentation had occurred." In commenting upon this Statute, Foster, Ch. J., in the opinion of the court, says: "The policy and purpose of the law were to promote honest and open fair dealing, to do equal justice, to protect the confidence reposed by the insured in those with whom he may contract and (especially disclaiming any reference to the defendant company) to spring the traps concealed in the mass of rubbish, before the unwary traveler shall have

put his feet in them; to prevent and prohibit, in short, the farce and fraud by which it has too often been found that the party apparently insured by the stipulations written on one side of a piece of paper was uninsured by the conditions involved in the insurance typography indorsed upon the other side of the same piece of paper." And again he says, "the Legislature of 1855 enacted the substance of the law which is now expressed in § 2, chap. 157, Gen. Stat., and every subsequent contract of insurance made in this State has been made in view of, and in subordination to, this law, which has thus been practically incorporated into the contract."

A statute of Wisconsin provided that where real property in that State, insured against loss by fire, should be destroyed by fire without criminal fault of the assured, the amount of insurance written in the policy should "be taken and deemed to be the true value of the property at the time of such loss, and the amount of the loss sustained." This Statute was construed in the case of *Reilly v. Franklin Ins. Co.*, 48 Wis. 449, where the plaintiff had policies on his property, issued by different companies, aggregating \$10,000. The policy issued by the defendant company was for \$1,000. The property was destroyed by fire, and suit brought on the policy. The answer alleged, as in this case, that it was provided in the policy that the loss or damage should be established "according to the true and actual marketable value" of the property at the time of the loss, which, it was alleged in that case, did not exceed \$7,000; and the defendant claimed that it was only liable for its proportion of that sum, being one tenth of that amount. The plaintiff demurred to the answer, and the demurrer was sustained. It was insisted by the defendant that if the Statute applied it should be construed to mean that the amount of insurance written in the policy should be taken as prima facie the value of the property, so as, in case of total loss, to place the *onus* of proving the real value upon the insurer instead of the insured; and that the Statute did not prevent the parties from agreeing, in the policy, that the true value of the property should be the measure of the loss, and the stipulation to that effect in the policy should control. But the court held otherwise. In the course of an able opinion by Cole, Ch. J., it is said, "The words of the Statute are neither obscure, doubtful nor ambiguous as to their meaning, and they therefore afford but little room for interpretation. In clear and precise terms they make, in case of total loss of real property without criminal fault of the assured, the amount of insurance written in the policy the value of the property at the time of the loss; and that amount is fixed as the measure of damages. It is analogous to a valued policy; only here the Statute peremptorily declares what shall be deemed the value of the property at the time of loss, and what sum shall be paid as indemnity. And as the intention of the Legislature is obvious, the Statute clearly prescribing that the amount of insurance written in the policy shall be deemed the true value of the property at the time of loss, it

results that the above allegation (of the answer) is bad and shows no defense. For if the Statute is to have effect as enacted, nothing is left open in the case to proof; 'the true and actual cash and marketable value of the property' at the time it was destroyed is not a matter to be inquired into, as the amount of insurance written in the policy determines the amount of the loss and fixes the extent of the recovery." Again he says: "We have no doubt that the Statute applies to the policy; and so far as there is any conflict or inconsistency between it and the provisions of the policy, the Statute must control. The law must be regarded as though written in the policy itself; and the stipulation that the loss shall be established according to the actual cash marketable value of the property when destroyed, being in conflict with the rule of damages prescribed by the Statute, must fall."

In *Thompson v. St. Louis Ins. Co.*, 48 Wis. 459, the construction given the Statute in the preceding case of *Reilly v. Franklin Ins. Co.* was approved, and it is there held that a stipulation in the policy, that the amount of the loss, in case of difference between the parties, should be settled by arbitration, and that no suit should be brought until an award was obtained "fixing the amount," has no effect, and that neither an arbitration nor award need be had or averred.

To the same effect is *Thompson v. Citizens Ins. Co. of Mo.*, 45 Wis. 388.

In *Bammessel v. Brewers F. Ins. Co. of America*, 48 Wis. 463, the answer alleged that the policy contained the condition that "all fraud or attempt at fraud, by false swearing

or otherwise, should cause a forfeiture of all claim under the policy, and that after the loss the plaintiff made and delivered to the defendant a false and fraudulent account of the alleged loss and damages, duly sworn to by him, in which he falsely and fraudulently stated the actual cash value of the property, immediately before the fire, to be materially greater than it was. This was held to be no defense; for, as the Statute fixed the amount of recovery at the sum written in the policy, false statements of its value could not be material or constitute a fraud. And *Cayon v. Dwelling-House Ins. Co. of Boston*, 68 Wis. 510, holds the same way. In *Oshkosh Gas Light Co. v. Germania F. Ins. Co.*, 71 Wis. 454, the court says: "The Statute must be regarded as a part of the contract of insurance, and the amount written in the policy as liquidated damages, agreed upon by the parties. . . . And this is so notwithstanding other clauses in the policies inconsistent therewith." And the Supreme Court of Maine, speaking of a similar Statute of that State, and its effect on policies issued after its adoption, says: "The Act is to be regarded as included in and a part of the policies issued since its passage. Nor is this any hardship upon the parties, for all are deemed to have contracted with knowledge of its existence, and subject to its provisions." *Emery v. Piscataqua M. & F. Ins. Co.* 52 Me. 322, 326.

The law, as we conceive it to be, was administered in the trial court, and the circuit court committed no error in affirming its judgment.

Judgment affirmed.

NEW HAMPSHIRE SUPREME COURT.

Joseph D. NEWTON

v.

Sophia A. TOLLES.

(.....N. H.)

1. A contract for the purchase of a farm containing "about 200 acres" will be rescinded where the farm contains in fact only 135 acres, and there was a mutual mistake in the quantity of land, both parties understanding that there were 200 acres of it, and the vendor informing the purchaser that it did contain that number.

2. In an action to rescind a contract for the purchase of real estate on the ground of mistakes as to the quantity contained in the tract, evidence is inadmissible to show that the quantity actually there is worth the sum which was to be given for the tract as represented.

(March 14, 1890.)

RESERVATION from the Supreme Court for Hillsborough County for the opinion of the full court of an action brought to rescind a contract for the purchase of a farm and other property, and for a return of the money paid upon the purchase price. *Judgment for plaintiff.*

9 L. R. A.

Sophia A. Tolles employed a real-estate agent to sell her farm. In May, 1886, Newton, seeking to buy a farm, applied to such agent, who informed him of the Tolles farm, told him it contained 200 acres, took him to see it and there pointed out to him such of the courses and boundaries as he knew; but he did not know, or undertake to point out, all of them. Afterwards the agent as agent of both parties executed an agreement by which Tolles agreed to sell, and Newton to buy, the farm for \$5,400, "said Newton to have all the stock, tools, hay, grain," etc.

On the margin of the agreement, "Farm contains about 200 acres" was written.

On May 15 Newton paid a portion of the purchase price, and Tolles executed and delivered to Newton a bond conditioned to convey to him "a certain lot or parcel of land situated in Nashua," and particularly described by metes and bounds, "meaning and intending to convey all the homestead farm, containing about two hundred acres, as by deed of heirs of Horace C. Tolles, to me, and all other land and right in said homestead farm."

On the margin of the deed was written: "It is agreed, for the above consideration, that said Newton is to have all the stock, tools, hay, grain, etc., and that said Tolles is to remove

only household furniture and family stores from said premises." About the 1st of August, Newton found by a survey that the farm as described in the bond contains only 135 acres. October 20, 1886, Tolles tendered to Newton a warranty deed of the premises of which he is in possession, and demanded payment of the balance of the purchase money. Newton refused to accept the deed, and on the same day filed his bill, in which he offered to restore the real and personal property to the defendant, and give up and cancel the bond, and to account for the rents and profits while he has been in possession. He has consumed the hay and grain, but has other hay and grain out of which he can return an equivalent. He sold four cows in August, but replaced them with four others of greater value. The farm has not deteriorated in value. Evidence to show that the property which Tolles by her bond was obliged to convey was of the value of \$5,400 or more was excluded, subject to the defendant's exception.

Messrs. G. B. S. French and H. B. Cutter for plaintiff.

Messrs. C. W. Hoitt and E. S. Cutter, for defendant:

A statement of the number of acres more or less in the sale of land is mere matter of description and not an agreement or covenant on the part of the grantor.

4 Kent, Com. *467; 1 Story, Eq. § 144; 2 Washb. Real Prop. ed. 1862, 630; *Mann v. Pearson*, 2 Johns. 87; *Powell v. Clark*, 5 Mass. 355; *Noble v. Googins*, 99 Mass. 231; 2 Wait, Act. and Def. 503; *Wilder v. Davenport*, 2 New Eng. Rep. 811, 58 Vt. 642.

When the land is described by metes and bounds and the number of acres are stated differing from the quantity as described, the former controls the latter, and the latter will be rejected for inconsistency.

4 Kent, Com. *466; 2 Washb. Real Prop. 630; 1 Wait, Act. and Def. 714; *Noble v. Googins*, *supra*; *Harvey v. Mitchell*, 31 N. H. 575; *Benton v. McIntire*, 7 New Eng. Rep. 107, 64 N. H. 602.

A party seeking to rescind a contract must put the other party *in statu quo*.

2 Kent, Com. *480; 2 Parsons, Cont. 679; Benjamin, Sales, §§ 426, 427; 2 Chitty, Cont. 11th ed. 1092; *Hunt v. Silk*, 5 East, 449; *Shepherd v. Temple*, 3 N. H. 457; *Cook v. Gilman*, 34 N. H. 556.

After the survey, when plaintiff found the farm contained only 135 acres, he sold four cows and also consumed all the hay and grain he had of the defendant. In so doing plaintiff exercised such acts of ownership over said property as are only consistent with a fulfillment of the contract on his part, and he thereby affirmed the contract, and disabled himself from rescinding it. Having done that he could not put the defendant *in statu quo*.

Cobb v. Hatfield, 46 N. Y. 533.

A party cannot rescind without returning all the property; if he has innocently disposed of any he cannot rescind.

Smith v. Brittenham, 98 Ill. 1898; *Wolf v. Dietrich*, 75 Ill. 205.

The farm and personal property all having been sold together for one entire sum, \$5,400, the contract is entire and the plaintiff is not at

liberty to rescind it, as to the real estate and affirm it as to the personal property.

2 Parsons, Cont. 519; Benjamin, Sales, §§ 426, 427; *Miner v. Bradley*, 23 Pick. 457.

A party seeking to rescind a contract must do so within a reasonable time after a knowledge of the facts upon which the rescission is grounded.

Chitty, Cont. 11th Am. ed. 1092, and notes; 2 Parsons, Cont. 781; 5 Wait, Act. and Def. 508; *Getchell v. Chase*, 37 N. H. 110; *Evans v. Gale*, 17 N. H. 573; *Manahan v. Noyes*, 52 N. H. 232; *McCrillis v. Carlton*, 37 Vt. 140; *Matter v. Holt*, 45 Vt. 386.

In the case at bar, the defendant discovered the shortage in acres about the 1st of August, 1886, but gave no notice of a rescission of the contract, or offered to return the property till October 20, 1886. If the statement of the number of acres after a full description of the land by metes and bounds is mere matter of description, and to be rejected, then there has been no breach of the contract and no ground of abatement.

2 Wait, Act. and Def. 503; 4 Kent, Com. 467; *Perkins v. Webster*, 2 N. H. 287; *Drumbaugh v. Chapman*, 45 Ohio St. 868; *Shoemaker v. Cake*, 83 Va. 1; *Hess v. Cheeney*, 38 Ala. 251; *Smith v. Evans*, 6 Binn. 102.

Having examined the farm personally and seen the true boundaries thereof, no action for deceit will lie.

Mooney v. Miller, 102 Mass. 217.

Carpenter, J., delivered the opinion of the court:

There was a mutual mistake in the quantity of land. The defendant understood she was selling, and the plaintiff that he was buying, a farm of 200 acres. It in fact contains only 135 acres. The defendant, believing that the farm contained 200 acres, informed the plaintiff that it did contain that number. The plaintiff relied on her statement. Under the influence of the error common to both parties, the transaction was consummated. The mistake was one of fact in a material point affecting the value of the property. *Boynton v. Hazelboom*, 14 Allen, 107, 108.

Its prejudicial consequences to the plaintiff are the same as if the defendant's statement had been designedly fraudulent. *Spurr v. Benedict*, 99 Mass. 465, 467.

The deficiency is so great that it would "naturally raise the presumption of fraud, imposition or mistake in the very essence of the contract," if the mistake were not affirmatively found. *Stebbins v. Eddy*, 4 Mason, 414, 420.

A material mistake in the quantity does not, in its effect upon the equitable rights of the parties, differ from a like mistake in the character, situation or title of the bargained property. It is equivalent to a mistake in the existence of a material part of the subject of the contract. The case is as if before the contract was executed, and without the knowledge of either party, a parcel containing 65 acres of the 200 contracted for had sunk in the sea. *Allen v. Hammond*, 36 U. S. 11 Pet. 63, 71, 72 [9 L. ed. 633, 636]; *Hitchcock v. Giddings*, 4 Price, 135; Story, Eq. Jur. §§ 141, 142.

The error is as injurious to the plaintiff as if 200 acres were comprised in the stated bounda-

ries, and the defendant had no title to a parcel of sixty-five acres, or as if she had title to only $\frac{1}{16}$ of the whole in common with a stranger.

Hooper v. Smart, L. R. 18 Eq. 683.

The defendant could not sustain a bill to compel a specific performance of the contract by the plaintiff, because it would be inequitable. *Pickering v. Pickering*, 88 N. H. 400, 407, 408; *Eastman v. Plumer*, 46 N. H. 464, 479.

The party against whom a contract, made under a mutual mistake of material facts, will not be specifically enforced, is in general entitled to rescind. Pom. Spec. Perf. § 250.

If there are exceptions to the rule, this case does not fall within them. It is inequitable, in the highest degree, that the defendant, by reason of her negligent and erroneous, though not fraudulent, representation, should make a profit of the sum at which the parties valued sixty-five acres of land, and that the plaintiff, without fault on his part, should lose that sum. Equity will prevent such a result by rescinding the contract, or decreeing a specific performance with compensation in behalf of the injured party, at his election, or by refusing specific performance on the application of the other party. *Hill v. Buckley*, 17 Ves. 895; *Price v. North*, 2 Younge & C. 620; *Dalby v. Pullen*, 8 Sim. 29; *Leslie v. Tompson*, 9 Hare, 268; *Barnes v. Wood*, L. R. 8 Eq. 424; *Whittemore v. Whittemore*, Id. 603; *Aberman Iron-Works v. Wickens*, L. R. 4 Ch. App. 101; *Denny v. Hancock*, L. R. 6 Ch. 1; *Torrance v. Bolton*, L. R. 8 Ch. 118; *Re Turner*, L. R. 18 Ch. Div. 130; *Belknap v. Sealey*, 14 N. Y. 144; *Paine v. Upton*, 87 N. Y. 327; *Couse v. Boyles*, 4 N. J. Eq. 212; *Thomas v. Perry*, 1 Pet. C. C. 49; *Daniel v. Mitchell*, 1 Story, 172; *Doggett v. Emerson*, 8 Story, 700; *Smith v. Babcock*, 3 Woodb. & M. 246; *Queanell v. Woodlief*, 2 Hen. & M. 178, note; *Laurence v. Staigg*, 8 R. I. 256; *Noble v. Gogins*, 99 Mass. 281.

Neither of the parties understood that the contract to convey "about" 200 acres was performed by conveying 135 acres. *Wilson v.*

Randall, 67 N. Y. 838, 841, 842, and cases above cited.

No laches can be imputed to the plaintiff. He had a right to rely on the defendant's statement of the quantity. He could not discover the mistake by examining the external boundaries. *Paine v. Upton*, 87 N. Y. 327, 337.

When, by the defendant's tender of a deed and demand of payment, he ascertained that she would not voluntarily correct the mistake, he immediately filed his bill.

The personal property formed no substantial part of the consideration. It is not named in the body of the bond, but is mentioned, apparently as an afterthought, on the margin. Upon the rescission, for any cause, by a vendee in possession of a sale of farm lands, there must, in most cases, necessarily be an accounting, in order to restore the parties to the situation they occupied prior to the contract. Upon such an accounting, all the property, the possession of which passed from the defendant to the plaintiff, or its full equivalent, together with the income derived from it, may be fully restored to her. It is no objection to a rescission, in a case of this character, that such articles as are necessarily consumed in the proper and ordinary management of a farm cannot be restored in specie. It does not appear that the plaintiff, after his discovery of the mistake, took any action by which he intended to affirm the contract (*Montgomery v. Pickering*, 116 Mass. 227), or that he did anything with the property not reasonably necessary for its preservation, or which equity would not require to be done. The plaintiff is to be relieved upon such terms as justice to both parties requires. *Winnall v. Harriman*, 62 N. H. 671, 672; 2 Story, Eq. Jur. § 707.

The offered evidence of value was immaterial, and was properly excluded. In the suit at law, there must be judgment for the defendant. The details of the decree will be settled at the trial term.

Decree for the plaintiff.

Allen, J., did not sit; the others concurred.

MINNESOTA SUPREME COURT.

John ELLIOTT *et al.*, App'ts.,

v.

Jennie CALDWELL *et al.*, Resp'ts.

(.....Minn.....)

*1. The findings of the referee.—*Held*, justified by the evidence.

*Head notes by MITCHELL, J.

NOTE.—*Building contract; "substantial compliance."*
A substantial performance of a building contract is all that is required. *Woodward v. Fuller*, 80 N. Y. 312; *Heckman v. Pinkney*, 61 N. Y. 211; *Phillip v. Gallant*, 62 N. Y. 253; *Gladius v. Black*, 60 N. Y. 145; *Nolan v. Whitney*, 88 N. Y. 648; *Blits v. Toovey*, 28 N. Y. S. R. 160.

One who invokes the protection of the equitable doctrine of substantial performance, in order to show a right to recover on a contract, must present a case in which there has been no willful omission or departure from the terms of the contract; he

2. The doctrine of "substantial compliance" of building contracts does not apply when the omissions or departures from the contract are intentional, and so substantial as not to be capable of remedy, and that an allowance out of the contract price would not give the owner essentially what he contracted for.

3. To entitle a party to recover for part performance or for performance in a

must have faithfully and honestly endeavored to perform it in all particulars. *Gillespie Tool Co. v. Wilson*, 123 Pa. 19.

When a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract is not being fully performed, the performance of the residue cannot be insisted on as a condition precedent to payment for the benefits received from the part performance. *Wiley v. Athol*, 6 L. R. A. 242, 150 Mass. 428; *O'Dea v. Winona*, 41 Minn. 424.

different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it. Hence, in the case of a building on land, which the builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land, and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, notwithstanding the nonperformance of the special contract.

4. **The complaint construed, and,—Held,** that the cause of action stated in it is only on the special contract, and not on an implied one, to pay the measure and value price of the work done.

(June 2, 1890.)

APPEAL by plaintiffs from an order of the District Court for Hennepin County overruling their motion to set aside the decision of a referee in favor of defendants, and to grant a new trial in an action brought to recover the amount alleged to be due upon a contract for the erection of a certain dwelling-house. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Welch, Botkin & Welch*, for appellants:

In the earlier New York cases the rule was most rigid requiring literal performance. This has been greatly modified.

Woodward v. Fuller, 80 N. Y. 812, and cases cited; *Phillip v. Gallant*, 62 N. Y. 256.

The complaint alleges acceptance of work, and all the facts in connection with the deviation from the contract as it appears.

Winona v. Minnesota R. Const. Co. 27 Minn. 415. See also *Belt v. Stetson*, 26 Minn. 411.

The party who receives the possession, and enjoys the labor and materials of another, is obliged to make compensation for what he has received, after a full and liberal allowance has

been made for any damages he may have sustained.

Phillips, Mech. Liens, 2d ed. p. 225; *Hayward v. Leonard*, 7 Pick. 181; *Newman v. McGregor*, 5 Ohio, 849; *Britton v. Turner*, 6 N. H. 481; *Davis v. Fish*, 1 G. Greene, 406; *Lord v. Wheeler*, 1 Gray, 282; *Goldsmith v. Hand*, 26 Ohio St. 101, citing *Jewett v. Weston*, 11 Me. 846; *Taylor v. Williams*, 6 Wis. 363; *Malbon v. Birney*, 11 Wis. 107, distinguished; *Dermott v. Jones*, 69 U. S. 2 Wall. 1, 17 L. ed. 762; *Outer v. Powell*, 2 Smith, Lead. Cas. 7th Am. ed. *17.

Where the owner has knowledge of defective work being done, and makes payment with such knowledge, and permits the contractor to proceed with the work, it operates as an estoppel upon the owner.

Kats v. Bedford, 1 L. R. A. 826, 77 Cal. 818. Plaintiff can recover the contract price less amount of damages caused by nonperformance.

Phelps v. Beebe, 71 Mich. 554; *Bell v. Teague*, 85 Ala. 211; *Campbell v. Hildebrandt* (Tex.) Jan. 18, 1887; *Pinches v. Swedish E. L. Church*, 55 Conn. 183; *Presbyterian Church v. Hoopes A. S. C. & P. Co.* 66 Md. 598; *Fuller v. Rice*, 52 Mich. 435; 2 Greenl. Ev. 82, *et seq.*; *Swain v. Seamens*, 76 U. S. 9 Wall. 254, 19 L. ed. 554; *Van Buren v. Digges*, 52 U. S. 11 How. 461, 13 L. ed. 771.

The evidence shows such a performance of the contract as cannot be ignored by the courts.

See *O'Dea v. Winona*, 41 Minn. 424, and cases cited. See also *Leeds v. Little* (Minn.) Jan. 29, 1890; *Etna Iron & Steel Works v. Kossuth County* (Iowa) Jan. 22, 1890.

Messrs. Davenport & Thian, for respondents:

If plaintiff has failed to perform his special contract he cannot recover anything.

Bond v. Corbett, 2 Minn. 248; *MacKubin v. Clarkson*, 5 Minn. 247; *Baby v. Wilkinson*, 25 Minn. 481; *Winona v. Minnesota R. Const. Co.* 27 Minn. 415; *Paxon v. Mansfield*, 2 Mass. 147; *Olmstead v. Beale*, 19 Pick. 528; *Davis v. Barrington*, 80 N. H. 529; *Glacius v. Black*, 50 N. Y. 145; *Phillip v. Gallant*, 62 N. Y. 264.

Where one party agrees to do a thing to the satisfaction of the other, and the excellence of the work is a matter of taste, the employer may reject it without assigning any reason for his dissatisfaction; and the fact that he suggested an alteration in a design sent to him is not a waiver of the condition. *Gray v. Alabama Nat. Bank*, 30 N. Y. S. R. 824.

But a just claim under a contract which provides that the work shall be done to the entire satisfaction of the other party cannot be defeated by the latter by arbitrarily and unreasonably saying he is not satisfied. *Dall v. Noble*, 5 L. R. A. 554, 116 N. Y. 820.

Where a contractor has in good faith substantially performed the terms of his contract, but there are some slight omissions or defects which are not so essential as to defeat the object of the parties, but can be readily remedied, the contractor, in an action on the contract, may recover the contract price less the damages on account of the omissions or defects; and if the other party wishes to claim a deduction on account of such defects or omissions, he must allege and prove his damages. *Leeds v. Little* (Minn.) Jan. 29, 1890.

Defendants, claiming the benefit of a contract 9 L. R. A.

giving them discretionary power to make arbitrary changes, must show they have performed it to the letter. *Bush v. Brooks*, 14 West. Rep. 889, 70 Mich. 446.

Defendants' failure to furnish estimates and a final estimate, as required by contract, was such a failure to perform by them as gave plaintiff a right to recover what his labor and materials were worth. *Ibid.*

Where plaintiff entered upon performance of the contract, performed a part and furnished a part of the materials in accordance with the contract, and was ready to complete the same, when defendants took possession of the building and the materials furnished and completed the work without the consent of the plaintiff,—the latter had a right to treat the contract as rescinded, and to recover for the work and materials at their reasonable market value. *Bonnett v. Glatfeldt*, 8 West. Rep. 637, 120 Ill. 166.

Acceptance of work entitles contractor to recover. See note to *Boettler v. Tendick* (Tex.) 5 L. R. A. 270. See also note to *Hanley v. Walker* (Mich.) L. R. A. 207.

Such gross violations of contract could not happen without fraud or such gross folly as would be equal to fraud in its consequences; and in such cases no recovery will be allowed on a *quantum meruit* or *quantum valebant*.

Maynard v. Leonard, 1 Pick. 186.

Mitchell, J., delivered the opinion of the court:

We have carefully read the evidence in this case, and are satisfied that it amply justified all the material findings of fact by the referee. Upon the facts thus found, it is impossible for the plaintiffs to recover in this action. They declare upon a written contract by which they agreed to build for the defendant Jennie Caldwell, according to certain plans and specifications, a dwelling-house for a gross sum. They allege that before they made their bid or executed the contract it was agreed that certain changes were to be made in the plans and specifications, and that they made their bid and entered into the contract with reference to such agreed changes, which were, however, through mistake or inadvertence, never made. They further allege that they have fully performed their contract by constructing the house according to such plans and specifications as thus agreed to be changed, and ask that the written contract (of which the plans and specifications are a part) be reformed so as to conform to the intention and actual agreement of the parties, that they have judgment for the amount of the contract price, and that the judgment be declared a specific lien on the building.

The defendants in their answer deny all the facts set up in the complaint as a ground for the reformation of the written contract, which they allege correctly embodies the actual agreement. They also deny that plaintiffs have performed their contract, but allege, on the contrary, that they have fraudulently, and by means of a conspiracy between them and one Jones, the person named in the contract as the supervisor of the construction of the building, made numerous material and substantial deviations and departures from the contract by using different and inferior and defective material, and doing different and inferior work, from that called for in the specifications, so that the house is essentially different from and inferior to the one contracted for.

The referee finds that plaintiffs executed the written contract with full knowledge of its contents, and without any mistake or oversight. He also finds that plaintiffs have not completed or constructed the building in substantial compliance with this contract, but have omitted altogether certain things, and have deviated and departed from it in numerous particulars as to the kind and quality of both the materials and the work, which he specifies. Without enumerating these, it is enough for present purposes to say that, taken as a whole, they are not mere slight defects or omissions, which may be remedied without difficulty, so as to give defendants substantially the building they bargained for, but that they are of a substantial nature, which run through the whole work, and are now incapable of correction, and render the house substantially different from and inferior to the one which plaintiffs contracted to build.

9 L. R. A.

Jones, the supervisor, was discharged, and a new one appointed December 4, after the building was up and inclosed, and sheathing, siding and roof boards on, and the windows in, and the floor joists, floor lining, studding, etc., up. From the referee's description, it appears that at this date the plaintiffs had already made the greater number of the most material departures and deviations already referred to. The referee further finds that all departures and deviations from the specifications by plaintiffs prior to that date were made with the knowledge and consent of Jones, but without the knowledge or consent of the defendants; also that they were made by plaintiffs well knowing that the same were unauthorized by the defendants, and for the purpose of defrauding the defendant Jennie Caldwell; that the last work was none by the plaintiffs on the building on May 8; that on May 16 defendants moved into it, and occupied it; that before doing so they requested plaintiffs to complete it in conformity with the plans and specifications, which they refused to do; that the defendants have never at any time accepted the building as complete, or as erected in conformity to the requirements of the contract. The referee also states that he is unable to find from the evidence that the defendants ever excused the plaintiffs from conforming to the specifications in any of the particulars specified. This is equivalent to a finding in the negative, or that the fact was not proven.

Upon such a state of facts, the plaintiffs cannot recover on the express contract, because they have not performed it on their part, and performance is a condition precedent to payment. They have not at all brought themselves within the liberal rule of "substantial performance" laid down in *Leeds v. Little* (Minn.), 44 N. W. Rep. 809, for the omissions and deviations were not slight and easily remedied, but substantial and remediless, except by tearing down and rebuilding the structure. Neither were they the result of mistake or oversight, but intentional, and even fraudulent. And we may remark here, in passing, that the very nature of the deviations, as in using inferior and defective material all through the building, is intrinsic evidence strongly supporting the finding that plaintiffs acted fraudulently. No case, we think, can be found where the doctrine of "substantial performance" was applied to such a state of facts. To justify a recovery upon the contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial, and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court. *Olmstead v. Beale*, 19 Pick. 528; *Woodward v. Fuller*, 80 N. Y. 812.

It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but the other party can well say: "I never made any such agreement. I agreed to pay you if you would build my house in a

certain manner, which you have not done." The fault is with the one who voluntarily violates his contract.

The plaintiffs, however, contend that, even if they are not entitled to recover upon the express contract, they are entitled to recover upon an implied contract the measure and value price of their labor and material. They claim that the evidence shows that, at least after December 4, the defendants, with knowledge of these deviations from the contract, without objections permitted them to go on and expend money and labor on the building, and have since occupied it, and are enjoying the benefit of it. It is sufficient answer to this to say that the plaintiffs did not in their complaint predicate their right of recovery on any such ground, and there is nothing in the record to indicate that the parties voluntarily litigated any issue outside the pleadings. The plaintiffs declared expressly and exclusively upon the written contract which they sought to have reformed and enforced. It is true that they alleged in their complaint that their labor and material were reasonably worth the contract price, but they nowhere allege any other contract for its performance or promise to pay for it except the written one. The allegation that the work was accepted by the defendants can only mean that they accepted it as performance of the express contract,—a fact which is found against them by the referee. But, even if the issue had been in the case, the most that could be claimed for the evidence is that the existence of any implied contract to pay the measure and value price was one of fact for the referee; and plaintiffs have no finding in their favor on any such issue. That there are cases where, the special contract remaining open and unperformed, an action may still be maintained to recover compensation for what the plaintiff has done under it, cannot be doubted. See *Cutter v. Powell*, 2 Smith, Lead. Cas. 7th Am. ed. *17.

Without entering into any general discussion of this subject, we may say, generally, as applied to cases like the present, that such an action can only be maintained where a new contract may be implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from the partial performance; for an express contract necessarily excludes a contemporaneous implied one in relation to the same matter. The acceptance of the benefit of a partial performance, or of performance in a way different from that contracted for, where the party has the option of returning or rejecting the consideration performed, will usually be sufficient to imply a promise to pay a compensation commensurate with the benefit accepted. But the mere fact that a part performance has been beneficial is not enough to render the party benefited liable to pay for the advantage. It must appear that he has taken the benefit under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Therefore, in a case of a building on land under a contract which the builder fails to complete, or which he completes in a manner not conforming to the contract, so that the owner cannot be charged with the contract price, the mere

fact of the building remaining on the land, and that the owner resumed possession and enjoys the fruits of the labor, is not such an acceptance as alone will imply a promise to pay for it; for the possession of the land necessarily involves possession of the buildings in their existing state, and the owner has no option of rejecting them. *Leake, Cont. 68; Munro v. Butt*, 8 El. & Bl. 788.

But it is unnecessary to pursue this subject further, for the question whether the defendants by their conduct waived the special contract, and impliedly promised to pay for a substantially different and inferior building, according to its reasonable value, was not an issue in the case; and the finding that they never accepted the building as performance of the express contract is abundantly supported by the evidence. The newly discovered evidence was purely cumulative, and, as to the only really material part of it, the plaintiffs furnished no sufficient excuse for not producing it at the trial.

Order affirmed.

ELLA M. MOORE, *Repl.*,

v.

H. G. NORMAN, *Appl.*

(....Minn....)

- *1. **Tender of the amount due upon a promissory note** secured by a chattel mortgage, though made after the note has matured, extinguishes and discharges the lien of the mortgage.
2. **It is not necessary to keep the tender good** by bringing the money into court in case an action is thereafter brought by the mortgagee to obtain possession of the chattels.
3. **In such a case, however, the proof should be clear** that the tender was fairly made, and deliberately and intentionally refused

*Head notes by COLLINS, J.

NOTE.—Chattel mortgage; lien devested by absolute tender.

An absolute tender of the amount due on a note secured by a chattel mortgage, made the day after the debt is due, but kept good, devests the lien of the mortgage. *Knox v. Williams*, 24 Neb. 680.

Where tender has only the effect of extinguishing the lien, and does not discharge the debt, bringing the money into court is not required. *Cass v. Higenbotam*, 1 Cent. Rep. 318, 100 N. Y. 248; *Kortright v. Cady*, 31 N. Y. 343.

Where tender of a debt by the pledgor, conditioned on return of the pawn, is refused by the pledgee, the pledgor need not pay the money into court, in an action to recover the pawn. Such refusal is a conversion. *Ibid.*

The refusal of either party to perform, where performance is tendered, furnishes ground for an action. *Holmes v. Holmes*, 12 Barb. 188.

A tender of the whole sum which is in fact due on a mortgage, and a refusal to accept it, does not discharge the security if the refusal was accompanied by a bona fide claim of right which was believed in by the creditor, and was not wantonly put forward as a cover to a wrong purpose. *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* (Mich.) 3 L. R. A. 30, 37 Fed. Rep. 236

by the mortgagee; that sufficient opportunity was afforded for the latter to ascertain the amount due; and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered.

(June 2, 1890.)

APPEAL by defendant from an order of the District Court for Jackson County overruling a motion for new trial after judgment in favor of plaintiff in an action brought by a mortgagee to recover possession of the mortgaged chattels from the mortgagor after condition broken. *Reversed.*

The facts are fully stated in the opinion.

Mr. George W. Wilson, for appellant:

The law does not provide for the tender to be deposited in court, nor even that the party should keep the identical money in his possession at all times.

Mitchell v. Vermont Copper Min. Co. 67 N. Y. 280; *Pinney v. Jorgenson*, 27 Minn. 26; *Korthright v. Cady*, 21 N. Y. 343; *Cass v. Higenbotam*, 1 Cent. Rep. 815, 100 N. Y. 248, and authorities there cited; *Flanders v. Chamberlain*, 24 Mich. 805; *Bartel v. Lope*, 6 Or. 321; *Balme v. Wambaugh*, 16 Minn. 116.

Mr. T. J. Knox, for respondent:

Where the forfeiture was complete when the tender was made and the mortgagor had no other interest in or to the property than the naked possession without right and the equity of redemption, in order to enable defendant to avail himself of the tender, it must be kept good.

See Jones, Chat. Mortg. §§ 632-637, and cases cited; *Tompkins v. Batis*, 11 Neb. 147; *Patchin v. Pierce*, 12 Wend. 61; Boone, Mortg. § 268.

In every State where the legal title to the mortgaged property passes by the mortgage to the mortgagee, the rule is that a tender after forfeiture, to be available as a defense, must be kept good.

Jones, Chat. Mortg. §§ 632-637, 669-707; Boone, Mortg. § 268; *Smith v. Phillips*, 47 Wis. 202; *Wood v. Dudley*, 3 Vt. 430; *Porter v. Parmly*, 43 How. Pr. 445; *Merchants Nat. Bank of St. Paul v. McLaughlin*, 2 Fed. Rep. 128; *Orain v. McGoon*, 86 Ill. 431; *Perre v. Castro*, 14 Cal. 519.

In mortgages of chattels the mortgagee takes the legal title, and the mortgagor retains only an equity of redemption in the mortgaged property.

Gates v. Smith, 2 Minn. 80; *Mann v. Flower*, 25 Minn. 500; *Fletcher v. Neudeck*, 30 Minn. 125; *Kellogg v. Olson*, 34 Minn. 103. And see Jones, Chat. Mortg. §§ 1, 699.

This being so it follows that a tender after forfeiture does not have the effect to extinguish the mortgage or to revert the title in the mortgagor, and is not available as a defense in an action by the mortgagee for the possession of the property, unless kept good by bringing the money into court, or being at all times ready and willing to pay the same.

Tompkins v. Batis, *supra*.

Plaintiff was willing to accept the money and apply it on the notes, but defendant wanted it to be accepted in full settlement. This was a condition he had no right to make, and vio-

lated the tender, even if it was otherwise sufficient.

Tompkins v. Batis, *supra*; *Elderkin v. Fellows*, 60 Wis. 339; 2 Greenl. Ev. § 602.

Collins, J., delivered the opinion of the court:

Action of claim and delivery brought by a mortgagee against a mortgagor to recover possession of certain domestic animals. Mortgages had been given upon distinct property to secure separate notes. By the verdict of the jury the animals described in one of these mortgages were awarded to plaintiff, while those covered by the other were held to belong to defendant. Under the charge of the court, this conclusion must have been reached by determining that one of the notes was tainted with usury, and hence the mortgage securing it invalid, while the other was not. By this charge there was excluded from the consideration of the jury all testimony in reference to tenders made by the defendant mortgagor after he had defaulted in his payments, and just prior to the commencement of this action. In substance, this testimony was that defendant, in due form, had twice tendered to plaintiff in payment of his notes a sum of money differing in amount each time, and that on each occasion the tender had been rejected; and that he had thereafter retained the money, so tendered, in his possession, ready for the plaintiff should it be called for, until after the property in dispute had been sold upon a foreclosure of the mortgages. The fact of these tenders, and the amount of each, seems undisputed, the real difference between the parties being as to the balance then remaining due and unpaid upon the defendant's notes. The sole reason given by plaintiff for refusing to accept the money offered by defendant was that it was insufficient in amount. The defendant in his answer averred a readiness to pay the balance which he admitted and alleged to be due on his notes, and averred, further, that he brought this sum into court for plaintiff, but there was no actual deposit or offer to deposit the amount in court. Upon the other hand the testimony, as before stated, showed that the money was kept by defendant but a few days, until the property was sold on foreclosure. The position of the court below, taken upon the trial, and also when it refused to allow the motion appealed from, was that the defendant should have kept his tender good by bringing the money into court for payment to the plaintiff should it have been determined by the jury that it was sufficient in amount. The question before us—the effect of a tender made subsequent to default in the conditions of a mortgage—has never been presented to this court. In *Balme v. Wambaugh*, 16 Minn. 116, it was assumed, expressly for the purposes of a consideration of that case, that a sufficient tender of the debt on the lay-day, and a refusal to accept, discharged the lien of a mortgage upon real property, although the tender was not kept good.

The subject of tender, in case of a debt secured by chattel mortgage, was also referred to in *Coffin v. Reynolds*, 21 Minn. 456; *Ferguson v. Hogan*, 25 Minn. 185; *Norton v. Baxter*, 41 Minn. 146, 4 L. R. A. 805, and *Reisan v. Mott*

(Minn.) 43 N. W. Rep. 691. But the necessity of keeping the tender good by payment of the money into court when the mortgagee, refusing, after condition broken, to accept it, commences a possessory action for the mortgaged property, is now the question to be determined.

At common law, when it was held that a mortgage upon real property was a grant of the land, defeasible only on the condition subsequent of paying the money at the exact time specified (on the "law-day," as it was then termed), it was well settled that a tender and refusal upon the law-day extinguished the lien of the mortgage, although the debt remained. But in case the money was not tendered when due, upon the exact day, the estate vested absolutely in the mortgagee. Even payment and acceptance thereafter did not re-vest the estate in the mortgagor without a reconveyance from the mortgagee. In case of a tender and refusal after maturity of the debt, the lien was not extinguished, nor the character of the mortgagee's estate changed. A mortgagor's only remedy was in equity, by a bill to redeem. It was settled at an early day in the State of New York, in opposition to the ancient doctrine, that a mortgage upon real property was a mere security or pledge of the land covered by it for the money borrowed or mentioned in it; that the mortgagor remained the owner of the estate, entitled to its possession until divested by foreclosure; and that an acceptance of the amount due on the mortgage, at any time prior to a foreclosure, discharged the incumbrance on the land, precisely as an acceptance of the amount for which personal property was held discharged the pledge. With this view of the law in regard to real-estate mortgages, came the contention that no sound distinction could longer be maintained between a tender and refusal upon the due or law day, and a tender and refusal upon any day thereafter, prior to foreclosure; and in *Kortright v. Cady*, 21 N. Y. 843, it was held that a tender of the money due on a real-property mortgage, at any time before foreclosure,—though made after the law-day and not kept good,—extinguished and discharged the mortgage lien.

This doctrine in regard to real-property mortgages has been steadily adhered to in the State of New York, and with the common law correctly stated, as it has been, in respect to the sweeping effect of a tender made upon due-day, it is difficult to see what distinction can now be suggested, when considering the force and effect of a tender made upon the law-day and one made thereafter. We are positive none can be pointed out which possesses any real merit; and the doctrine announced in the *Kortright Case* has been adopted elsewhere, without regard to the character of the security, whether real or personal. *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Or. 321.

But in *Noyes v. Wyckoff*, 80 Hun. 466, it was held inapplicable in the case of a chattel mortgage because of the difference in structure and effect between such a security and a mortgage upon real estate, the latter being a lien only, and conveying no title to the land, while the former transferred the title at once, subject to a defeasance by performance of the condition

annexed, the payment of the debt. On appeal, this case was affirmed on another point. 114 N. Y. 204.

The character of the real-estate mortgage, and the status of the lands covered thereby, are the same in this State under our statutes as they were declared to be by the courts of New York many years ago while the same distinction between chattel mortgages and those upon real property exists here as it does there; for it has been announced repeatedly in the decisions of this court that the former vests in the mortgagee a defeasible title in the mortgaged property, and upon default he is entitled to possession without foreclosure, unless stipulated to the contrary, subject to the mortgagor's right of redemption. There has been of late years considerable legislation upon the subject of chattel mortgages, with a view to guarding and protecting the rights and interests of the mortgagor. Although technically the legal title to the mortgaged property is vested in the mortgagee, he has been deprived of many of the rights which formerly resulted from that rule of law. He cannot arbitrarily and unreasonably take possession of the chattels prior to the time the mortgagor is in default in his payments. Unless power to sell is granted by the mortgage, a foreclosure thereof must be made by service of a notice of intent to foreclose, the foreclosure becoming complete at the expiration of sixty days; and pending these proceedings, it does not seem to be absolutely essential that possession should be taken by the mortgagee. If by the terms of the mortgage a sale be authorized as a method of foreclosure, it must be public, and after due notice, as prescribed by the Statute. Until the foreclosure is complete, either by service of the notice of intention to foreclose and the expiration of the period of sixty days thereafter, or by a public sale of the property under the terms of the mortgage, the right to redeem is fully recognized and protected. If the mortgagee has reduced the possession to himself, a tender before actual sale, and a refusal to accept the amount due, with costs, if any there be, confers upon the mortgagor the right to maintain replevin, or claim and delivery, for the property. Now, all of these salutary provisions of the Statutes (Gen. Stat. 1878, chap. 89; Gen. Laws 1879, chap. 65; Gen. Laws 1885, chap. 171) have had a practical effect upon the rule of law that the legal title to the mortgaged chattels vests in the mortgagee, and that he is entitled to possession thereof upon default of the annexed conditions. It still exists, and for obvious reasons, not apparent in cases where real property has been mortgaged, will continue to exist. But in truth very little difference can be pointed out between the rights, privileges and remedies of the mortgagor of real and personal property, either in the structure of the mortgage or its effect. As against third parties, one must be filed, the other put upon record; as to either, redemption may be made after default, upon payment of the debt secured thereby within a specified interval of time, denominated, in each case, a "period for redemption." The same kind of an instrument, a certificate in writing (executed with more formality in case the security is upon real

than if it be upon personal property), releases and discharges either. The distinction is therefore more in theory than in practice. If this be so, why should a different effect be given a tender made of the amount of a debt in the one case than in the other? We can discover no reason for a distinction which commends itself, and no reason is suggested in the decisions cited by respondent, except that based upon the technicality before referred to, that a mortgage upon real estate is a mere lien, while a mortgage on personal property vests the legal title thereof in the mortgagee. This is not satisfactory, and, in analogy with the rule laid down in case of real estate security, which is well supported on principle and by authority, we are of the opinion that the effect of a tender of the amount of a debt secured by a chattel mortgage, though made after maturity, is to extinguish and discharge the lien, the debt only remaining; and that it is not necessary to keep the tender good by depositing the money in court, in case an action is thereafter brought by the mortgagee to obtain possession of the chattels.

It is urged in some of the cases, where a different conclusion has been reached, that the adoption of this rule must work great hardship and injustice to the mortgagee, frequently causing a loss of the entire debt; but certainly, in this respect, the rule will not be more unjust when invoked as to chattel than when governing a real property mortgage, or than when it is applied, as it always has been without hesitation, in the case of a pledge. See *Norton v. Baxter*, *supra*, and cases cited.

As was said in the *Kortright Case*, it is not perceived how the mortgagee is to be embarrassed by the establishment of this rule. If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished, and he runs no risk in accepting it. If, upon the other hand, it is sufficient in amount, his debt is paid, and that is all he has any right to demand. It is his own folly if he attempts to exact more. But, in view of the serious consequences which might possibly result from a refusal to accept such a tender, the proof should be clear that it was fairly made, deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered. *Tut-hill v. Morris*, 81 N. Y. 94. See also, upon the sufficiency of a tender, *Storey v. Krewson*, 55 Ind. 397; *Wilder v. Seelye*, 8 Barb. 408; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Nelson v. Robson*, 17 Minn. 284.

As the character of the tender, whether conditional or otherwise, and its sufficiency as to amount, should have been submitted to the jury, under proper instructions, the trial court erred in its ruling, and a new trial must be had.

Order reversed.

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MOORE, *Resp.*,

RUGG, *Appt.*

(....Minn....)

*1. There is an implied contract between a photographer and his customer that the negative for which the customer sits shall only be used for the printing of such photographic portraits as the customer may order or authorize.

2. The complaint herein states a good cause of action.

(July 1, 1890.)

APPPEAL by defendant from an order of the District Court for Hennepin County overruling a demurrer to the complaint in an action against a photographer to recover damages for an alleged improper use of a photograph negative. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. J. L. Dobbin for appellant.

Mears, Lane & Johnson for respondent.

Collins, J., delivered the opinion of the court:

The complaint in this action is not a model, as is admitted by the attorney who drew it, but it appears therefrom that defendant, a photographer, had been employed to make, and had made and sold to plaintiff, a number of photographic portraits of herself; and that subsequently, without the order or consent of plaintiff, he made and delivered to a detective another of these photographs, who used it in a manner particularly stated in the pleading, and claimed to have been highly improper. In justice to defendant, it is right that we should here remark that it is nowhere averred in the complaint that the occupation of the detective was known to him, or that he knew that the photograph so delivered was to be used in the manner stated in the complaint, or in any other improper way. This action was brought to recover damages, and this appeal is from an order overruling a general demurrer to the complaint. A good cause of action was therein stated, for which nominal damages, at least, may be recovered. The object for which the defendant was employed and paid was to make and furnish the plaintiff with a certain number of photographs of herself. To do this a negative was taken upon glass, and from this negative the photographs ordered were printed. An almost unlimited number might also be printed from the negative, but the contract between plaintiff and defendant included, by implication, an agreement that the negative for which plaintiff sat should only be used for the printing of such portraits as she might order or authorize. *Pollard v. Photographic Co.* L. R. 40 Ch. Div. (C. D.) 845.

The complaint shows that there was a breach of this implied contract.

Order affirmed.

*Head notes by *COLLINS, J.*

NEVADA SUPREME COURT.

Josephine WALCOTT

v.

Thomas H. WELLS.

(.....Nev.....)

1. A writ of prohibition will not be granted where there is a complete and effective remedy by appeal or writ of error.
2. A judge *de facto* cannot be prevented from acting by a writ of prohibition on the ground that he is acting as judge without any authority of law.
3. Judicial notice will be taken of the fact that after a judge was commissioned and sworn into office he was assigned to a certain district by the presiding judge, and commenced to discharge the duties of the office, and has been recognized as judge by the officers and people of the State.

4. A judge *de facto* is a judge *de jure* as to all parties except the Commonwealth.
5. A statute, though unconstitutional, may give such color to the appointment of an officer as to constitute him an officer *de facto*.
6. A person appointed judge under a Statute increasing the number of judges, even if the Act is unconstitutional, is a *de facto* officer while acting by virtue of his commission in his own right, by consent of the other judges, and under assignment by the presiding judge to a district in which no other judge is acting.

(Bellnap, J., dissents.)

(July 12, 1890.)

A PPLICATION for a writ of prohibition to prevent the trial of a certain case in the District Court for White Pine County. *Denied.*

NOTE.—Writ of prohibition defined.

The writ of prohibition is one which commands the person to whom it is directed not to do something which the court is informed he is about to do. It will not lie after the cause is ended. *United States v. Hoffman*, 71 U. S. 4 Wall. 158, 18 L. ed. 364; *State v. Burckhardt*, 3 West. Rep. 303, 37 Mo. 533; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814.

Prohibition does not lie to restrain an inferior tribunal, after its judgment has been given and fully executed. *Haldeman v. Davis*, 28 W. Va. 324.

It can only operate to restrain a pending action or proceeding, and can never be used to prevent the institution of an action. *Ibid.*

It will not lie to restrain an inferior court from exercising jurisdiction in a particular case, if such court has jurisdiction of cases of that kind. *Ibid.*

It cannot be assumed that any tribunal will act in a matter over which it has no jurisdiction, and until it has done some act to indicate its intention to do so, prohibition will not lie. *Romberger v. Water Valley*, 63 Miss. 218.

The petition for a writ of prohibition must clearly show by its allegations that the inferior court is about to proceed in a matter over which it has no jurisdiction. If the facts alleged leave the question of jurisdiction doubtful, the writ will be refused. *Haldeman v. Davis*, *supra*.

It will not issue to restrain the execution of a judgment, unless it clearly appears that the court is without jurisdiction. *State v. Lapeyrollerie*, 38 La. Ann. 264.

Nor will it lie to restrain a superior court from proceeding in a matter alleged to be in excess of its jurisdiction, unless the attention of the superior court has first been called to the alleged excess of the jurisdiction. *Baughman v. Calaveras Co.* Super. Ct. 72 Cal. 572.

A complete remedy at law is sufficient reason for withholding a writ of prohibition. *State v. Burckhardt*, *supra*.

Prohibition will not issue where there is an adequate remedy by an appeal from the order of an inferior court. *State v. Cory*, 35 Minn. 178; *State v. Burckhardt*, *supra*; *State v. Eighteenth Dist. Ct. Judge*, 26 La. Ann. 321.

A supposed error in a judgment of an admiralty court on the merits of an action for pilotage fees cannot be corrected by prohibition. The remedy, if any, is by appeal. *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 394; *Ex parte Hagar*, 104 U. S. 520, 26 L. ed. 518.

4 L. R. A.

A motion for a change of venue, being a plain speedy and adequate remedy for the error of commencing an action in an improper county, a writ of prohibition will not be allowed therefor. *Fresno Nat. Bank v. San Joaquin County Super. Ct.* 33 Cal. 491.

The writ cannot be made to serve the purpose of a writ of error, or of review.

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari, to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Ex parte Detroit River Ferry Co.* 104 U. S. 519, 26 L. ed. 815; *Ex parte Hagar*, 104 U. S. 520, 26 L. ed. 518; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 394; *State v. Bombauer*, 99 Mo. 216.

Where a court of admiralty has jurisdiction of the vessel and of the collision, it can decide whether it will estimate the damages which a person has sustained by the wrongful killing of another by such collision. An appeal lies from its decree to the circuit court, and the supreme court will not issue a prohibition to prevent such decree. *Ex parte Gordon* and *Ex parte Detroit River Ferry Co.* *supra*.

But a person having no special interest cannot appeal from proceedings to locate a railroad crossing over a highway, and a writ of prohibition is his remedy. *Chandler v. Railroad Comrs.* 2 New Eng. Rep. 55, 141 Mass. 206.

It matters not that the sum demanded is too small to allow an appeal to the supreme court. It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise. *Ex parte Detroit River Ferry Co.* *supra*.

Prohibition, not in aid of its appellate jurisdiction, issued by a district court to a justice of the peace, is an absolute nullity, and should be ignored by the justice. *State v. Nineteenth Judicial Dist. Judge*, 39 La. Ann. 97.

Where a prohibition issued to a justice of the peace has been annulled, the justice must proceed with the case. *Ibid.*

Prohibition does not lie to restrain the court from proceeding in a controversy involving, not the identical, but a similar, matter to that part of the judgment rendered upon which the suspensive appeal has been taken. *State v. Davey*, 39 La. Ann. 507.

The case sufficiently appears in the opinion. *Mr. A. C. Ellis* for petitioner.

Messrs. Wren & Cheney and Henry Rives, for respondent:

The object and purpose of a writ of prohibition is to enable superior courts to confine inferior judicial tribunals within the limits of their rightful jurisdiction.

Notes to State v. Road Comrs. (S. C.) 12 Am. Dec. 604; *Smith v. Whitney*, 116 U. S. 176, 29 L. ed. 608; *Thompson v. Tracy*, 60 N. Y. 81; *Ex parte Braudlocht*, 2 Hill, 867.

The question of jurisdiction must be determined from the record of the inferior court.

Ex parte Christy, 44 U. S. 8 How. 292, 11 L. ed. 608; *Ex parte Easton*, 95 U. S. 77, 24 L. ed. 876; *Fraser v. Freelon*, 53 Cal. 644.

If the inferior tribunal has jurisdiction of the subject matter and parties to the action, any act therein, however irregular or erroneous, does not authorize the issuance of the writ of

of prohibition. The party aggrieved has a plain, adequate and speedy remedy at law, by appeal, writ of error, etc., and must pursue that remedy.

High, Extr. Legal Rem. §§ 767, 770, 772; *note to State v. Road Comrs.* (S. C.) 12 Am. Dec. 608; *Low v. Crown Point Min. Co.* 3 Nev. 75; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Ex parte Detroit River Ferry Co.* 104 U. S. 519, 26 L. ed. 815; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894; *Smith v. Whitney*, *supra*.

Courts have asserted these principles in many recent cases.

See *State v. Burckhardt*, 8 West. Rep. 806, 87 Mo. 538; *Bank Lick Turnp. Co. v. Phelps*, 81 Ky. 618; *Shell v. Cousins*, 77 Va. 328; *State v. Houston*, 85 La. Ann. 236; *State v. Columbia*, 17 S. C. 80; *State v. Twenty-sixth Jud. Dist. Ct. Judge*, 84 La. Ann. 782; *State v. Monroe*, 88 La. Ann. 923; *State v. Twenty-first Jud.*

If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is conclusive. *Ex parte Detroit River Ferry Co. supra*.

When writ will not lie.

A writ of prohibition is a civil remedy given in a civil action, even when instituted to arrest a criminal prosecution. *Farnsworth v. Montana*, 129 U. S. 104, 32 L. ed. 618.

The trial of a criminal case will not be restrained by prohibition for mere irregularities and errors in law occurring before and after the finding and return of the indictment. Such matters are reviewable on appeal. *Levy v. Wilson*, 69 Cal. 105.

A court having jurisdiction of the subject matter of the condemnation of real estate, and of the parties, cannot be prevented from proceeding in such matter by a writ of prohibition, on the ground that the petitioner is not entitled to condemn the special class of property sought. *State v. Valliant* (Mo.) March 10, 1890.

The Supreme Court of the District of Columbia has no jurisdiction to restrain, by writ of prohibition or otherwise, the proceedings of courts martial. *United States v. Whitney*, 4 Cent. Rep. 154, 4 Mackey, 585.

Prohibition is an extraordinary remedy, and the writ will not be granted unless the defendant has objected to the jurisdiction, and his objection has been overruled. *State v. Williams*, 48 Ark. 227; *State v. Eighteenth Dist. Ct. Judge*, 38 La. Ann. 220; *State v. Steele*, Id. 569.

But a motion to dismiss an action for want of jurisdiction is a sufficient objection. *State v. Williams, supra*.

An application for a prohibition cannot be entertained until after a plea to the jurisdiction has been made and overruled below. *State v. Henry* (La.) Dec. 18, 1890.

Late cases in which the writ was granted.

Prohibition lies to arrest the proceedings of a judicial tribunal when they are without or in excess of its jurisdiction; but the writ is issuable only in cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. *Levy v. Wilson*, 69 Cal. 105.

Where want of jurisdiction of the district court in admiralty appears on the face of the proceedings, a writ of prohibition may issue from the Supreme Court of the United States. *Ex parte Phoenix Ins. Co. of Brooklyn*, 118 U. S. 610, 30 L. ed. 274.

A writ of prohibition will be granted to prevent proceeding in a suit which is barred by prior judgment in another court. *Bates v. Alpena Circuit Judge* (Mich.) July 2, 1890.

9 L. R. A.

Prohibition is the proper remedy to restrain a district judge who attempts to enjoin the execution of a judgment rendered by the supreme court, on the ground that the judgment is not yet final. *State v. Second Dist. Ct. Judge*, 88 La. Ann. 274.

It lies against a judge who takes jurisdiction to decide a plea of recusal against himself, on the ground that he had been employed as advocate in the cause. *State v. Third Judicial Dist. Judge*, 88 La. Ann. 247.

It lies to a district court to prevent it from executing a judgment rendered by it to enforce the judgment of a justice of the peace. *State v. Livaudais*, 30 La. Ann. 984.

It will lie to prohibit justices and other petty tribunals from exercising a jurisdiction beyond their authority, before judgment has been fully carried into effect. *Bodley v. Archibald*, 33 W. Va. 229.

Where it is sought to prohibit a petty tribunal from exercising a jurisdiction beyond its authority, its jurisdiction may be shown by matters *dehors* the record. *Ibid*.

Where a claim for an amount exceeding a justice's jurisdiction, due to two or more persons jointly upon a single contract, is by the creditors, without the debtor's consent, apportioned among them so that the amount assigned to each is within the justice's jurisdiction, and one or more of the creditors sues on his portion before a justice and obtains judgment, prohibition will lie to prevent the enforcement of the judgment. *Ibid*.

The writ of prohibition issues only to prohibit action by an inferior court. The ordinary, in respect to an election to decide the question of fences or no fence, is not a court, and if he acts as a court, the writ would issue only to stop him from acting as such, if the subject matter was beyond his jurisdiction. *Seymour v. Almond*, 75 Ga. 112.

Where a court has clearly no jurisdiction, and the defendant therein has objected to the jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right, and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. *Smith v. Whitney*, 116 U. S. 173, 29 L. ed. 608; *Weston v. Charleston*, 27 U. S. 2 Pet. 449, 7 L. ed. 481; *Foster v. Foster*, 4 Best & S. 187; *London v. Cox*, L. R. 2 H. L. 239; *Chambers v. Green*, L. R. 20 Eq. 552; *Worthington v. Jeffres*, L. R. 10 C. P. 379.

Prohibition, object and design of writ; not to review either law or fact; distinguished from mandamus. See *note to Fleming v. Guthrie* (W. Va.) 8 L. R. A. 53.

Judicial notice. See *note to Olive v. State* (Ala.) 4 L. R. A. 33.

Dist. Ct. Judge, Id. 1284; *State v. Municipal Courts*, 26 Minn. 165; *State v. Ramsey Dist. County Ct.* Id. 233; *Sherlock v. Jacksonville*, 17 Fla. 93; *Leonard v. Bartels*, 4 Colo. 95; *Kemp v. Vantulett*, 58 Ga. 419; *Buskirk v. Circuit Ct. Judge*, 7 W. Va. 91; *State v. Kyle*, 8 W. Va. 711; *State v. Braun*, 81 Wis. 600; *Tasia v. Martinez* (N. M.) Jan. 1888; *People v. Hills* (Utah) Jan. 26, 1888; *People v. Larimer County Dist. Ct.* 11 Colo. 574; *People v. Whitney*, 47 Cal. 584; *People v. Kern County Supers.* 47 Cal. 81; *Bandy v. Ransom*, 54 Cal. 87; *Coker v. Colusa County Super. Ct.* 58 Cal. 177; *Bliss v. Santa Clara County Super. Ct.* 62 Cal. 543; *More v. San Francisco Super. Ct.* 54 Cal. 345; *Al Goon v. Superior Court*, 61 Cal. 555; *Levy v. Wilson*, 69 Cal. 105; *People v. Mize*, 80 Cal. 41; *Manuello v. Bellrude* (Cal.) June 6, 1886.

Title to office cannot be tried by a writ of prohibition.

See High, Extr. Legal Rem. § 49; *Buckner v. Vouze*, 63 Cal. 304; *Hull v. Shasta County Super. Ct.* 63 Cal. 174; *People v. Sasosvich*, 29 Cal. 480; *Satterles v. San Francisco*, 23 Cal. 314. See *State v. Hudnall*, 2 Nott & McC. 419; *State v. Naita*, 4 Rich. L. 514; *Ex parte Roundtree*, 51 Ala. 51; *North Bloomfield G. Min. Co. v. Keyser*, 58 Cal. 815; *People v. Scanell*, 7 Cal. 438; *People v. Olds*, 3 Cal. 167; *People v. Stevens*, 5 Hill, 616; *Ex parte Daughtry*, 4 Ired. L. 155; *Fitch v. McDiarmid*, 26 Ark. 482.

Hawley, Ch. J., delivered the opinion of the court:

This is an application by the petitioner for a writ of prohibition to prevent the trial of the case of *Walcott v. Watson et al.* in the District Court of White Pine County.

1. Petitioner claims that the court has no jurisdiction to try the case (1) because it has been dismissed; (2) that, if not dismissed, it has been transferred to the circuit court of the United States. The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action. It does not lie for grievances which may be redressed in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. The writ should not be granted except in cases of a usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition.

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The district court has unquestioned jurisdiction of the subject matter of the action of *Walcott v. Watson et al.* Petitioner, after submitting her cause to the jurisdiction of that court, sought to dismiss the action. A controversy arose as to whether or not the action was dismissed before the filing of defendant's answer setting up a counterclaim. This was a question for the district court to decide. It may have erred in deciding it adversely to petitioner; but if it did, the petitioner would have redress by an appeal to this court, if the final judgment should be rendered against her. The same principle applies to the second ground relied upon. It was within the jurisdiction of the court to determine whether or not the case had been transferred. If the court erred in its ruling upon this question, petitioner could have redress in the same manner; by appeal, or she might apply by petition to the circuit court of the United States to have the case transferred,—a proceeding involving but little, if any, greater expense or delay than will be incurred by this application. Moreover, that question ought not to be raised by this extraordinary remedy in this court. The decision thereon would not be final. If it was considered and decided by this court that the cause was transferred, the circuit court might, when it came up in that court, decide otherwise, and send it back to the state court for trial. It is a principle which lies at the very foundation of the law of prohibition that the jurisdiction is strictly confined to cases where no other remedy exists; and it has always been held to be a sufficient reason to refuse to issue the writ where it clearly appears that the petitioner therefor has another plain, speedy and adequate remedy at law.

In *Mastin v. Sloan*, after a temporary injunction was dissolved in an action brought by an administrator, the defendant therein moved for an assessment of damages on the injunction bond. During the proceedings a new administrator was substituted. One of the sureties on the injunction bond instituted this proceeding, and applied for a writ of prohibition to prevent the court from proceeding any further upon the motion for damages, on the ground that the original suit had abated, and the jurisdiction of the court terminated. The court said: "This is plainly no case for the issue of a writ of prohibition. Should the trial court enter a finding and judgment for damages against petitioner, and the other sureties on the injunction bond, any one of them aggrieved may review that result by appeal or writ of error, on taking proper steps to that end. Any error that court may make in determining the proper limits of its jurisdiction in the premises can be effectively corrected by any of the usual modes of reviewing judgments. The writ of prohibition should issue only in circumstances where the ordinary remedies are inadequate to the ends of justice. Where, as here, an appeal or writ of error furnishes a complete and effective remedy for an error of the court below prejudicial to the rights of a party, this extraordinary remedy should be denied." 98 Mo. 252. See also *People v.*

District Court, 11 Colo. 574; *Buskirk v. Judge of Circuit Court*, 7 W. Va. 91; *Fleming v. Commissioners*, 81 W. Va. 619; *Bedford Suprs. v. Wingfield*, 27 Gratt. 333; *State v. Houston*, 40 La. Ann. 393; *State v. Rightor*, Id. 339; *Wilson v. Berkstresser*, 45 Mo. 233; *People v. Westbrook*, 89 N. Y. 152; *Turner v. Foreyth*, 78 Ga. 687; *People v. Wayne Co. Circuit Ct.* 11 Mich. 403; *People v. Hills* (Utah) 16 Pac. Rep. 405; *Powelson v. Lockwood*, 82 Cal. 615; High. Extr. Legal Rem. § 765 *et seq.*

2. Petitioner next contends that the writ should be issued to prohibit respondent, Wells, from acting as judge upon the trial of said cause, upon the ground that he is not one of the district judges authorized to try cases in the District Court of the State of Nevada; that he is acting as a judge without any authority of law; that he has, in defiance of law and without any jurisdiction, "usurped the authority and power to try said cause, in that the law under which he was appointed and commissioned by the governor is wholly void and of no effect." On the other hand, it is claimed that the right of respondent, Wells, to exercise and perform the functions of a district judge, and his title to the office of district judge, cannot be raised, tried or determined in this proceeding; that the constitutionality of the Act of the Legislature under which he was appointed to the office is not involved, and cannot be attacked, and should not be considered or decided herein; that the validity of the Act, in so far as it involves respondent's title to the office, can only be considered and determined in proceedings in the nature of *quo warranto*, instituted as provided by statute, for the purpose of determining his right to hold said office; that until such a proceeding is instituted, and until it is decided therein that he has no right or title to the office, he is, as to third persons and the public, at least a *de facto* officer; and that all his acts as such are valid and binding, and that there is no valid reason why he should not be permitted to try petitioner's case, as well as the cases of other litigants pending in the court over which he presides. Which contention is correct? First, let us consider the facts upon which the respective claims are based.

The Act supplemental to and amendatory of an Act entitled "An Act to Redistrict the State," etc., approved March 4, 1885, was approved March 12, 1889; and section 1 of said Act reads as follows: "The number of district judges in the Judicial District of the State of Nevada shall, from and after the passage of this Act, be four; and the governor of said State shall, immediately upon the passage of this Act, appoint a district judge from said judicial district to hold such office under such appointment until the next general election, when four district judges from said judicial district shall be elected." Stat. 1889, p. 122, chap. 118.

There was, at the time of the passage of this Act, a district court, legally constituted, constitutionally organized and existing by virtue of law, to be held in every county of the State. The office of district judge also legally existed. There was but one judicial district for the entire State, but one district

court, and one judicial office in connection therewith to be filled, to wit, the office of district judge of the District Court of the State of Nevada. This office was then filled by three district judges, each having equal and co-extensive jurisdiction and power throughout the State to hold the district court in any county, and to exercise and perform the powers, duties and functions of the court, and all other duties pertaining to the office of district judge. These judges were authorized to elect a presiding judge, who had, among other things, the power to direct the district judges to hold court in the several counties as the public business might require. Stat. 1885, p. 60; *State v. Atherton*, 19 Nev. 332.

The Legislature, in 1889, deeming it to be necessary for the proper and speedy transaction of judicial business in the district court, and believing that they were authorized to increase the number of district judges, passed the Act in question, authorizing the governor to appoint another judge. This Act did not create any new court or new officer. It simply provided for an increase of judges. There were to be more officers,—an additional district judge to preside in the district court, and perform the functions and exercise the powers of a district judge throughout the State. The governor, pursuant to the provisions of the supplemental Act, appointed and commissioned the respondent as a district judge. There was no first, second, third or fourth judge. But there were four district judges, each commissioned to fill the one office of district judge; each, apparently at least, authorized to hold court, not in any particular county, but in each and every county in the State. We are bound to take judicial notice of the fact that, after respondent was commissioned and sworn into office, he was assigned by this presiding judge of the judicial district to hold the district court in the County of White Pine, and certain other counties; that immediately thereafter he commenced to discharge the duties pertaining to the office of district judge; and that for more than a year past he has been recognized by the state and county officers, and by the people of this State, as one of the district judges, and that his right to perform the duties of the office of district judge, and receive the salary pertaining thereto, has never been questioned until this proceeding was instituted. It is a general rule, of universal application, that the acts of an officer *de facto* are valid and binding as to third persons and the public, and cannot be questioned except in a direct proceeding instituted for that purpose by *quo warranto*.

In *Coyte v. Com.* the defendant, on trial for murder, contended that the judge was acting under an unconstitutional law, and that he had no jurisdiction to try the case. The supreme court said: "The question sought to be raised by the prisoner's special plea to the jurisdiction is not properly before us. The rightful authority of a judge in the full exercise of his public judicial functions cannot be questioned by any merely private suitor, nor by any other, excepting in the form especially provided by law. A judge

de facto assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is open to the attack of the sovereign power alone. If the question may be raised by one private suitor, it may be raised by all; and the administration of justice would, under such circumstances, prove a failure. It is not denied that Judge McLean was a judge *de facto*; and if so he is a judge *de jure* as to all parties except the Commonwealth. The attorney-general, representing the sovereignty of the State, by a writ of *quo warranto*, might properly present this constitutional question for our consideration; but it cannot come before us from any other source, or in any other form." 104 Pa. 130. See also, to same effect, *Clark v. Com.* 29 Pa. 129; *Com. v. McCombs*, 56 Pa. 436; *People v. Sassovich*, 29 Cal. 485; *Buckner v. Vease*, 63 Cal. 304; *Carleton v. People*, 10 Mich. 251; *People v. White*, 24 Wend. 524; *Fowler v. Bebes*, 9 Mass. 231; *Sheehan's Case*, 122 Mass. 445; *Com. v. Taber*, 123 Mass. 253; *Re Boyle*, 9 Wis. 284; *State v. Bloom*, 17 Wis. 522; *Ex parte Johnson*, 15 Neb. 512; *Trumbo v. People*, 75 Ill. 565; *State v. Meahan*, 45 N. J. L. 192; *State v. Vickers*, 51 N. J. L. 180; *Keith v. State*, 49 Ark. 442; *State v. Fuller*, 96 Mo. 167; *Re Cleveland*, 51 N. J. L. 311; *Jewell v. Gilbert*, 64 N. H. 14, 2 New Eng. Rep. 847; *Baker v. State*, 69 Wis. 87; *Hull v. Shasta County Superior Ct.* 63 Cal. 177.

But petitioner contends that respondent is not a *de facto* officer, that the conditions necessary to constitute such an officer do not exist, that there is no office to be filled, that it is a legal impossibility for a fourth judge to fill the office of district judge, "because the office has always been full;" and that for these reasons the rule above stated has no application to this case. We admit that there can be no officers, either *de jure* or *de facto*, if there be no office to fill; that an office attempted to be created by an unconstitutional law has no existence, and is without any validity; and that any person attempting to fill such a pretended office, whether by appointment or otherwise, is a usurper, whose acts would be absolutely null and void, and could be questioned by any private suitor, in any kind of an action or proceeding. It would be a misnomer of terms to call a person an "officer" who holds no office. A public office cannot exist without authority of law. An office cannot be created by an unconstitutional Act, for such an Act is no law. It confers no rights, imposes no duties, affords no protection, furnishes no shield, and gives no authority. It is in legal contemplation to be regarded as never having been possessed of any legal force or effect, and is always to be treated as though it never existed. *State v. Tuffy*, 20 Nev. —, 22 Pac. Rep. 1054; *Norton v. Shelby County*, 118 U. S. 442 [30 L. ed. 186].

If, therefore, the contention of counsel for petitioner has any solid foundation for its support, the conclusions to be drawn therefrom should be sustained. But if the contention is wholly unsupported and unwarranted by the facts, then the entire fabric upon which the claim is made must fall, it having nothing to support it.

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The case of *Ex parte Roundtree*, 51 Ala. 42, wherein a writ of prohibition was issued to a circuit judge to prohibit him from proceeding in a case, is relied upon by petitioner's counsel to sustain his position. That case, however, is wholly different in its facts, and is plainly distinguishable from this. There the Legislature of Alabama passed an Act, by its terms creating a new court, to be known as the "Law and Equity Court of Morgan County," and provided "that the judge of the Fourth Judicial Circuit of Alabama shall be the judge of said court of law and equity." This Act was held to be unconstitutional because it took from the qualified electors of Morgan County the power of electing a judge. The court attempted to be created by an unconstitutional law had no legal existence. Here the district court in which respondent is presiding had a legal existence prior to and at the time of his appointment, and was not created by virtue of the Act authorizing his appointment. We refer to two other decisions, similar to the Alabama case, for the purpose of illustrating the particular character of cases to which the argument of petitioner's counsel would apply, and to show the distinction in the facts between such cases and the one under consideration. The Legislature of Kentucky attempted, in an unconstitutional manner, to abolish the constitutional court of appeals, and to create a new court of appeals, in direct violation of the plain provisions of the Constitution of the State. The constitutional court of appeals, in *Hildreth v. McIntire*, 1 J. J. Marsh. 206, held that there could be but one court of appeals, and that such a thing as a *de facto* court of appeals could not exist under the Constitution, and as no such court existed the gentlemen appointed to preside over such a court were not *de facto* officers.

In *Norton v. Shelby County*, 118 U. S. 426 [30 L. ed. 178], on writ of error from the Supreme Court of Tennessee to the Supreme Court of the United States, the Legislature had attempted, by an unconstitutional Act, to abolish what was known as the "Quarterly Court," composed of the Justices of the Peace of Shelby County, and to create in its stead a board of commissioners consisting of three members. It was held that, as this board of commissioners never had a lawful existence the members thereof were not *de facto* officers, and that all the acts of the pretended board were null and void. The distinction in the facts between the cases referred to and the present one is so clear, plain and manifest that no one ought to be misled in applying the legal principles which control the respective classes of cases. In each of the cases referred to no court or office known to the law existed, to be filled by anyone. Here the court and the office existed by virtue of the Constitution and a valid law. There the right of the pretended officers to perform the functions of the pretended office was not admitted by anyone, but, on the contrary, was directly disputed and drawn in question when the respective persons attempted to act. In *Norton v. Shelby County* the members of the quarterly court not only denied the right of the

supervisors to act, but instituted proceedings by *quo warranto* to remove them from office; and such proceedings were pending in the courts at the time the acts under review in that case were performed. Here the right of respondent to act as district judge was never disputed, and his authority to act was publicly recognized and acquiesced in.

What constitutes a *de facto* officer? This court in *Mallett v. Uncle Sam G. & S. Min. Co.*, 1 Nev. 197, said that an officer *de facto* is on the one hand distinguished from a mere usurper of the office, and on the other hand from an officer *de jure*.

In *Meagher v. Storey County*, 5 Nev. 245, it was said that acts performed by a city recorder as a committing magistrate, though the Statute authorizing him to so act is unconstitutional and void, are to be regarded as the acts of a *de facto* officer, and valid as to third persons and the public.

In *State v. Curtis*, 9 Nev. 838, we had occasion to examine and discuss, to a limited extent, the question as to what constitutes an officer *de facto*. The rules taken from the authorities were there announced as follows:

(1) one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; (2) one who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election; (3) one who has the color of right or title to the office he exercises; (4) one who has the apparent title of an officer *de jure*.

In *State v. Carroll*, Chief Justice Butler gave the following complete definition of a *de facto* officer: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: *First*. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. *Second*. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond or the like. *Third*. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power or defect being unknown to the public. *Fourth*. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." 38 Conn. 471.

This definition has been accepted, approved and followed, in its entirety, in all the numerous subsequent cases where the question has been discussed, and was referred to with approbation by this court in *State v. Blossom*, 19 Nev. 817.

In *Taylor v. Skrine*, decided in 1815, it was sought to set aside a decree on the ground that it was made by a person who was not

constitutionally qualified to preside as judge. There was an Act in South Carolina authorizing the governor to appoint and commission some fit and proper person to sit as judge in case any of the judges on the circuit should happen to be sick or unable to hold the court, in his circuit. The judge who made the decree was appointed pursuant to the provisions of that Act. After the rendition of the decree the Act was declared void by a decision of the supreme court. The question was whether all the acts of the judge so appointed were necessarily void. The court, in answering this question, said: "The judge in this case acted under color of legal authority. He had a commission under the seal of the State, signed by the governor, and authorized by an Act of the Legislature. . . . The public acts of officers *de facto* are often valid although the authority under which they act is void. Public convenience, as well as public justice, requires that they should be supported. It would lead to incalculable mischief if all the proceedings under the several judges who have been thus appointed should be declared null and void." 3 Brev. 516.

The cases of *State v. Carroll*, *supra*, and *Ex parte Strang*, 21 Ohio St. 610, are similar in their facts to that of *Taylor v. Skrine*, the difference being only that in the South Carolina case the law authorizing the appointment of a temporary judge had been declared unconstitutional before the decision in *Taylor v. Skrine* was rendered, and in the other cases the court declined to pass upon the constitutional question, holding it to be unnecessary so to do, as the temporary presiding judge was at least a *de facto* officer, and that his acts were valid and binding as to the public and third persons. We are of opinion that the facts of the present case bring respondent clearly within the definition of a *de facto* officer, as given in *State v. Curtis* and *State v. Carroll*, even if the Act authorizing his appointment is unconstitutional, and that the case comes clearly within the principle of law as stated in the three cases above quoted from or referred to. In those cases the office was full. There was no vacancy. The law authorizing the appointment of a temporary judge had either been declared unconstitutional, or, for the purposes of the decisions, admitted to be unconstitutional. The temporary judge acted in the place of the judge *de jure*, under color of authority derived from an unconstitutional statute by virtue of his commission, etc. Here respondent did not take the place of either of the three other judges, for there was no separate place for either to fill, except by the assignment of the presiding judge. He was acting by virtue of his commission, in his own right, by the consent of the other judges, and was assigned to the place by the presiding judge, and was the only judge presiding in the District Court of the State in and for the County of White Pine. He acted as a district judge, filled the office, and presided in court, under as much color of authority as either of the temporary judges in the cases referred to. Why should not the same shield of protection to the public be given to his acts? "The doctrine which gives validity to acts of officers *de facto*,

whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if, in every proceeding before such officers, their title could be called in question." *Norton v. Shelby County*, 118 U. S. 441 [30 L. ed. 186].

In *Leach v. People*, 123 Ill. 420, 10 West. Rep. 617, the Legislature having passed an Act in violation of the Constitution of the State of Illinois, taking the management of county affairs under township organizations from the supervisors of the several towns, consisting of fifteen members, and vesting the same in a board of supervisors consisting of only five members, it was contended, as it is contended here, that there was no *de jure* office for the supervisors to fill; and *Norton v. Shelby County* was relied upon to sustain this position. Chief Justice Sheldon, speaking for a majority of the members of the supreme court, in answer to this contention, said: "Wherever township organization prevails, there is in every county a board of supervisors for the transaction of the affairs of the county. The Act in question merely changed the number of the members of the board from fifteen to five, and the mode of election from towns singly to two or more towns unitedly, and the term of office. Nothing was added to or taken from the powers or duties of the board. After the passage of the Act there still remained the board of supervisors of Wayne County, the official body for the management of the county's affairs, and the persons elected as members under the Act went on, under the sanction of the Statute, and exercised the powers and duties of the board of supervisors of Wayne County without question. There was no rival board, but it was the sole acting board of supervisors in Wayne County." There was all the while the legally established office or official body of the board of supervisors. It appeared in that case that the new members of the board were elected in pursuance of the Act, and entered upon the duties of their office, and went on and exercised the powers and duties of the board of supervisors of Wayne County for years, without question of their right to do so. They had the sole management and transaction of the affairs of the county, and did all the official legislative business of the county, just as respondent, Wells, had the sole management of the affairs of the District Court in White Pine County, and did all the judicial business of the county that was done. There was no other official body ready and willing to do it. Upon this state of facts, the court said: "They were recognized and acquiesced in by all the public as

the board of supervisors of Wayne County; and to hold their acts to be invalid would be most disastrous to the public interest, and that of individuals who were justified in relying upon such acts as the acts of the board of supervisors of the county. There are present here all the elements which, from considerations of public policy, and for the avoiding of public inconvenience, have been recognized as going to make up the character of *de facto* officers, whose acts should be held valid as officers by virtue of an election as such under an Act of the Legislature; reputation of being public officers, and public belief of their being such; public recognition thereof, and public acquiescence therein; and action as such unquestioned, during a series of years, with no other body ready and willing to act as the board of supervisors. We are therefore of opinion that this Act . . . in relation to the board of supervisors of Wayne County, even if it be unconstitutional, was sufficient to give color of title that the official board, elected and acting under the law, were officers *de facto*, and that their acts should be held valid, so far as the public and third persons are concerned."

In *State v. McMartin* (Minn.), 48 N. W. Rep. 572, there was an Act of the Legislature establishing a justice's court in one of the wards of the City of St. Paul, and providing for the election of such justice at the next general city election. There was a section of the Act authorizing the mayor of the city to appoint the first justice to have the office until the next election. Respondent, McMartin, was occupying the office, and performing its duties, under appointment by the mayor, pursuant to the provisions of this Act. A civil action was commenced in the court, and the defendant therein applied for a writ of prohibition to restrain McMartin from proceeding in the action, on the ground that he was not a justice of the peace, and had no authority to act as such, for the reason that the provision of the Act assuming to confer the power on the mayor to fill the office by appointment is unconstitutional. The court said: "This part of the Act is entirely separate and distinct from the provisions creating the court or office; and hence, even assuming that the former is invalid, the latter are valid. We have, then, a case where the court or office was legally created; and the illegality, if any, consists in an attempt to fill it by appointment for the period indicated in a way not authorized by the Constitution. On these facts, according to all the authorities, the respondent is a justice *de facto*. That his title to the office cannot be tried on a writ of prohibition, but only on information in the nature of *quo warranto*, is too well settled to require discussion." Counsel in that case, as well as in the case under consideration, argued that petitioner had no other available remedy for the wrong and injustice that was about to be done him, and that, inasmuch as there must be a remedy for every wrong, therefore a writ of prohibition ought to be issued. But, said the court: "The fallacy consists in the assumption that relator is threatened with any wrong. Respondent being a justice *de facto*, his acts are as valid as if he was

a justice *de jure*. In fact, as to everybody, except the State, in proceedings by *quo warranto* to test his right to the office, he is, in effect, a justice *de jure*."

In support of the views we have expressed we cite the following additional authorities: *Rices v. Pettit*, 4 Ark. 582; *Re Ah Lee*, 6 Sawy. 410; *Campbell v. Com.* 96 Pa. 844; *Brown v. Lunt*, 87 Me. 429; *State v. Farrier*, 47 N. J. L. 385, 1 Cent. Rep. 694; *Carli v. Rhener*, 27 Minn. 298; *Re Parks*, 8 Mont. 431; *Fitchburg R. Co. v. Grand Junction R. & D. Co.* 1 Allen, 557; *Petersilea v. Stone*, 119 Mass. 467; *Clark v. Easton*, 146 Mass. 45, 15 New Eng. Rep. 657; *People v. Staton*, 73 N. C. 546; *Hamlin v. Kaszner*, 15 Or. 458.

The construction of petitioner's counsel "that, when a law is unconstitutional under which a person claims to exercise authority, such authority may be attacked and disregarded in any form of proceeding," is not sustained by reason or authority. The legal existence of the District Court of the State of Nevada, and of the office of district judge of said court, cannot be questioned. Neither the court nor the office was created by the Act which is claimed to be unconstitutional. The question raised in this proceeding is not, therefore, one touching the jurisdiction of the court; but it is an inquiry into the right of a particular person to hold the office of district judge, which is a question absolutely distinct from that of the jurisdiction of the court. The only question that is before us for consideration is whether or not the reputed or colorable authority required by law to constitute an officer *de facto* can be derived from an unconstitutional statute. From a review of the authorities bearing directly on the question, it clearly appears that it is sufficient if the officer claims and holds the office under some power having color to appoint, and that a statute, though it should be found repugnant to the Constitution, will give such color.

The question of the constitutionality of the Act increasing the number of district judges to four will not be considered. It is not properly before us for decision. It was not discussed by counsel for respondent, and is simply assumed to be unconstitutional by petitioner's counsel. This question, in so far as respondent's right to hold the office of district judge is concerned, can only be raised in a direct proceeding, by *quo warranto*, to determine by what authority he exercises the right.

The alternative writ of prohibition heretofore issued in this case is vacated, and the temporary writ asked for denied.

Murphy, J., concurring:

I was not present, and did not hear the oral arguments made by the attorneys on the hearing of the writ. But from an examination of the briefs filed, and all the authorities having any bearing upon the subject, I am of the opinion that the application for the writ should be denied. I therefore concur in the opinion of Chief Justice Hawley.

Belknap, J., dissenting:

At the Session of 1886 the Legislature constituted the State one judicial district, and 9 L. R. A.

provided that there should be three judges of the district court. Pursuant to this law, three judges were elected at the general election of 1886 for the term of four years. Their terms will not expire by limitation until the first Monday in January, 1891. At the Session of 1889 the Legislature enacted that the number of district judges should be increased to four, and authorized the governor of the State to forthwith appoint a fourth judge. Respondent was commissioned under this authority in the month of March, 1889. This enactment, in so far as it attempts to increase the number of district judges during the term of the judges elected in 1886, is in direct violation of the provisions of the Constitution, which require that the number shall not be increased or diminished "except in case of a vacancy, or upon the expiration of the term of an incumbent of the office." Const. art. -6, § 5.

The enactment, being unconstitutional and void in the respect stated, created no office or judgeship to be filled. It was as inoperative as though it had never been passed. No *de jure* judge could be created by virtue of its provisions; and, if there could be no *de jure* judge, there could be no *de facto* judge, for the reason that the *de facto* doctrine presupposes provision by law for a *de jure* officer. It is considered, however, by the majority of the court, that if the Law of 1889 be unconstitutional, the office of district judge created by the Constitution and laws passed in pursuance thereof remains; that respondent is an incumbent of this office, and therefore a *de facto* officer. In my view the case does not admit of the application of the *de facto* doctrine. At the time of respondent's appointment the office of district judge was, and continuously since has been, filled by the three judges before mentioned. A *de facto* officer, as the term implies, is one who is in fact the officer. It is evident that there is no room for such an officer if the number of the officers fixed by the law are in the actual possession of the office. *McCahon v. Leavenworth County*, 8 Kan. 437; *Boardman v. Halliday*, 10 Paige, 282, 4 N. Y. Ch. L. ed. 953; *Morgan v. Quackenbush*, 22 Barb. 60; *Cohn v. Beal*, 61 Miss. 399; *State v. Blossom*, 19 Nev. 312.

The cases cited by the chief justice fall short, it seems to me, of establishing the conclusion that respondent is a *de facto* officer. In *State v. Carroll*, *Taylor v. Skrine* and *Ex parte Strang*, the legal incumbent was temporarily incapable of discharging the duties of the office, and had surrendered it and its instrumentalities to the possession of the appointee. There was therefore, in each of these cases, a vacancy, or that which was tantamount to one.

In *State v. McMartin* (Minn.), 43 N. W. Rep. 572, the office was vacant when the appointment was made.

In *Leach v. People*, 123 Ill. 420, 10 West. Rep. 617, the Legislature had passed an unconstitutional Act providing for the election of a board of supervisors for the management of the affairs of Wayne County, consisting of five members only, instead of fifteen. "The real cause of complaint," said the court in

its opinion, "is that the office legally existing was illegally filled." The question in all of these cases was whether an officer appointed or elected under an unconstitutional Act to a vacant office was a *de facto* officer. This question is not involved in the present

case, because there was no vacancy in the legal organization of the court to be filled. I think respondent should not be considered a judge *de facto*, and that the writ of prohibition should issue.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ALABAMA.

CENTRAL TRUST COMPANY of New York

SHEFFIELD & BIRMINGHAM COAL, IRON & R. CO.,

WATT MINING-CAR WHEEL CO., *Intervenor.*

(43 Fed. Rep. 106.)

1. A coal mine is an "improvement" within the meaning of Alabama Code 1886, § 8018, giving a lien on buildings or improvements for materials, fixtures or machinery furnished.
2. Coal cars, which are a necessary part of a coal mine, are "materials," if not "fixtures" or "machinery," within the meaning of Alabama Code 1886, § 8018, giving a lien for materials, etc., furnished for a building or improvement.

(February 12, 1890.)

SUIT to have a coal mine sold for the payment of a debt. Intervention by the Watt Mining-Car Wheel Company to enforce an alleged lien upon the mine for coal cars furnished for use therein. On exceptions by Intervenor to the master's report disallowing the lien. *Exceptions sustained, report amended, judgment for intervenor.*

The case sufficiently appears in the opinion. *Messrs. Roquemore, White & McKendrie* for intervenor.

Messrs. Henry B. Tompkins and Lawrence Cooper for defendants.

Pardee, J., delivered the following opinion:

The intervenor came into this court to have recognized and enforced a lien claimed on a certain coal mine, and on the machinery, equipment and fixtures therein, especially on 240 coal cars, all of which are in the custody of this court. Under a specific contract, the intervenor furnished to the owners of the mine cars specifically adapted for use in the mine; and for the furnishing and equipment thereof. "It is agreed that said cars are now in use in said mine as a part of the equipment thereof, and are used to haul coal from where it is mined to the opening or mouth of the mine, upon an iron track; and they are propelled or drawn by machinery at the mouth of the mine, or pushed by hand, or drawn by mules, and are not adapted to any other use or transportation, or used in any other manner."

The case shows that the laws of the State of Alabama with regard to recording a lien were complied with. In short, the joint answer of the complainant, defendant and the receiver, to the intervention, admits the entire case as claimed for the intervenor except as to the

lien. The intervention was referred to a special master to report upon the amount due and as to the character and extent of intervenor's lien. The master has reported against the intervenor on the question of lien, on the ground that a coal mine is not a building or improvement, within the meaning of § 8018, Alabama Code 1886. As a further reason for his report, the master doubts if the cars are such "material," "fixtures" or "machinery" as come within the purview of the said Statute.

Intervenor's lien is claimed under § 8018, Alabama Code 1886, as follows: "Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for, any building or improvement on land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this chapter shall have a lien therefor on such building or improvement and on the land on which the same is situated," etc.

The first question presented is whether or not the coal mine, as set forth and described in the intervention and exhibits, is such an improvement upon land as comes within the meaning of the Statute just quoted, it being contended on one side that the word "improvement" in the Statute must be limited in its meaning to buildings and things *ejusdem generis*; in other words, that an improvement upon land which is not in the nature of a building is not an improvement within the meaning of the Statute. On the other hand it is claimed that, in the proper construction of the Statute, the word "improvement" is not at all limited by the word "building" preceding it, but that it is to be taken as extending the class of constructions which may be the subject of a lien, rather than limiting such class. It is said that this point has never been settled by the jurisprudence of the State of Alabama, and is to that extent a new question. The question was before the Supreme Court of the State in the case of *Montgomery Iron Works v. Dorman*, 78 Ala. 218, but was not passed upon, the lien being defeated for failure in description of land subject to lien. An examination of the legislation and jurisprudence of the State with reference to this matter of liens will, however, decidedly aid in reaching a correct decision. Code of 1867, § 3101, provides as follows: "Mechanics and builders have a prior lien upon the tract, parcel or lot of land on which buildings are erected by them, and on the buildings so erected, for the price agreed on or compensation to be paid and materials used in the construction thereof, unless surety be given to such builders for the performance of the

contract, or an agreement be made in writing waiving the lien."

In 1878 (Alabama Acts 1872-78, p. 117) the said section 8101 of the Code of 1867 was amended so as to read as follows: "Mechanics and builders have a prior lien upon the tract, parcel or lot of land on which buildings, inclosures or fixtures are erected by them, and on the buildings, inclosures or fixtures, for the price agreed upon or compensation to be paid and materials used in the construction thereof, unless there be an agreement in writing waiving the lien," etc.

This Act extended the cause of the lien from "buildings" to "buildings, inclosures or fixtures," and the subject of the lien from "land" and "buildings" to "land," "buildings, inclosures or fixtures."

In 1876, three years later, the law was again amended so as to read as follows: "Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for, any building, erection or improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this chapter, shall have, for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished, a lien, to the extent and in the manner by this chapter provided, upon such building, erection or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre," etc. Alabama Code 1876, 3440.

This Act extended the subject of the lien from "land," "buildings, inclosures or fixtures," to "land," "building, erection or improvement."

The next change that seems to have been made in the law is made by section 8018 of the Code of 1886, *supra*, in which the Statute last quoted is amended by striking out the word "erection," so that the Statute reads, "for any building or improvement on land," and by further striking out the words, "for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished," in that part of the section describing extent of the lien, so as to read, "shall have a lien," etc. The changes made at this time were in codifying, and do not appear to materially enlarge or restrict the scope and effect of the Act of 1876.

In the case of *Ex parte Schmidt*, 62 Ala. 252, the Supreme Court of the State of Alabama, in considering the proper construction of the mechanic's lien under the Code of 1876, said: "Our present statutory system, defining and declaring liens of mechanics, employes and materialmen for buildings, erections or improvements upon lands, or for repairing the same, are of recent enactment, and their construction, in the main, remains to be settled. Such liens were unknown to the common law, and hence are purely of statutory creation. They are to be construed as other statutes introductory of a new policy are construed; and, while it is not permissible, under the guise of interpretation, to extend the provisions of the enactments to cases not provided for, it is equally unjust and unauthorized to emasculate

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the statutes by a narrow or strict construction of their beneficial provisions. Their general policy was and is to secure to the artisan and laborer the just reward of his labor, and the lien conferred is somewhat analogous in its aims to the equitable lien of a vendor for unpaid purchase money of land sold. It is inequitable, says the law, that one shall enjoy another's lands and not pay the promised price. So the policy of the Statute we are considering declares that it is inequitable that one shall enjoy another's goods, or the products of his labor and skill, without making just compensation therefor. The same reason which upholds the policy of the one vindicates the justice of the other. Our legislative policy for the last thirty years, and the overthrow of private fortunes consequent upon our late civil war, have had the effect to place much of the property of the country in fiduciary hands; and the beneficiaries of many estates, while they could and did enjoy the products of their property, were left without power to fasten a charge upon it by any contract of theirs. This, in many instances, worked great hardship and inflicted grievous wrong; and our very liberal Exemption Statutes, in the absence of a special waiver, have placed the entire property of much the larger part of our population beyond the reach of legal process. The manifest and deplored result of all this has been that the honest toll of the laborer, and the merchandise of the materialman, have often been appropriated by a faithlessness in some cases highly culpable. These considerations, no doubt, influenced the Legislature in declaring the very liberal and comprehensive system of liens now found upon our statute book. It is our duty, in construing these statutes, to give to the language its natural import and scope, and thus carry into effect the intention of the Legislature as far as it can be gathered from the language employed."

If the changes made in the Statute from 1867 to 1886 are considered, and the Statute itself is considered and construed in the light of the decision of the supreme court, just quoted, it seems clear that the lien granted is not to be restricted to material, etc., furnished for any building or improvement of the same kind and nature as a building upon land, but rather that the words "building or improvement," in the law, are used independently, and as having a different meaning; and, if not independent of each other, then that the word "improvement" is of the greater significance, and has the larger meaning; otherwise the Act of 1876 is useless, for the Act of 1873, under the description of inclosures and fixtures, included improvements that were of the same kind and nature as buildings.

The decision in *Ex parte Schmidt*, *supra*, is in harmony with *Copeland v. Kehos*, by the same court, reported in 67 Ala. 594, which latter case is cited by the master as favoring a strict construction of the Statute. Neither case proposes to go outside the language of the Statute to find its meaning, but the former case does make use of the light furnished by the current history of the State to show the meaning of the words used in the Statute, which is no more going outside the Statute than would be a resort to a dictionary. Statutes like the one

in hand are in derogation of the common law, and courts have been inclined to construe them strictly; but the better opinion now is that these Statutes are highly remedial, and should be construed so as to carry out the objects in view. See *Ex parte Schmidt, supra*; *De Witt v. Smith*, 68 Mo. 263; *Taggard v. Buckmore*, 42 Me. 77; *Buchanan v. Smith*, 43 Miss. 90; *Weatherby v. Sinclair*, Id. 189; *Putnam v. Ross*, 46 Mo. 837; *Bullock v. Horn*, 44 Ohio St. 420.

At the time the Act of 1876 was passed the State of Alabama was known to have immense mineral resources awaiting development, and wanting capital therefor. Mechanics' liens were restricted to buildings and things *ejusdem generis*. The new law, in terms, extended the lien to all improvements on land. If this word "improvement" is given its ordinary meaning, the new law is extended to cover the construction of coal and iron mines; and thereby great help is given to the owners of mineral lands to develop their property, and such development increases the general prosperity of the State. There was no reason why capital and labor put into the coal and iron industries should not be encouraged and protected as well as in other works and improvements. A going coal mine is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc.; and, taken as a thing, if not a building, it is unquestionably an improvement, and an improvement on land. Taking into consideration the importance and condition of the mines and mining interests of the State in 1876, it is a fair presumption that the legislative intention in the Act of 1876 was mainly to extend the lien of mechanics and materialmen for work and material so as to aid in the development of the State's mineral resources. However this may be, it clearly appears to me that the coal mine described in the intervention and exhibits is an improvement, within the meaning of the terms used in section 3018 of the Alabama Code, and that for material, fixtures, engine, boiler or machinery furnished therefor, a lien results to materialmen on compliance with the requirements of the Statute.

The question remains as to whether the coal cars, as furnished under the contract by intervenor, are "material," "fixtures" or "machinery," within the meaning of the said section 3018. There is good authority at the present day for holding rolling-stock of a railroad to be, in a general sense, "fixtures." See brief of Matt Carpenter, in *Brooks v. Martin*, 69 U. S. 2 Wall. 170 [17 L. ed. 732], *note*. And many cases to that effect may be cited where the question arose generally under mortgages.

In Alabama the question is not decided. Whether the coal cars in this case can be considered machinery, as they have no motive power, and are "propelled by machinery, or pushed by hand, or drawn by mules,"—query.

"Machine. A contrivance which serves to apply or regulate moving power; or, it is a tool, more or less complicated, which is used to render useful natural instruments." Bouvier, Law Dict.

"The term 'machine' includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result." *Piper v. Brown*, 4 Fish. Pat. Cas. 175.

"Material," however, is a word of such general import that I see no difficulty in making it cover the cars in question. "Material includes everything of which anything is made." See Bouvier, Law Dict.

It is a conceded fact in this case that the contract with intervenor stipulated that the coal cars were to be furnished for the equipment of the particular mine, and were used for that purpose. As the mine ready for operation is an improvement on land, and the coal cars are a necessary part of the mine, considered as an entirety, the coal cars were material for the improvement, and within the Statute.

The intervenor should have judgment recognizing its lien as prayed for.

The master's report should be reformed and amended so as to conform to the views herein expressed, and, as so amended, should be approved and confirmed; and an order to that effect will be entered.

FLORIDA SUPREME COURT.

CITY OF JACKSONVILLE *et al.*, *Appts.*,
v.

William M. LEDWITH.

(....Fla....)

*1. A market, within the meaning of that provision of the Jacksonville

*Head notes by RANNEY, CH. J.

NOTE.—Regulation of markets and market houses.

A city has power to forbid the selling of fresh meats elsewhere than at market houses established by it, where it has power to establish and regulate market places and the vending of fresh meats. *Newson v. Galveston*, 7 L. R. A. 797, 76 Tex. 550; *Ex parte Canto*, 21 Tex. App. 61.

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See also 28 L. R. A. 588; 29 L. R. A. 734.

Municipality Act, chapter 3775, Statutes of 1887, authorizing the mayor and city council to establish and regulate markets, is a place to which the public may resort for selling and buying certain articles; and where the articles are exposed for sale in stalls or space provided for such purpose, and for the use of which stalls or space toll may be charged; and for whose government reasonable regulations having in view the preservation of peace and good order and the health of the community may be prescribed.

An ordinance forbidding private markets within certain limits is not depriving a person of property without due process of law. *Newson v. Galveston, supra*.

Such a power is most necessary for the protection of the health of a city, and has often been recognized. *Bowling Green v. Carson*, 10 Bush. 66; *New*

2. In the United States the authority to establish and regulate markets falls within the police power of the States; and the right to exercise such authority may be conferred by a State upon municipal corporations, and it is competent for these corporations, if the authority delegated is sufficient, to prohibit the sale of such articles as are within the exercise of the police power and usually sold at markets, elsewhere than at a duly established market.

3. The question whether or not a grant to a municipal corporation of power to establish and regulate markets implies authority to prohibit the sale of articles falling within the power, and vendible at a market, elsewhere than at a duly established market, not decided, but referred to, and authorities cited.

4. A grant to a municipal corporation of power to regulate by ordinance the vending of meat, poultry, fish, fruits and vegetables gives authority to prescribe by ordinance the times and places of their sale, and to prohibit the sale of them elsewhere. The restrictions as to such times and places must, however, be reasonable with reference to the welfare of the community, and not be in general restraint of trade. Under this grant sales may be restricted, under the same limitations, to markets duly established under a grant of power to establish and regulate markets.

5. The authority of a municipal government to establish and regulate markets implies power to purchase or provide a site, erect necessary buildings and stalls, and, when they are provided either by a lease, purchase or other lawful mode, to adopt reasonable regulations for the government of the market and the business transacted there.

6. Where a municipal corporation constructs or rents a building, its principal

object being to provide a market house, an appropriation of a portion of the building for another purpose, as the holding of municipal courts, does not render the erection or renting of the building illegal.

7. If reasonable facilities for selling at markets are given, regulations restricting to markets the sale of articles falling within the police power, or the sale of which the health or welfare of the community requires to be regulated, do not constitute a prohibition or illegal restraint of trade, or a monopoly.

8. The courts are the final judges as to what are proper subjects of the police power, and the law-making power cannot arbitrarily make that a subject of its exercise which, from its nature, is not one.

9. Where the language of a statute authorizing an exercise of the police power is so broad, as to include things which are not as well as those which are subjects of the power, the exercise of the power will be confined to things which are legally the subjects of that power.

10. Where the Statute establishing a municipal government provides that its legislative power shall be exercised by a city council, and that no bill shall become a law until it shall be signed by the mayor unless he shall fail to return it with his objections to the council within a prescribed time, or unless it, on being so returned, shall be passed by two thirds of the whole number of the council, and also provides that the mayor and council shall have power to establish and regulate markets by ordinance, and to regulate the vending of meats and other specified articles in like manner, a market cannot be established, nor can it or the vending of such articles be regulated, otherwise than by municipal law enacted in the manner above indicated; and an ordinance attempting to authorize the city council or a board of health or both to

Orleans v. Stafford, 27 La. Ann. 417; *Ash v. People*, 11 Mich. 351; *St. Louis v. Weber*, 44 Mo. 549; *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 418; *Winnaboro v. Smart*, 11 Rich. L. 553; *Wartman v. Philadelphia*, 33 Pa. 209; *Tiedeman. Pol. Powers*, § 104; 1 Dillon, Mun. Corp. § 381-382. See *Palestine v. Barnea*, 50 Tex. 533; *Le Claire v. Davenport*, 13 Iowa, 210.

The City of New Orleans has, by virtue of its charter, the same power to regulate the sale of fruits that it has to regulate the sale of vegetables and fish. *Goesgl v. New Orleans*, 41 La. Ann. —.

A private market kept within six squares measuring, with the width of intervening streets, 2,100 feet over the shortest walking distance of the nearest public market, is not in contravention of La. Act of 1873, No. 100. *State v. Schmidt*, 41 La. Ann. —; *State v. Barthe*, 41 La. Ann. —, Jan. 1899.

A city ordinance forbidding farmers and gardeners selling their products to stand, with carts, wagons and other vehicles, within a distance of 500 feet from any part of the city market-house, on streets adjacent thereto, is valid and does not create a monopoly in favor of hucksters occupying stands in the market. *People v. Keir* (Mich.) Nov. 15, 1899.

A municipal corporation may authorize an individual to build a market house, rent stalls and collect dues for a certain period upon consideration that the land whereon it stands, with its improvements, shall thereafter be turned over absolutely to the city. *State v. Natal*, 41 La. Ann. —.

The market put up in pursuance of such contract is a public market, and any private market,

found within the prohibited distance of six squares, is in violation of law. *Ibid.*

Where there is no public market in the village, a by-law, not intended as a market regulation, that no person shall sell or offer for sale, on any street, fresh meat in pieces or quantities less than one quarter of the animal without paying a license fee, under penalty of fine or imprisonment, is not authorized. *Chaddock v. Day*, 4 L. R. A. 809, 75 Mich. 527.

To regulate, license or restrain the sale, in any private stall or shop in the city outside of the public meat markets, of fresh meats, vegetables, fish or other articles usually sold on markets, is within the powers of the Provincial Legislature. *Pigeon v. La Cour Du Recorder*, 4 Montreal L. Rep. 6 Q. B. 60.

The Legislature can confer upon municipalities the power to prescribe by their ordinances the manner of disposing of meats and other marketable things, for the purpose of protecting the public health or promoting good government,—as, by prohibiting it to be retailed except at designated market places. *State v. Pendegrass* (N. C.) March 17, 1890.

But the Illinois statute authorizing cities to regulate the inspection of meat, poultry, etc., and to prohibit any offensive business or establishment, and make regulations necessary to promote health and suppress disease, gives the city no power to erect and maintain a public slaughter-house. *Huey v. Rock Island*, 128 Ill. 465.

Police power of State. See note to *State v. Marshall*, 1 L. R. A. 51, 6 New Eng. Rep. 914, 64 N. H. 549.

exercise either of the above powers independently and in disregard of the above provision for the co-ordinate action of the mayor conveys no authority in the premises. The authority cannot be delegated.

11. The word "privileges," as used in the Act establishing the Municipality of Jacksonville, where power is given to levy and collect taxes for the purpose of revenue upon "all property and privileges taxable by law for state purposes," and to license, tax and regulate auctioneers, retailers of liquor, and other named avocations, "and all other privileges taxable by the State," does not mean such things as are technically privileges and can never be enjoyed or exercised except under authority of law, but means other occupations of the same kind as those designated. A market being a franchise or technical privilege is not taxable by the City of Jacksonville for revenue purposes.
12. The Municipality of Jacksonville is not given the power which the State has of selecting the subjects of occupational taxes for raising revenue, but is limited to the occupations named in its Charter Act or the Revenue Laws of the State.
13. The 1st section of article 12, chap. 3775, of the Statutes, as amended by the 11th section of the Act of May 31, 1889, does not in its provision, "privileges may be licensed and taxed by city ordinances," designate subjects of taxation. The purpose of the section is to regulate the manner of assessing and levying taxes on real and personal property and taxing avocations elsewhere subjected to municipal taxation.
14. Wherever the power to authorize or license a person to establish a market exists in a municipal corporation a fee for the permit or license may be charged by the municipality as a police regulation, although the power to exact a tax for revenue may not exist. A sufficient fee may be charged under the police power to cover not only the necessary expense of issuing the license, but also that of the additional labor of officers and other expenses imposed upon the public by the business, but no more.
15. A license to a person to sell meats or other thing named in the grant to the Municipality of Jacksonville of power to regulate the vending of meats, etc., is not the grant of a right to maintain a market within the meaning of the legislative grant of authority to establish and regulate markets.
16. The grant of authority to regulate the sale of meats, etc., by ordinance, is one of police power. Under it the hours, the places and rules for conducting the business may be prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonable facilities for all who may desire to engage in vending such articles, the sales may be confined to particular places; yet all this must be done by impartial and general regulations affording the same rights to all alike upon the same conditions.
17. The grant of authority to regulate the vending of meats, etc., does not give power to tax for purposes of revenue, the occupation of vending any of the named articles, but it, in connection with the grant of power to regulate inspection, justifies the imposition of such fees and charges as will cover the expense of both inspecting the articles offered for sale and of the police supervision of the business necessary to prevent its becoming harmful to the community.

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18. The power to establish markets cannot be used to create a monopoly of the right to sell.

19. The police power cannot be parted with or impaired by contract.

20. The power of a municipal government to establish markets implies the authority to change their location as the convenience of the community may dictate.

21. Where an ordinance amending a section of a former ordinance provides that such section "shall read as follows," stating the provisions, the section as amended becomes for all future purposes the entire section, and anything which was in the original section but is omitted from it as amended is repealed.

(May 12, 1890.)

A PPEAL by defendants from a decree of the Circuit Court for Duval County overruling their motion to dissolve an injunction restraining their interference with complainant or his tenants in the sale of marketable articles in buildings of complainant which had been used for market purposes before the establishment of a new public market place and also restraining them from prohibiting the use of such buildings as a market place. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. J. M. Barrs and Fletcher & Wurts*, for appellants:

The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police.

New Orleans v. Morris, 8 Woods, C. C. 107; *Morano v. Mayor*, 2 La. 217.

Markets may be closed from considerations of public security and benefit. The number of markets may be reduced as a sanitary regulation. Lessors and lessees of markets in such cases must yield their private benefit and advantage to the public advantage.

New Orleans v. Stafford, 27 La. Ann. 417, 21 Am. Rep. 568. See *Milne v. Davidson*, 5 Mart. N. S. 409, 16 Am. Dec. 189; *Ex parte Canto*, 21 Tex. App. 61, 57 Am. Rep. 609. See *Com. v. Patch*, 97 Mass. 221; *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766; *Spaulding v. Lovell*, 23 Pick. 71; 1 Dillon, Mun. Corp. §§ 380-390, note 4.

Incorporated cities and towns have the power to build market places without an express grant. And such buildings may be used in part for something else.

1 Dillon, Mun. Corp. § 381, note 2.

The fixing the place and times at which markets shall be kept and held open, and the prohibition to sell at other places and times, is among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass laws relative to the public markets.

Bush v. Seabury, 8 Johns. 418. See *Buffalo v. Webster*, 10 Wend. 99.

The Legislature may prohibit the plying of trade of vending meat and vegetables in any other place than the market established and regulated by the government.

Tiedeman, Pol. Powers, pp. 314, and note, 323, 324; *Cooley*, Const. Lim. 4th ed. 595, 596; *Vanderbilt v. Adams*, 7 Cow. 849.

A by-law that no butcher or other person

shall cut up or expose for sale any fresh meat in any part of the City except in the shops and stalls of the public markets, or at such places as the standing committee on public markets may appoint, is good.

1 Dillon, Mun. Corp. p. 890.

Appellee has no vested right which constitutes him and his tenants a class peculiarly privileged to violate the market ordinances of the City.

The permission given him, if any, was merely temporary,—an “act of grace,”—and was binding, if at all, only so long as it remained unrevoked.

Bradley v. McAtee, 7 Bush, 667, 8 Am. Rep. 809; *Cooley*, Const. Lim. 596, note 4; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Brimmer v. Boston*, 102 Mass. 19; *Calder v. Kirby*, 5 Gray, 597.

A corporation cannot by contract abridge its legislative powers.

Brick Presby. Church v. New York City, 5 Cow. 588; *Coates v. New York City*, 7 Cow. 585.

The court will not interfere with the municipal regulations of a city unless it can be clearly shown that it has transcended its powers or violated its functions.

Towns v. Tallahassee, 11 Fla. 180; *Ex parte Byrd*, 34 Ala. 17, 8 Am. St. Rep. 328; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143.

An act of common council can only be impeached for fraud. Generally its motives cannot be inquired into.

1 Dillon, Mun. Corp. §§ 811, 813; *Cooley*, Const. Lim. 186, 187; *Paine v. Boston*, 124 Mass. 486.

Messrs. Cooper & Cooper, for appellee:

Where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction, at the suit of any person injuriously affected thereby, to stay its execution by injunction.

Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 240, and cases cited. See also *Wood v. Brooklyn*, 14 Barb. 425; 2 Dillon, Mun. Corp. § 909, note 2; *Third Ave. R. Co. v. New York City*, 54 N. Y. 159; *Waring v. Mobile*, 75 U. S. 6 Wall. 110, 19 L. ed. 842; 1 High, Inj. § 20.

A city can have no power of making an exclusive market or markets, or of preventing sale of articles in proper manner in other places, unless the power is specifically given by statute.

1 Dillon, Mun. Corp. § 880.

The power to establish and regulate markets gives no power to make them exclusive places of sale, even where there are not such indications of the intention of the Legislature to withhold such power of exclusion as there are in this case.

1 Dillon, Mun. Corp. § 886; *Bethune v. Hughes*, 28 Ga. 560, 73 Am. Dec. 789; *St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89; *Caldwell v. Alton*, 33 Ill. 416, 85 Am. Dec. 282; *Grant, Corp.* *176, 185; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462, and cases cited.

Powers of municipal corporations are limited and doubts are to be decided against the power of the corporation.

Minturn v. Larue, 64 U. S. 23 How. 435, 16

L. ed. 574; *Logan v. Pym*, 48 Iowa, 524, 23 Am. Rep. 261; *St. Paul v. Laidler*, *supra*.

Even where a city has the power to require the obtaining of a license to do business, it cannot use such power for the purpose of taxation or raising revenue.

1 Dillon, Mun. Corp. §§ 857, 859.

These ordinances are illegal and void, because they attempt to delegate the powers of the city council to the so-called city board of health, a body unknown to the statutes.

Cooley, Const. Lim. p. 248, *204; 1 Dillon, Mun. Corp. §§ 96, 421; *Austin v. Murray*, 16 Pick. 121; *State v. Stark*, 18 Fla. 255.

Whenever an ordinance is unreasonable the court, as a matter of law, will declare it void.

Cooley, Const. Lim. p. 293, *200; *Dunham v. Rochester*, 5 Cow. 462; *Austin v. Murray*, *supra*; *Barling v. West*, 29 Wis. 807, 9 Am. Rep. 576; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 87, 16 Am. Rep. 611; 1 Dillon, Mun. Corp. §§ 819-321.

The ordinances are not equal and impartial in their operation, but are unequal and partial.

1 Dillon, Mun. Corp. § 822; *Re Phases*, 63 Mich. 396, 6 Am. St. Rep. 310.

Complainant had acquired vested rights, which appellants cannot deprive him of, and they are estopped in the premises.

1 Dillon, Mun. Corp. 459, § 450, and note; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 685; *Florida, A. & G. R. Co. v. Pensacola & G. R. Co.* 10 Fla. 146; *Herman, Estoppel*, 439, 441; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 287, 24 L. ed. 695; *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 619.

Raney, Oh. J., delivered the opinion of the court:

The Act of May 31, 1887, chap. 8775, establishing the Municipality of Jacksonville, provides, in section 4 of article 8, that the mayor and city council “shall have power by ordinance to make regulations to secure the general health of the inhabitants and to prevent and remove nuisances; . . . to provide for and regulate the inspection of beef, pork, flour, meal and other provisions, oils, whiskey and other spirits in barrels, hogsheads and other vessels; to regulate the inspection of milk, butter, lard and other provisions; to regulate the vending of meat, poultry, fish, fruits and vegetables; to restrain and punish the forestalling and regrating of provisions, and to establish and regulate markets; . . . and to pass all ordinances necessary for the health, convenience and safety of the citizens, and to carry out the full intent and meaning of this Act, and to accomplish the object of this incorporation.”

The substance of the market ordinances of Jacksonville, as they stood on September 10, 1889, the time the bill in this case was filed, is, omitting the penal provisions as to a violation of the same, as follows: The public market ordinance makes every day except Sunday a public market day, and constitutes the market buildings on Water Lot No. 24, at the foot of Market Street, and “not elsewhere,” the public market; and ordains that stalls, tables or space in this market shall be

rented to butchers or others desiring to hire the same by the month, or such longer period as may be desirable, upon such terms, and for such sum, as the board of public works shall determine. It also provides that no person shall sell any fresh beef, fresh pork or mutton, or establish or maintain any market, stall or shop for the keeping or sale of fresh beef, pork or mutton, at any place within the corporate limits, except at the public market, unless such person or persons shall be expressly authorized to do so by the city council; provided, however, that producers bringing vegetables, poultry, eggs or other country produce to the city for sale shall be permitted to sell the same free of tax anywhere within the city.

The Private Market Ordinance provides that private markets may be established, regulated and abolished at the discretion of the city council, but no private market for the sale of fresh meats or fish shall be maintained within the City except with the permission of the city council granted by resolution, and not more than one stall shall be permitted or licensed within the same building. Private markets must be constructed and maintained in accordance with specifications, rules and regulations approved by the city board of health governing the same and prescribing the size and character of stalls; and no permit for the establishment or maintenance of any private market shall be granted except upon a petition indorsed by the city board of health. No person can maintain or do business in a private market except upon paying to the city treasurer, for a license, the sum of \$5 per month for each and every stall used; and no person shall do the business contemplated by this ordinance except upon stalls licensed as heretofore provided.

A market, says Blackstone, is a franchise or liberty derived from the crown by grant, or by prescription which supposes a grant (2 Com. 87), the establishment of public markets or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, being in England within the king's prerogative as to domestic commerce (1 Com. 274), such prerogative consisting in the discretionary power of acting for the public good where the positive laws are silent; and if it be abused by him to the public detriment, such prerogative is exerted in an unconstitutional manner. 2 Com. 252.

In Jacobs' Law Dictionary, as well as that of Tomlin, a market is defined to be the liberty by grant or prescription, whereby a town is enabled to set up and open shops, etc., at a certain place therein for buying and selling, and better provision of such victuals as the subject wanted, it being less than a fair and usually kept once or twice a week.

Bouvier's definition is: "A public place and appointed time for buying and selling; a public place appointed by public authority where all sorts of things necessary for the subsistence or for the convenience of life are sold."

In *Ketchum v. Buffalo*, 21 Barb. 296, it is said, citing Crabb's Law of Real Property, that a market is the privilege within a town

to have a market, and the franchise may be granted to natural persons or bodies politic; the grantee of the franchise has the right to have the market, but the public have also an interest in the market and the grantee of the franchise is bound to provide suitable accommodations for those who attend the market.

Judge Dillon, in his work on Municipal Corporations, note 4 to section 880, quotes the definition given by Judge Breese, which is: "A designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale." See also *Cincinnati v. Buckingham*, 10 Ohio, 257; *Smith v. Newbern*, 70 N. C. 14; *Burlington v. Bankwardt*, 73 Iowa, 170.

The public character of markets is further illustrated by *Prince v. Lewis*, 5 Barn. & C. 363, where the grantees of the market for the buying and selling of vegetables, fruits, flowers, roots and herbs, had for his own profit premitted part of the space to be used for other purposes than those specified in the grant, and the residue of the space became insufficient for public accommodation, and there was not on ordinary occasions space within the market for carts and wagons resorting thither with vegetables *et cetera*; and it was held that the owner of the market could not maintain an action against an individual for selling vegetables in the neighborhood of the market and thereby depriving him of toll, even at a time when there was room in the market, without showing that on the day when the sale took place he gave notice to the seller that there was room within the market.

Again, in *Mosley v. Walker*, 7 Barn. & C. 55, it is said by Bayley, J.: "I take it to be implied in the terms in which a market is granted that the grantee, if he confine it to particular parts within a town, shall fix it at such parts as will from time to time yield to the public reasonable accommodations; and that if the space once allotted ceases to give reasonable accommodation, he is bound if he has land of his own to appropriate land on which to hold it; or if not, to get land from other people, in order that the market which was originally granted for the benefit of the people, as well as for the benefit of the grantee, may be effectually held, and that the public may have the benefit which was originally intended they should derive from it."

In the case of *Penryn v. Best*, L. R. 8 Exch. Div. 292, decided in 1878, the court said: "The mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held. This was decided in the case of *Macclesfield v. Chapman*, 12 Mees. & W. 18. It is pointed out in the judgment that an old case, the *Prior of Dunstable's Case*, 11 Henry VI., lib. 7, p. 19a, and cited in *City of London's Case*, 8 Coke, Rep. 127a, had been erroneously supposed to decide the contrary. It may also be considered as decided by the case of *Egremont v. Saul*, 6 Ad. & El. 924. We feel bound by these authorities, although dicta may no doubt be found to the contrary. See *Mosley v. Chadwick*, in note to *Mosley v.*

Walker, 7 Barn. & C. 47. The second conclusion by which we are bound is that such a right as is contended for may be acquired by immemorial enjoyment or prescription. *Mosley v. Walker*, *supra*; *Macclesfield v. Pedley*, 4 Barn. & Ad. 897."

In the court of appeal, this view of the law was affirmed, though the judgment of the lower court was reversed on the ground that the right to prevent butchers from selling at their private shops on market days within the limits of the franchise was shown by the evidence to exist by prescription. L. R. 8 Exch. Div. 292, 297, *et seq.*

In our own country the authority to establish and regulate markets falls within the police power of the States, and the right to exercise such authority may be conferred by a State upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets. *Dillon*, Mun. Corp. §§ 141, 380; *Bowling Green v. Carson*, 10 Bush, 643; *First Municipality v. Cutting*, 4 La. Ann. 355; *Ex parte Byrd*, 84 Ala. 17.

The question whether or not the grant of the power to "establish and regulate markets" implies, when standing alone, authority to prohibit, elsewhere than at duly established markets, the sale of articles falling within the exercise of the police power, need not be decided in this case, although it would seem that authorities of great respectability sustain the affirmance of it, and some of them hold that such is the current of authority. *Bush v. Seabury*, 8 Johns. 418; *Buffalo v. Webster*, 10 Wend. 100; *Cronin v. People*, 82 N. Y. 818; *Ex parte Canto*, 21 Tex. App. 61, 57 Am. Rep. 609; *Ex parte Byrd*, *supra*; *Morano v. Mayor*, 2 La. 217; *Bowling Green v. Carson*, *supra*; *Winnsboro v. Smart*, 11 Rich. L. 551; *Dillon*, Mun. Corp. § 580; *Ash v. People*, 11 Mich. 347; *St. Louis v. Weber*, 44 Mo. 547.

There are, however, authorities to the contrary. *Bethune v. Hughes*, 28 Ga. 560; *Caldwell v. Alton*, 33 Ill. 416. See also *Bloomington v. Wahl*, 46 Ill. 489; *St. Paul v. Laidlon*, 2 Minn. 190.

In addition to the grant of authority to "establish and regulate markets," the Legislature has, as appears in the first paragraph of this opinion, expressly authorized the mayor and council to "regulate the vending of meat, poultry, fish, fruit and vegetables," and under this grant we are satisfied that they may by ordinance prescribe the times and places for the sale of the articles it covers; and such restrictions as to times and places being reasonable with reference to the welfare of the community, and not being in general restraint of trade, they may likewise prohibit the sale of such articles elsewhere. That the sale of them may, under this grant, be restricted to markets duly established under the other, where the regulations do not constitute an illegal restraint or a prohibition of the trade, we do not doubt. *Tiedeman*, Pol. Powers, § 104; *St. Paul v. Traeger*, 25 Minn. 248-255, and authorities cited *supra*.

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implies, beyond question, the power to purchase or provide the site and erect necessary buildings and stalls, and, when provided by lease, purchase or other lawful mode, to adopt reasonable and usual rules and regulations in regard to the market and the business transacted there, and having in view the preservation of peace and good order, and the health of the community. *Dillon*, Mun. Corp. § 882; *Ketchum v. Buffalo*, 14 N. Y. 856; *Smith v. Newbern*, 70 N. C. 14; *Gale v. Kalamazoo*, 23 Mich. 844; *Spaulding v. Lowell*, 23 Pick. 71; *Caldwell v. Alton*, *supra*.

If the real and principal object is the building of a market house, the appropriation of a portion of the building to other purposes, as for the holding of courts, does not render the erection of the building illegal (*Spaulding v. Lowell*, *supra*); and the same rule will hold good where, as in the case before us, the premises are leased. *Gale v. Kalamazoo*, *supra*.

An express grant of police power as to regulating the vending of meat, poultry, fish, fruits and vegetables, as has been given to the City of Jacksonville, supplements the other with a restrictive authority as to the time and place at which any article within its meaning and purpose shall be sold. There is nothing in the Act which excludes markets as the places to which the vending shall be restricted.

Where reasonable facilities for sale at markets are given, such a regulation is not a prohibition of trade, nor the creation of a monopoly, the subject matter of the regulation being, as in the case of fresh meat and fresh fish, one which the health or welfare of the community requires should be regulated. It is argued by counsel for appellee that the language of the Act includes the power to regulate the vending of all kinds of cured meat as well as of fresh meat, and if the power is given to prohibit the latter it is also as to the former, and hence it was not intended to give this power as to either. We do not admit that there is "prohibition" of the sale of fresh meats in the fact that an ordinance restricts its sale to market houses; still it is a sufficient answer to the argument made, to say that if the language of the Statute is broad enough to cover any kind of meat, the vending of which cannot reasonably be dangerous to the health or welfare of the people, such language will be confined, when considered as authorizing the exercise of the police power, to the proper subjects of that power. It is well settled that the courts are the final judges as to what are proper subjects of its exercise, and the Legislature cannot arbitrarily make that a subject which from its nature is not so. *Re Jacobs*, 98 N. Y. 98; *Mugler v. Kansas*, 123 U. S. 623 [31 L. ed. 205].

It would be unreasonable to hold that the use of language so broad when considered in the abstract as to cover things not the subject of the police power shows a legislative intent not to authorize the exercise of the power as to proper subjects of it. Moreover, the provisions of the same section as to preventing nuisances, and regulating or licensing, or prohibiting and suppressing, theatrical

and other exhibitions, and prohibiting and suppressing gambling houses and other things, certainly do not limit the meaning and effect of a grant of the power to regulate the vending of meat or to establish and regulate markets.

The General Law for the Incorporation of Cities and Towns, as amended in 1877, § 22, p. 250, McClellan's Digest, enacts expressly that the city or town council shall have power to establish market houses, and to require each and every person who may have for sale any fresh meats or fresh fish to bring the same into the market and offer the same for sale only in the market; and in view of the absence of such an express provision from the Charter Act under consideration, it is contended that a legislative intention to withhold from the Municipality of Jacksonville the authority to restrict such sales to market places is manifested. No particular formula of words or expression is essential to convey a power. The only question is, Does the language used in any special or general Act clearly confer the power? As stated above, our opinion is that both upon principle and authority the grant is unquestionably sufficient to do so in this case.

It is necessary to a judgment upon the validity of the above ordinances to inquire how the power to establish markets, or to regulate the same, or the vending of meats or other articles mentioned, can be exercised. The Statute says: The mayor and city council shall "have power by ordinance" to do so. Section 4, art. 8, chap. 8775, p. 164, Acts of 1887.

The 1st section of the same article enacted that "the legislative power of said incorporation shall be exercised by a city council," and this provision is retained in the section, as amended by an Act approved May 16, 1889, chap. 3952, Acts 1889.

The 2d section of the article of the Act of 1887 provides that no bill shall become a law "until it shall have been signed by the mayor, except that it may be passed without his signature as herein provided. No ordinance, or portion of an ordinance, vetoed by the mayor shall go into effect unless the same be passed by two thirds of the whole number of members of the city council. If the mayor fail to return any ordinance at or before the next regular meeting after its passage, he shall be deemed to have approved the same, and it shall become a law without further action." Acts 1887, p. 164.

The 2d section of the same article of this Act, p. 162, is to the effect that the mayor shall carefully examine all bills passed, and should any not meet his approbation, he shall return the same to the next regular meeting of the council with his objections in writing, and he may veto objectionable features, and "approve" the residue of the bill. From these provisions it is plain that a market cannot be established, nor can regulations thereof or of the vending of meats, poultry, fish, fruits or vegetables be made, except by municipal law duly passed by the council and afterwards submitted to the mayor and sanctioned by his approval attested by his signature, or which he has failed to

return to the next regular meeting of the council after its passage, or which, having been returned to the council with his objections, has been passed over his veto by two-thirds of the whole number of the council.

It is to be observed that by the Public Market Ordinance as given above no person can sell any fresh beef, fresh pork or mutton, or establish any market, stall or shop for keeping or selling the same or either of them, within the corporate limits of the City except at the public market, unless such person shall be expressly authorized to do so by the city council. This provision appears in the Ordinance as it was when adopted in January, 1889, and was not changed by the amendment made by the council and approved by the mayor July 30 of the same year. The Private Market Ordinance passed by the council July 30, but not approved by the mayor till August 5, provided in its 1st section that private markets might be established, regulated and abolished at the discretion of the city council, but that no private market for the sale of fresh meats, fish or vegetables should be maintained *except by and with the permission of the mayor and city council granted by ordinance*; but an ordinance was passed and approved the 30th day of August providing that this section should read as follows: "Private markets may be established, regulated and abolished at the discretion of the city council, but no private market for the sale of fresh meats or fish shall be maintained within the limits of the City of Jacksonville except with the permission of the city council granted by resolution." The provision that not more than one stall should be licensed or permitted in the same building was added by the amendment passed September 6, and approved the next day. The 5th section of the Private Market Ordinance, approved August 5, repeals an ordinance of June 6, 1888, regulating and governing Private Markets, but it is not shown, nor is it material to know, what its provisions were. We may, however, remark that it does appear there was in the contract made between appellee and the City, in 1876, as to the public market established at the foot of Ocean Street, on Water Lot No. 10, and continued, with renewals and modifications, immaterial to mention, down to May 1, 1889, an express stipulation that all other markets then existing in the City should be abolished, and that be the sole and exclusive market, excepting such markets as might be legally existing under contract with the City.

We do not think it can be doubted that the purpose of the amendment of August 30 was to make the right to keep a private market for the sale of fresh meats *et cetera*, dependent upon the permission of simply the council expressed by resolution, instead of the permission of the law-making power duly expressed according to the form prescribed by the Charter Act for making municipal law; and considering the ordinance as thus amended, and also as it stood after the subsequent amendment approved September 7, its meaning was that the city council as a separate body might establish, regulate and abolish

at its discretion private markets without its action being subjected to the co-ordinate action of the mayor or having gone through the course required by the Statute to make it municipal law. It is too plain to admit of discussion that this cannot be done (*Ex parte Frazer*, 63 Mich. 396, 6 West. Rep. 140, 6 Am. St. Rep. 810; *Dillon*, Mun. Corp. §§ 96, 357, 716, 779; *Cooley*, Const. Lim. 249); not that legislative action in the form of a resolution and which has been passed by the council, submitted to the mayor and received his approval, or not been returned by him, or, having been duly returned by him, has received the two-thirds vote, may not be an ordinance (*Dillon*, Mun. Corp. § 307, 769, and *note*; *Robinson v. Franklin*, 84 Am. Dec. p. 633, *note*), but for the reason that markets cannot be established, nor can regulations for them, or for the vending of meat and other articles specified in the provision of the Statute, be made by the council as an independent part of the city government, or in any other manner than by proper ordinance duly enacted as the Statute has provided. *Horn v. People*, 23 Mich. 221, and *Ruggles v. Collier* and other authorities cited with it *infra*.

The amendatory section of August 30 took the place of and entirely superseded the 1st section as it was in the original ordinance of August 5, and the consequence resulting from the omission of the italicised words and the insertion of those proposing to delegate to the council the power to establish and regulate markets is, that there was from the approval of the amendment no valid provision, for the establishment or regulation of private markets. *Re Executive Communications*, 15 Fla. 735; *Basnett v. Jacksonville*, 19 Fla. 664; *State v. Duval County*, 23 Fla. 485; *Saunders v. Pensacola*, 24 Fla. 226.

That which was in the old section, but was left out of the new, ceased to exist as a part of the municipal law because it was actually, and, we must hold, intentionally, omitted, and the invalidity of the substituted subject matter in the new section proposing to give to the council a power which it cannot legally exercise, does not change the fact that the italicised provisions of the original section are no longer a part of the municipal law. The omitted matter is no longer in existence as a part of the section, or to be construed by the courts.

Another part of this Private Market Ordinance to be noticed is its 2d section, which provides that such market must be constructed and maintained in accordance with specifications, rules and regulations approved by the city board of health governing the same, and prescribing the size and character of stalls, and no permit for the establishment or maintenance of any market shall be granted except upon a petition indorsed by the city board of health.

It appears that on the 6th day of August, or the day after the approval of the Private Market Ordinance, the board of health formulated and prescribed rules for the government of private markets. They prescribe, *inter alia*, that such a market shall have a water-tight floor of yellow pine-heart plank, or Portland cement, or of both, as in the

judgment of the board may be deemed necessary, at least one inch in thickness, on a solid foundation; the grade of the floor; connections with the sewers and with the water works; that the construction of all markets shall be subject to the supervision and approval of the city engineer and health officer, and the market to the daily inspection of an officer of the health department; the size of the stalls (not less than three feet wide and six feet long), and that they shall be covered with a marble slab, white oil-cloth or other "acceptable" substance, and furnished with "suitable" meat block and with galvanized iron hooks; the hour at which the markets shall be closed, and the removal of meats afterwards; the washing of the stalls, floors, *et cetera*, and the use of disinfectants that may be prescribed by the board; and how meat shall be moved from one market to another, or transferred through the streets. The fifth of these rules is, that persons owning and operating private markets and wishing to continue the same, and those desiring to establish and maintain them, must immediately present to the health officer or to the chairman of the board, for the action of the board, a petition to the city council; that it shall state the location, number of stalls, full specifications of the construction, size and other details of the proposed market or building, together with an assurance that the applicant will, in case his application is approved by the board and granted by the city council, promptly comply with ordinances of the City and the rules of the board, adopted or that may be adopted, in relation to the payment of license, and the fulfillment of sanitary requirements and restrictions in the construction and operation of private markets.

These rules appear from an indorsement of the recorder to have been submitted to and adopted by the city council in regular session on the day they were formulated by the board.

They are intended to control the establishment of and to regulate markets. The establishment and regulation of markets must be effected by ordinance enacted or ordained in the manner prescribed by the Statute. It cannot be done either by a board of health acting, in the language of the brief of appellants' counsel, "in the capacity of a committee from the council," nor by the council itself, nor by both. The board of health in prescribing these rules has done no more than the second section of the Ordinance contemplated, and the attempted exercise of this authority by the board was as much unauthorized as the effort of the Ordinance to delegate the power was illegal. A public duty which the Legislature has confided to the deliberative judgment or discretion of the law-making power of a municipality cannot be delegated by the latter to the judgment or discretion of one constituent element of that power, nor to the judgment or discretion of others. To permit it to be done would be to defeat the will of the Legislature as to whose judgment or discretion should direct the subject matter of the duty confided. *Ruggles v. Collier*, 43 Mo. 359; *St. Louis v. Clemens*, Id. 395; *Sheehan v. Gleeson*, 46 Mo. 100; *Matthews v. Alexandria*, 68 Mo. 115; *Whyte v. Nashville*.

2 Swan, 364; *Day v. Green*, 4 Oush. 483; *State v. Bell*, 84 Ohio St. 194; *Lord v. Oconto*, 47 Wis. 886; *Birdsall v. Clark*, 78 N. Y. 78; *Hitchcock v. Galveston*, 98 U. S. 844 [24 L. ed. 659]; *Indianapolis v. Indianapolis Gas-Light & Coke Co.* 66 Ind. 396.

The Special Market Ordinance is alleged to be void because it also prescribes illegal prerequisites, and one of the prerequisites objected to is the license and the charge of \$5 per month for each and every stall.

Section 4 of art. 8 of the Charter Act, chap. 8775, authorizes the mayor and council "to levy and collect taxes upon all property and privileges taxable by law for state purposes; . . . to license, tax and regulate auctioneers, taverns, peddlers and retailers of liquors, and all other privileges taxable by the State; to license, tax and regulate hackney carriages, carts, omnibuses, wagons and drays; and to regulate and license the sale of fire-arms; . . . and to regulate, tax, license or suppress the keeping and going at large of all animals within the City."

The 11th section of the Act of May 31, 1889, chap. 8958, an Act supplementary to chap. 8775, amends § 1 of art. 12 of the parent Act, retaining, however, the provision, "Privileges may be licensed and taxed by the city ordinances," and also enacting that the council may provide for licensing the keeping of dogs.

At the session of the Legislature of 1887, at which the Charter Act, chap. 8775, was passed, a General Revenue Law, chap. 8681, was enacted, it having received the approval of the governor June 18, 1887, or thirteen days after the Charter Act was approved. This Act imposes what was styled "license taxes" on different occupations and professions, and provides that no person shall engage in or manage the business, profession or occupation mentioned therein unless a state license shall be procured in the manner prescribed, and enacts that counties, incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, but that they shall not impose any such tax on any business, profession or occupation not mentioned therein, nor shall the tax imposed by them exceed fifty per cent of the state tax. The same limitation upon counties, cities and towns is to be found in former General Revenue Laws, as it also is in the Amending Revenue Law of May 28, 1888, chap. 8347. The Revenue Law of 1887, chap. 8681, imposes a license tax on auctioneers, "taverns" (or, what may be deemed the same thing, keepers of hotels and boarding houses), peddlers and retailers in spirituous, vinous or malt liquors, but not on hackney coaches, carts, omnibuses, wagons or drays; and all of this is true of the Act of 1889; and in each of these General Revenue Statutes there is to be found a proviso that the license tax provision as to peddlers with boat or horse and cart or carriage shall not extend to boats and carts engaged in the sale of vegetables and plantation products, fish and oysters. The question, assuming the \$5 fee to be a tax for revenue, is: Does the Special Act authorize the imposition of such a license or

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occupational tax upon the franchise or business of a market? Counsel for appellants suggests that, the right to maintain a market being a franchise, it is a privilege, and is therefore taxable. Admitting, as we do, that the right to keep a market and charge toll is a franchise, and consequently a privilege, within the meaning of *Stevens v. State*, 2 Ark. 291, 85 Am. Dec. 72; *Washington v. State*, 18 Ark. 752,—still this admission is not conclusive in favor of the right of the City under the above provisions of its Charter Act to impose a revenue tax upon such markets or persons keeping them; for the meaning of the word "privileges" in the Charter Act is unmistakable from the connection in which it is used. When the Act gives power to levy and collect taxes upon all property and privileges taxable by law for state purposes, and to license, tax and regulate auctioneers, taverns, peddlers and retailers of liquors and all other privileges taxable by the State, it is clear that the Legislature did not use the word, "privilege," to designate such things as are technically privileges, and cannot ever be enjoyed or exercised in England except through the prerogative of the crown or under Act of Parliament, or in this country by authority of law, but to denote other occupations and business of the same kind as those mentioned and that are taxable by law for state purposes. In a word, we think the meaning of the Legislature, as shown by the language last referred to, was simply that whatever occupations were subjected to taxation by the state laws might be taxed by the City of Jacksonville under an ordinance or ordinances duly passed, and none other; and this view is strengthened by the fact of the subsequent provisions of the municipal law as to hackney carriages, carts, omnibuses, wagons and drays which were not subjected to "license taxes" by the Act of 1887, or that of 1889, and hence the necessity for the special mention of them in the Charter Act. Moreover, this provision as to hackney carriages, etc., would not have been inserted had it been the intention of the Legislature to delegate to the mayor and council by the preceding provision the same power which the State has of selecting the subject of occupational or license taxes (Const. art. 9, § 5), instead of limiting it to the subjects named in the Charter Act and the Revenue Laws of the State. Markets are then not subject as occupations to taxation for revenue under the Charter Act.

There was nothing in the provision of section 1 of art. 12 of the Act of 1887 as to "privileges," nor is there anything in the Amendment of it made in 1889, that qualifies the above conclusion. That section, as it appears in the Act of 1889, chap. 8958, reads, omitting the provision as to licensing dogs, as follows: "All property which is subject to state taxes shall be assessed and licensed for taxation alphabetically for the entire City without reference to wards. The assessment shall be made by the comptroller and his assistants, and the valuation of real and personal property shall be subject to be increased or diminished by the council under regulations to be made by ordinance. Privileges

may be licensed and taxed by city ordinances. . . . All the duties now devolved upon the recorder in reference to the levy and assessment of taxes shall devolve upon and be performed by the comptroller." It is evident that the purpose of the section is, not to designate the subject of taxation, but to regulate the manner of assessing and levying taxes upon real and personal property and of licensing and taxing the avocations declared elsewhere to be taxable and designated here as those by the word "privileges." It prescribes the manner and mode of exercising the taxing power against the previously defined subjects of taxation.

Appellants do not admit, however, that the charge of \$5 is a tax levied for the purpose of raising revenue, but contend that it is a fee properly chargeable as incident to the power of police regulation, and as such is authorized. According to this private market ordinance no person can "maintain or do business in a private market," except upon paying to the city treasurer, for a license, the sum of \$5 per month for each stall; and no person can do business in any such stall or private market that is not so licensed. We have seen that by this ordinance not more than one stall can be licensed in the same building. Prior to an amendment of it, approved September 7, 1888, there was no such limitation upon the number of stalls in one building. Assuming that, under the power granted to the mayor and council, they may by ordinance authorize the establishment of public markets by private individuals, the same being controlled and regulated by the mayor and council by ordinance according to the principles of the decisions in *Davenport v. Kelley*, 7 Iowa, 102 (notwithstanding *Le Claire v. Davenport*, 18 Iowa, 210); *Dillon*, Mun. Corp. § 885, and *note 4*; *Gale v. Kalamazoo*, 28 Mich. 844; *Indianapolis v. Indianapolis Gas-Light & Coke Co.* 66 Ind. 396; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21 L. ed. 894]; *Butchers Union S. H. & L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 [28 L. ed. 585]; *Villavaso v. Barthelet*, 39 La. Ann. 247,—our opinion is that the power to do so includes, as a market is a franchise, the power to license. A permit to establish a market is, from the nature of a market, a license; it is a permit to do something which could not be done before without such permit, and hence is the grant of a license. Besides this, as we have stated in the earlier part of this opinion, the power to establish markets is within the police power, and all this being true, we are unable to conclude that the power to charge, as a police regulation, a fee for the permit or license to establish and maintain a market, as distinguished from a permit or license for selling meats or vegetables therein, does not exist. It seems to us that it necessarily does. The fee, however, is not a tax for revenue, but a charge under the police power, and its amount is to be controlled by the principles governing in such cases. What amount of fee or charge can be exacted is a question upon which the authorities are in conflict. By some it is held that no more than the expense of issuing the license can be charged.

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Judge Cooley's view is that the right to license an employment, no power being given to also tax it for revenue, gives the corporation authority to impose such a charge for the license as will cover, not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the business, but nothing beyond this limit; and this seems to us to be the better rule. *Cooley*, Const. Lim. 244, and *note 1*; *Cooley*, Taxn. 408-410; *Van Hook v. Selma*, 70 Ala. 362, 45 Am. Rep. 85; *Espartero v. Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516; *Cincinnati Gas-Light & Coke Co. v. Ohio*, 18 Ohio St. 287.

A permit or license to a person to sell meats or fish, or other things, is not the grant of a right to maintain a market, within the meaning of the legislative grant to the Municipality of Jacksonville of the power to establish and regulate markets. The establishment and regulation of a market means the right to establish and furnish certain places where the public may resort for selling and buying provisions or articles of immediate necessity, and where the owner of the articles may expose them for sale, and to regulate these places and the business done there, and includes also the right to make charges for the use of stalls and space used by those resorting there with their products to sell the same. Markets are public conveniences, and not a mere license to a person to sell his marketable property. Though the grant of authority to regulate the vending of meat, poultry, fish, fruits and vegetables will permit the legislative power of the City to ordain general regulations, applicable to all alike, as to when and where those articles may be sold, it is not one conferring the franchise of establishing a market, but it is a power to regulate the sale of articles which, but for it, could be sold anywhere and at all times. The power to establish markets cannot be used to create a monopoly of the right to sell. It is not intended for any such purpose. The right to sell at markets must be secured to all alike on the same conditions. The grant as to vending meats *et cetera* is one of police power, and it is to be exercised upon considerations referable to the public health or welfare of the community, and not arbitrarily, nor to create a monopoly in one or several persons, nor to prohibit the trades to which it applies. Though under it the hours of the day, the places and the modes or manner of and rules for conducting the business may be designated and prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonably ample facilities for all who may desire to engage in vending such articles, the sales may be confined to specific places, yet all this must be done on principles of impartial and general regulation affording the same rights to all alike upon the same conditions, and not in the exercise of partial and discretionary or arbitrary will of the law-making power or of any part of it. *Tiedeman*, Pol. Powers, 278, 274, 278; *First Municipality of N. O. v. Blaneau*,

8 La. Ann. 688; *Kennedy v. Phelps*, 10 La. Ann. 227; *New Orleans v. Stafford*, 27 La. Ann. 417; *Villavaso v. Barthet*, 39 La. Ann. 247; *Belcher v. Farrar*, 8 Allen, 825; *Cooley*, Const. Lim. *201; *Horn v. People*, 26 Mich. 221; *Baltimore v. Radecke*, 49 Ind. 217, 83 Am. Rep. 239; *Ex parte Frazee*, 63 Mich. 396, 6 West. Rep. 140, 6 Am. St. Rep. 310; *Minturn v. Larus*, 64 U. S. 23 How. 485 [16 L. ed. 574]; *Logan v. Tyne*, 43 Iowa, 524; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Clark v. Le Oren*, 9 Barn. & C. 53; *Chamberlain v. Compton*, 7 Dow. & R. 597.

It does not authorize the imposition of taxes for revenue purposes upon the occupation of vending, but it does, in connection with the grant as to inspection made in the same section, justify such fees and charges as may be required to cover the expense of inspecting the articles offered for sale and of the police supervision of the business necessary to prevent its becoming harmful to the community. Though the right to engage in the business at the times and places and under the same conditions applicable to all cannot be denied to any, the business may be so regulated as the public welfare may demand, and the courts will not interfere with the enforcement of a regulation except where it shall be manifest that the protection of the public is not its purpose. *Austin v. Murray*, 16 Pick. 128; *Dillon, Mun. Corp. note 2* to § 141; *Cooley, Const. Lim. *203*.

The police power is one whose existence is essential to the protection and welfare of the public, and while it should be used unhesitatingly and efficiently for the ends it was intended it subserve, it should not be used for other purposes, nor further than is necessary to fully effect the legitimate end in any particular case falling within its proper exercise.

It is plain from the record before us that the right claimed by Ledwith, the appellee, is that of maintaining a building where stalls and space are provided for butchers or others desiring to sell, for the use of which stalls and space he makes charges. For some years prior to May, 1889, his premises at the foot of Ocean Street had been the designated public market controlled and regulated by the City under an ordinance and a contract between the City and himself, which contract expired on the first day of that month. The expiration of this contract excludes from the case all question as to the effect which, if existing, it might have had on the right and power of the city authorities to change by ordinance the location of the public market, or, barring any other defects that may exist in the Public Market Ordinance of July 30, 1889, to establish the public market at the foot of Market Street, and abolish that at the foot of Ocean Street. As against the appellee, or anyone whose premises or buildings had been the legally established public market, there can be no doubt of the right of the city authorities to remove the market to a different place, or to abolish an existing one and establish a new market. Neither the appellee, nor any other person, nor any corporate body other than the Municipality of Jacksonville, acting through its law-making

authority, has been given power by the Legislature to establish markets within the territory of that City. In Florida the Legislature alone can confer such power. The power to establish a market includes the power to change the location of it from place to place as the convenience and necessities of the community may dictate. *Dillon, Mun. Corp. § 882*; *Cooley, Const. Lim. 744, note 2*; *Wartman v. Philadelphia*, 83 Pa. 202; *Gall v. Cincinnati*, 18 Ohio St. 563; *Cougot v. New Orleans*, 16 La. Ann. 21; *New Orleans v. Stafford*, 27 La. Ann. 417; *Ree v. Cotterill*, 1 Barn. & Ald. 87; *Curwen v. Salkeld*, 8 East, 588; *Gale v. Kalamazoo*, 23 Mich. 844; *Villavaso v. Barthet*, 39 La. Ann. 247; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 748 [28 L. ed. 585]; *Brick Presbyterian Church v. New York*, 5 Cow. 588.

These authorities show how groundless the vested-right theory of complainant, based on the injury to the value of his property through decrease of rental, is, and how firmly set is the rule that the police power cannot be parted with or impaired, by contract or barter.

The 2d section of the Public Market Ordinance shows by the words "unless such person or persons shall be expressly authorized so to do by the city council," particularly when they are considered in connection with the Private Market Ordinance, that it was not the intention of that Ordinance to prohibit the sale of fresh meats, etc., elsewhere than at the so-called public market. On the same day, July 30, 1889, that the 1st section of this Ordinance was so amended as to establish the public market at the foot of Market Street, the so-called Private Market Ordinance was passed, although the latter did not receive the sanction of the mayor till the 5th day of August, and it is this Private Market Ordinance that was intended by the law-making power of Jacksonville to furnish the rule under which the express authority suggested by the 2d section of the Public Market Ordinance might be obtained for selling or offering for sale fresh beef, fresh pork or mutton elsewhere than at the public market, or establishing or maintaining a market, stall or shop for the sale of the same. The two Ordinances are to be considered together, or as one, in seeking for the intention of the municipal law-makers as to markets and the vending of the meats mentioned in them. Considering them together we find that the manifest intention to permit and regulate sale elsewhere than in the *locus* of the public market, as well as that to permit other markets, has not been effectually ordained; or, in other words, the ordinance governing such sales and markets is void because it purports to remit their establishment, maintenance, regulation and abolition to the sole discretion of a body—the city council—that cannot exercise the power, and also to delegate to a committee—the city board of health—authority which the State Legislature has committed to the law-making power of the municipality. It is thus apparent that the City of Jacksonville, as represented in the expression of her legislative agency speaking for her, intended

not only that there should be a public market at the foot of Market Street, but that there might be other places established, at which sales could be made, yet that sales could not be except at the public market or a so-called private market; and to make this intention effectual she has ordained that a person who violates the provision of the Public Market Ordinance as to selling at other places than the public market or a private market should be subject to fine or imprisonment. It happens, however, that the Private Market Ordinance is void, and the question arises as to what effect this fact has upon the validity of the above prohibitory provision of the Public Market Ordinance. In our opinion it invalidates it because it never was the intention of the law-making power of Jacksonville that sales should be confined to the public market, and to enforce it with the effect of prohibiting sales elsewhere in the absence of valid regulations of such sales would be to do what was never intended. Whether or not an ordinance restricting sales to one place in a city of the territorial extent and of the population of Jacksonville would be held to be valid if assailed as unreasonable, it is unnecessary to decide, as such cannot be said to have been the purpose in this case.

The rule as to statutes is that part of an Act may be unconstitutional without invalidating the whole of it. If all the provisions are connected in subject matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the Legislature would have passed the one without the other, the whole Act will be declared void. On the other hand, where some parts are not connected with or dependent upon others, as where a statute attempts to accomplish two or more independent objects, it may be void in part and valid as to the residue. If its purpose is to accomplish a single object only and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions. If the valid and the void parts "are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect, the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them." *Cooley, Const. Lim. *177-179; State v. Deal, 24 Fla. 295.*

The same principles apply to city ordinances. *Dillon, Mun. Corp. § 421, and notes, 9 L. R. A.*

A valid Charter Act is the constitution of a municipality as much as the work of a regularly chosen convention ratified by the vote of the people is the Organic Law of the State. It is evident that the purpose of the Public and Private Market Ordinances considered together is twofold. Outside of its prohibitory provisions the object of the former was to provide a public market where persons could resort to sell and buy as indicated above. The object of the prohibitory clause was to regulate the sale of certain articles, and it cannot be denied that it and the Private Market Ordinance are conditions, considerations and compensations for each other. Surely the specified provision of the former with the clause last quoted above would not have been ordained without enacting the Private Market Ordinance unless it should be assumed that it was deemed necessary to have the latter ordinance to make the quoted clause effectual; and that it was not so assumed we are concluded by the fact of the enactment of the Private Market Ordinance. This prohibitory clause of the so-called Public Market Ordinance, and the Private Market Ordinance are as connected with, conditional upon and compensatory to each other as if they were in the same ordinance or section of an ordinance, and the invalidity of the latter ordinance is fatal to the specified provision of the former. To hold the contrary would be to enforce what was never intended by any branch of the law-making power of Jacksonville in passing or approving either of these by-laws.

It is evident that there is no valid regulation prohibiting sales elsewhere than at the public market, and for this reason there is no legal impediment to the sales in the appellee's building, and he should, in the absence of legal restriction of sales to other places, not be interfered with in the alleged use of the premises.

It may be well for us to remark that it is not to be inferred from anything said in this opinion that the municipal authorities may not avail themselves of all sources of knowledge and experience in framing rules and regulations, nor is the power of the City to use all usual or proper agencies for the enforcement of the same when duly ordained to be doubted.

We have gone as far into the questions affecting the vendors of meat doing business in Ledwith's building as is necessary to a decision of the case. Ledwith is not such a vendor, and it is not proper that we should say more than we have upon any question not affecting his rights.

The decrees is affirmed.

INDIANA SUPREME COURT.

CONTINENTAL INS. CO., of New York,
Appt.,
v.
 KYLE.

(....Ind....)

A building is vacant or unoccupied, with-
 in the meaning of an insurance policy which de-
 clares that the insurance shall be void in case it
 becomes vacant or unoccupied, where a tenant
 has moved out, although for the purpose of let-
 ting new tenants come in, and they intended to
 move in the next day after the fire occurred, and
 had already made some repairs on the house, but
 nothing had been left in it, except two or three
 places.

(May 20, 1890.)

A PPEAL by plaintiff from a judgment of
 the Circuit Court for Vigo County in
 favor of defendant in an action brought un-
 der Rev. Stat. 1881, § 616, to review a judg-
 ment which had been obtained by defendant
 against plaintiff upon a policy of fire insur-
 ance. *Reversed.*

The facts are fully stated in the opinion.

NOTE.—*Fire insurance; condition against vacancy
 and non-occupancy.*

The term "vacant or unoccupied," relating to a
 cause of forfeiture of insurance on a dwelling "to
 be occupied by the assured or tenant," has not such
 definite signification that the assured is not entitled
 to rely on the statement of the agent that the pol-
 icy would remain valid for thirty days after a ten-
 ant removed. *Hotchkiss v. Phoenix Ins. Co. (Wis.)*
March 18, 1890.

A mere temporary absence of the occupant of a
 building will not render void a policy which con-
 tains a provision that it shall be void in case the
 building becomes vacant. *Springfield F. & M. Ins.*
Co. v. McLimans (Neb.) Feb. 25, 1890.

Where a tenant moved out on Tuesday, and on
 Wednesday morning the owner took possession of
 the house, and with his servants began cleaning it
 and preparing to move into it; and they were so
 engaged continuously, but on Friday night the
 house was burned,—it was held that the house was
 not vacant. *Eddy v. Hawkeye Ins. Co. 70 Iowa, 472.*

The vacancy of a tenant-house while the owner
 occupies a dwelling in the same inclosure will not
 avoid a policy by which, for a gross sum as consid-
 eration, without specifying the rate on either
 house, the owner is insured for \$1,000, of which \$400
 is upon the tenant-house and \$600 upon the other,
 with a provision that the policy shall be of no effect
 if the "premises become vacant and unoccupied."
McQueeny v. Phoenix Ins. Co. (Ark.) 5 L. R. A. 744.

A policy of insurance upon a single out-building,
 providing that it should be void if the premises be-
 came vacated, is not avoided by a disuse of such
 building, the other buildings remaining occupied.
Kimball v. Monarch Ins. Co. 70 Iowa, 614.

A clause inserted in the policy, that the house
 may be left unoccupied "during the summer," will
 be construed as meaning the "farming season,"
 when the original negotiations between the appli-
 cant and the agent specified that season, and it is
 reasonable to suppose that the parties intended it.
Vanderhoef v. Agricultural Ins. Co. 46 Hun, 328.

Where the holder of a fire insurance policy left it
 with the agent of the company, and asked him how
 it L. R. A.

Messrs. H. H. Boudinot and Eggleston
& Reed for appellant.
Messrs. McNutt & McNutt for appellee.

Berkshire, C. J., delivered the opinion
 of the court:

This is an action brought by the appellant
 to review a judgment obtained by the ap-
 pellee against the appellant in an action upon
 an insurance policy issued by the appellant
 to the appellee, the said judgment having
 been obtained in the said Vigo Circuit Court.
 The complaint rests upon the first branch of
 § 616, Rev. Stat. 1881. The court below
 sustained a demurrer to the complaint, and
 the appellant elected to abide by the ruling
 upon the demurrer; and, judgment having
 been given for the appellee, this appeal is
 prosecuted. The errors of law stated in the
 complaint are: (1) The court erred in its
 conclusions of law upon the facts found,
 and stated in its special finding. (2) The
 court erred in overruling the plaintiff's mo-
 tion to modify said special finding. (3) The
 court erred in overruling the motion for a
 new trial.

The first alleged error involves substan-

long the premises could remain vacant under the
 policy, he constituted such agent his own agent;
 and a misstatement by such agent that the prem-
 ises could remain vacant for thirty days, when in
 fact the policy allowed only ten days, was no
 ground for reforming the policy; and where the
 premises remained vacant more than ten days on
 the assurance of such agent, and then a loss oc-
 curred, the company was not liable. *Harrison v.*
Hartford F. Ins. Co. 30 Fed. Rep. 862.

A dwelling-house in which no one lives, but in
 which a former occupant had left some trifling ar-
 ticles of furniture, not of such character as to be
 valuable for use elsewhere, is "vacant and unoccu-
 pied," within the meaning of those terms as used in
 a fire insurance policy. *Moore v. Phoenix F. Ins.*
Co. 3 New Eng. Rep. 57, 64 N. H. 140.

Where a policy containing a provision against
 vacancy also has in the body of the policy the words
 "occupied for dwelling purposes only," stamped in
 printing, and a written clause in the body of the
 policy contains the words, "Permission to remain
 vacant thirty days without prejudice," a vacancy
 for longer than thirty days preceding a fire will
 avoid the policy, although the agent had knowledge
 that the premises were vacant when the policy was
 issued. *Newmarket Sav. Bank v. Royal Ins. Co. 150*
Mass. 374.

A policy is avoided where the house, between the
 time that elapsed from the removal of the tenant,
 several days before the fire, until the day of the fire,
 was unoccupied, except by the presence of the
 owner for a short time during each day for the pur-
 pose of cleaning it. *Feebe v. Council Bluffs Ins. Co.*
74 Iowa, 578.

A proviso in an insurance policy, that the policy
 shall be void if the building becomes vacant, is not
 abrogated by a rule existing at the time the policy
 was issued, that the company will permit a vacancy
 for the period of thirty days, as, notwithstanding
 such rule, the company has a right to contract
 against such vacancy. *Rogers v. Phenix Ins. Co.*
121 Ind. 570.

An insurer who temporarily waives a condition
 against vacancy is not liable if a loss occurred after
 the expiration of a reasonable time for procuring

tially the same questions as the third; and, as the third presents the questions more clearly and satisfactorily, we do not care to consider the first. It does not become necessary to consider the second alleged error; but see *Levy v. Chittenden*, 120 Ind. 87.

The policy sued upon in the original action contained the following conditions: "Or if the assured, without written permission hereon, shall now have, or hereafter make or procure, any other contract of insurance, whether valid or not; or if the above-mentioned building be or become vacant or unoccupied, or be used for any other purpose than is mentioned in said application, without consent indorsed hereon; or if the property shall hereafter become mortgaged or incumbered, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title or possession (except by succession by reason of the death of the assured) of the property herein named, or if the assured shall not be the sole and unconditional owner in fee of said property; or if the policy shall be assigned, or if the risk shall be increased in any manner, except by the erection of ordinary outbuildings, without consent indorsed hereon,—then in each and every one of the above cases this policy shall be null and void." The foregoing conditions are such as the parties had a right to place in their contract, and, as they form a

part of the contract, the courts cannot disregard them. It is the duty of the courts to recognize and enforce the contracts of parties, when valid and binding, according to the terms and conditions thereof as expressed therein. The portion of the policy which we have above set out is plain and easily understood. Policies of insurance, like all other contracts, are to be construed with reference to the intentions of the parties, to be ascertained from the terms and conditions placed therein by the parties. *Barton v. Home Ins. Co.* 42 Mo. 156; *Straus v. Imperial F. Ins. Co.* 94 Mo. 132, 18 West. Rep. 116; *Ripley v. Aetna F. Ins. Co.* 30 N. Y. 186; *Wells v. Pacific Ins. Co.* 44 Cal. 897; *Home Ins. Co. v. Gwathmey*, 83 Va. 923.

With this most important rule as our guide, when we read and consider the policy here under consideration, we must reach the conclusion that for a breach of any one of the conditions above named on the part of the assured the insurer was, because thereof, to be absolved from all liability on account of the policy, unless its consent to such breach of condition should be obtained in advance thereof.

There is no contention that the appellant, by indorsement on the policy or otherwise, ever gave its consent that the building insured should become or stand vacant. This leaves but one further question for our con-

an occupant. *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599.

Occupancy of premises.

Occupancy of premises, within the meaning of a condition in a policy of insurance, implies an actual use of the house as a dwelling-house; and the mere fact that the occupant may have left someone to look after it when he moved out with his furniture and vacated it will not save the forfeiture. *Bonenfant v. American F. Ins. Co.* 76 Mich. 653.

A policy does not become void upon the house ceasing to be occupied as a family residence, it continuing to be occupied by one person who had access to the entire building for the purpose of caring for it. *Imperial F. Ins. Co. v. Kiernan*, 83 Ky. 468.

A provision in a policy, that if the house should cease to be occupied the policy should become void, has no application to a risk on an unoccupied house. *Bennett v. Agricultural Ins. Co.* 3 Cent. Rep. 622, 106 N. Y. 243.

That the house, which was unoccupied at the time of effecting the insurance, it being so stated to the company, was occupied for a time thereafter, and then became again vacant during the period of insurance, would not avoid the policy. *Ibid.*

A stipulation in a policy, that the house was to be "occupied all the year round," is satisfied if permanent occupation was resumed so long before the fire that temporary absence of the occupant plainly appears to have no connection with the loss. *Ring v. Phoenix Assur. Co.* 5 New Eng. Rep. 387, 145 Mass. 426.

An insurance policy describing the building as a dwelling-house to be occupied by tenants for three years, and containing the usual condition that the policy shall be forfeited if used for a different purpose, the use of the second story by the tenants of the assured in shaving hoops will not work a forfeiture, where such use continued for one week only and terminated three days before the fire. 9 L. R. A.

Kiroher v. Milwaukee M. Mut. Ins. Co. 5 L. R. A. 779, 74 Wis. 470.

An agreement that the insured may leave the house unoccupied during the summer of each year, inserted in the original policy, will extend to all renewals of the policy. *Vanderhoef v. Agricultural Ins. Co.* 46 Hun. 323.

A building insured and intended to be occupied as a saloon, but the policy not designating the particular character of the building, or the use to which it was expected to be put, was not vacant, unoccupied or not in use, within the meaning of the policy, at the time of its destruction by fire, where plaintiff had taken actual possession with actual reference to using it as a saloon, and got it in order, and made it ready generally for that use. *Stensgaard v. National F. Ins. Co.* 36 Minn. 181.

Insurers were held not liable for loss which occurred at a time when no one lived in the house, though some articles belonging to a recent tenant, and some belonging to the insured, were in it at the time of the accident, and the land on which the house was situated, and which was described in the policy, was occupied. *Sexton v. Hawkeye Ins. Co.* 69 Iowa, 99.

Where an insured manufacturing establishment is leased by the insured, and the tenant thereafter ceases business, leaving the building closed and in charge of one who lives in a house on the premises, some distance from the factory, who is intrusted with the keys and visits the premises three or four times a week, the premises are unoccupied. *Halpin v. Aetna F. Ins. Co.* 120 N. Y. 70.

A provision avoiding the policy if the risk shall be increased by the occupation of neighboring buildings, or by any means within the control of the insured, refers to the permanent occupation of the adjoining property. *Allemania F. Ins. Co. v. Pittsburgh Exposition Society (Pa.)* 10 Cent. Rep. 232.

Forfeiture in case of vacancy or non-occupancy of premises. See exhaustive note to *Halpin v. Ins. Co. of North America* (N. Y.) 8 L. R. A. 79.

sideration: Had the building become vacant before it was burned? If the evidence establishes the affirmative of this proposition beyond controversy, then the court erred in overruling the motion made in the original action for a new trial, and erred in sustaining the demurrer to the complaint in the present action. In our opinion the court erred in both of its rulings. The complaint charges that the building was destroyed by fire on the 31st day of October, 1886, and the special finding states that the tenant who had occupied the building moved out on the 26th day of October, 1886, and that the fire occurred on the 31st day of the same month. The undisputed evidence is that the tenant moved out on the 26th day of March, 1886, and that the fire occurred on the 31st day of said month. We have concluded to set out the evidence as we find it in the bill of exceptions with reference to the occupancy of the building.

The appellee testified: "At the time the building was insured it was occupied by myself, and afterwards by my tenant. She moved out of the house on the 26th day of March, 1886, and took everything out of it. Prior to her removal from the house I had rented it to Crabb and McClentack. After she moved out they made some repairs on the house, and when they finished repairing they left two or three planes in the house. On the 30th or 31st day of March the said Crabb and McClentack hauled some hay, and put it in the stable loft on the premises, and intended to move in on the 1st day of April, 1886. On the night of the 31st day of March, 1886, the house was totally destroyed by fire. At the time it burned the only articles in it were the planes left there by Crabb and McClentack after they had finished the repairing."

Mrs. Kyle testified: "I am the aunt of the plaintiff. I moved out of the house which was burned down, for the purpose of letting the new renters in, Crabb and McClentack. There was some hay in the stable, and some potatoes buried in the ground near the house by Crabb and McClentack. The house was a frame house. Crabb and McClentack lived about one and a quarter mile from the house."

John Crabb testified: "I and Mr. McClentack, prior to March 26, 1886, rented the house belonging to Mr. Kyle, which was burned down on the 31st day of March, 1886. After we rented it Mrs. Kyle moved out, on the 26th day of March, 1886, and took all of her things out of the house. After she moved out we made some repairs on the house, and intended to move into the house on the 1st day of April, 1886. We had moved some of our things on the premises. I put some hay in the stable loft. After we got done repairing we left a plane or two in the stable. They were the only property we had there at the time the house burned down. No one was living in the house when it burned down. It was unoccupied by anyone."

Henry McClentack testified: "I and Mr. Crabb rented the house that was burned down of Mr. Kyle, the plaintiff. At the time we rented it his aunt, Margaret Kyle, was living in it. On the 26th day of March, 1886, she moved out, and took all of her things

out. After she moved out we made some repairs on the house and when we finished repairing we left a few planes in said house. On or about the 30th day of March, 1886, we hauled some hay, and put it in the stable loft. At the time the house burned down it was unoccupied by anyone. The planes were all the property there was in it. We intended to move in the next day after the fire occurred."

We have examined the authorities to which counsel for the appellee in their brief call our attention and other authorities which we have been able to find in the same line, but think they do not support the ruling of the court to which we have called attention. As strong a case as we have been able to find in support of the contention of the appellees is the case of *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472. The syllabus to that case is as follows: "A tenant moved out of the insured dwelling on Tuesday, and on Wednesday morning the owner, who lived near, took possession of the house, and with his servant began cleaning it; . . . and they were continuously engaged during the working hours of each day in cleaning and moving goods into the house until Friday evening, intending that the family should be fully domiciled there on Saturday, but on Friday night the house was burned. Held, that the house was not vacant." The facts as stated by the learned judge who delivered the opinion of the court are as follows: "The house had been temporarily occupied by a tenant, who removed therefrom on Tuesday. The fire occurred on the following Friday night. The plaintiff was residing in another house on another part of the farm, and on the next morning after the tenant moved out of the house which was burned the plaintiff took possession of it, and his employes cleaned the house, and prepared to move in. They were constantly engaged every day in cleaning the house and in moving in household goods until Friday evening. By that time there were carpets and bedding and bedsteads, cans of fruit, chairs, pictures, mirrors and a stove, and clothing, a table and dishes, in the house, and the family were expecting to be there to remain on Saturday. The farm stock was there, and the plaintiff or his employes were in and about the house every day from six o'clock in the morning until seven or eight o'clock in the evening. The preparation for occupying the house was continuous during all the working hours of each day."

The court could very well hold, as it did, from these facts, that the building was not vacant when burned. But we hereafter cite a later case from the same court, where the facts were not as favorable to the insurance company as the case before us, in which it was held that the policy could not be enforced. Most of the cases to which counsel call our attention (if the buildings insured were dwellings) were where there was a permanent occupancy, and a temporary absence of the tenant at the time of the fire; and (if mills or manufactories) where there was but a temporary suspension of business at the time of the fire. In construing a condition in an insurance

policy against vacancy or non-occupancy, the courts will look to the subject matter of the contract. *Whitney v. Black River Ins. Co.* 72 N. Y. 117; *American F. Ins. Co. v. Brighton C. Mfg. Co.* 125 Ill. 151; *Geo. Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Sonneborn v. Manufacturers Ins. Co.* 44 N. J. L. 220.

The occupancy of a dwelling, of a mill, of a barn, is each essentially different in its scope and character, and the construction must have reference thereto. *Sonneborn v. Manufacturers Ins. Co.* *supra*; *Kimball v. Monarch Ins. Co.* 70 Iowa, 518.

The house covered by the policy here under consideration was a dwelling. It became entirely vacant on the 26th day of March, 1886, and remained so until its destruction by fire, on the 31st day of March. The prospective tenants made some repairs on the building after Mrs. Kyle vacated it, but the nature and character thereof does not appear, nor the length of time they were engaged thereat. It appears that the repairs were completed about the 30th day of March, and on that day the prospective occupants moved some hay to the loft of the stable on the premises, and then, or before, buried some potatoes on the premises; but all of the witnesses state that the building was unoccupied when burned, and had not been occupied after Mrs. Kyle moved out, and that the only thing left in it at any time after her removal was a couple of carpenter's planes, left there by Crabb and McClelland during the time they were making the repairs and thereafter.

The contract in all of its parts was one that the parties were competent to make, and which they had a perfect right to enter into, and hence they are bound by all of its terms and conditions. From the time the building became vacant until its destruction the risk which the appellant had assumed was increased because of the vacancy, and it was an increase of risk which the appellant had guarded against by its contract. It would be folly to contend that the building would have been consumed notwithstanding the vacancy. Most certainly the care and vigilance that would have accompanied the occupation of the property for its protection and preservation was lessened because of the vacancy. In the light of all of the authorities, the facts which the record discloses establish beyond question that the property was "vacant or unoccupied" from the 26th of March, 1886, until it was consumed by fire, on the 31st of that month.

In *Atina Ins. Co. v. Meyers*, 63 Ind. 238, the condition in the policy and the circumstances of the case and in the present case do not materially differ. The following is the condition in the policy in that case: "It is hereby agreed and declared to be the true intent and meaning of the parties hereto that in case the above-mentioned building shall at any time after the making, and during the continuance, of this insurance, become unoccupied, . . . unless otherwise specially provided for, or hereafter agreed by the company in writing, and added or indorsed on this policy, then and from thenceforth, so long as the same shall be so unoccupied, . . . these presents shall cease and be of

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no force or effect." We copy the following from the opinion: "It appeared by the evidence that the house was occupied by tenants when it was insured; that the tenants failed to pay rent when due, and the landlord took steps to remove them. Meyers, the owner, testified: 'No one lived in the house at the time of the fire. The tenants left on Friday or Saturday. The building was burned the next Tuesday. The building was used as a tenant-house. It was a double tenement, usually occupied by two families. I put the tenants out because they would not pay rent. I had engaged it to S. C. Carney as soon as I could get them out and have the building repaired. A little plastering and whitewashing was all that was needed. Carney was living in my house across the street, and was to go into it for a year as soon as I could get the tenants out, and get Fred Meyers to fix the house. The tenant was to move in as soon as it was repaired.' In the case at bar the house was unoccupied at the time it was burned. It had been unoccupied for about four days,—some of the witnesses make the time longer; and no definite time when it was to be occupied was fixed. It was to be occupied as soon as it should be repaired by Fred Meyers. . . . As a matter of fact, as we have said, the house was unoccupied when it was burned. By its terms the company . . . was not liable on the policy sued upon. The policy was a contract. What reason appears for giving it an operation, by construction, different from that which its terms require? It seems to us that the literal meaning expresses just what the parties intended. Here, a tenant house is insured for a year. A change of tenants, during the time, is not prohibited, and might naturally be expected. Short intervals in which the property would be vacant might naturally occur. The contract provided that, when they did occur, the policy should not operate during their existence."

In *Cook v. Continental Ins. Co.*, 70 Mo. 610, the condition in the policy was: "If the premises become unoccupied without the assent of the company indorsed hereon, then, and in every such case, the policy shall be void." The following is the learned judge's statement of the facts: "About two weeks before the fire the plaintiff went to Kansas City, Mo., to reside, and lived there until after the fire. She shipped a carload of her furniture to the latter place, and left about \$800 worth in the house, and instructed one Barnard to sell it, except a bed-room set, and also to rent the house. Joseph Southwick was left in possession, with instructions to remain in possession and sleep in the house until he could rent it. Delaney was to rent the house. Southwick went to Kansas City three or four days before, and was there when the fire occurred. He left no one in the house, but told Delaney, with whom he left the keys (except the key of the bed-room he had slept in), to take charge of the house, and rent it if he could before he returned." And, following this recital of the facts, the learned judge goes on to say: "On these facts the question arises, Was the house unoccupied when it was burned? If it was, she was not entitled

to recover. 'Occupation of a dwelling-house is living in it.' *Paine v. Agricultural Ins. Co.* 5 Thomp. & C. 619. 'A fair and reasonable construction of the language "vacant and unoccupied" is that it should be without an occupant,—without any person living in it.' *American Ins. Co. v. Padfield*, 78 Ill. 169. Speaking of a dwelling-house and barn, Colt, J., in *Ashworth v. Builders Mut. F. Ins. Co.*, 112 Mass. 422, observed: 'Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling-place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for storage. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy.' . . . In *Wood, Ins.*, 164, the above observations of Colt, J., are quoted and approved. In *Paine v. Agricultural Ins. Co.*, *supra*, it was said that 'occupation of a dwelling-house is living in it, not mere supervision over it; and, while a person need not live in it every moment, there must not be a cessation of occupancy for any considerable portion of time.' After citing other authorities, the court says: "Applying the doctrines of the above-cited cases to this, it is clear that, within the meaning of the clause under consideration, the premises insured were unoccupied from the time plaintiff went to Kansas City until the fire occurred."

Farmers F. Ins. Co. v. Wells, 43 Ohio St. 519, supports the contention of the appellant. The tenant moved out with no intention of returning, leaving behind a barrel of corn and coal-oil can. During the night following the removal the building was destroyed by fire. The court said: "The condition that the policy should be void if the building therein mentioned be 'vacated or unoccupied' was absolute. The parties to the contract were competent to make such stipulation." The court concludes by holding that the property was vacant, and the policy void, and says that the duration of the vacancy was wholly immaterial.

In the case of *Sleeper v. N. H. F. Ins. Co.*, 56 N. H. 401, the condition in the policy was: "If the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company, and consent indorsed hereon, . . . this policy shall be void." In the opinion by Smith, J., it is said: "It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites shelter to wanderers and evil disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and for various reasons that might be enumerated an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire. If, then, the motive is to have someone present occupying and dwelling in the buildings,

and interested to preserve the roof that shelters his family or holds his household goods, that object would plainly be defeated by holding that he and his family may depart with all their possessions, save, perhaps, a few articles not needed for present use, and still the premises be considered occupied,

I cannot say that I have any doubt that these buildings were vacant at the time they were burned, in the sense in which that term was used in the policy." All of the reasoning of the court has much force when applied to the facts of the case we have before us. In the same case, Ladd, J., said: "I think, when the occupant of a dwelling-house moves out with his family, taking part of his furniture and all the wearing apparel of the family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling-house, while thus deserted, must be regarded as unoccupied, that is, vacated, according to the natural and ordinarily received import of those terms. It is the very situation against the hazards of which the defendants undertook to guard themselves, by an express stipulation and condition inserted in the contract, upon which this action is founded."

In the case of *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140, 3 New Eng. Rep. 57, 10 Am. St. Rep. 884, it is held that the words "vacant and unoccupied," when used in a policy of insurance, in connection with the idea that the insurer was stipulating against an increase in the risk from the absence of persons from the premises insured, must be regarded as interchangeable and equivalent in meaning; that when no one lives in the house it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove. In the learned note to the foregoing case (10 Am. St. Rep. *supra*) it is said: "There is strong authority in support of the rule that a fair and reasonable construction of the term 'vacant and unoccupied' is that the house should be without an occupant; that is, without any person living in it,"—citing *North American F. Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Ill. 167; *Phoenix Ins. Co. v. Tucker*, 93 Ill. 64; *Fitzgerald v. Connecticut F. Ins. Co.* 64 Wis. 483; *Alston v. Old North State Ins. Co.* 80 N. C. 826; *Cook v. Continental Ins. Co. supra*.

And it is stated: "The same construction is given to the term 'vacant or unoccupied.'" *Herrman v. Adriatic F. Ins. Co.* 85 N. Y. 163; *Stupetski v. Transatlantic F. Ins. Co.* 48 Mich. 373; *Imperial F. Ins. Co. v. Kierman*, 88 Ky. 468; *Sonneborn v. Manufacturers Ins. Co.* 44 N. J. L. 220.

As will be remembered, the words "vacant or unoccupied" are employed in the policy under consideration. In view of these authorities, we repeat, at least in substance, what we have once before said, that we cannot well imagine how it can be said that the building covered by the policy upon which the present action rests can be said not to have been vacant when the fire occurred. It was certainly without an occupant, in any sense of the term.

In *Sexton v. Hawkays Ins. Co.*, 69 Iowa, 99, it was held that the use of a building for the purpose of storing tools, jars, etc., was not a compliance with the condition against the vacancy of the building.

In *Fishes v. Council Bluffs Ins. Co.*, 74 Iowa, 676, the insured property was a dwelling-house occupied by a tenant, and the policy provided that it should become void if the building became "wholly or partially vacant or unoccupied." The tenant moved out, and five days afterwards the property was burned. The owner, who lived but a half mile distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night; and her father, who worked near, left a few tools in the house at night. It was held that the house was "vacant and unoccupied" within the meaning of the policy, and that no recovery could be had thereon.

In *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, the policy provided that it should be void "if the dwelling-house hereby insured shall cease to be occupied as such." At the time of the insurance the house was occupied by a tenant, who moved out about 6 o'clock on a certain evening, and the house was burned about 2 o'clock the next morning. It was held that the policy was void, and

was not saved by the fact that the fire had actually commenced, and was smouldering, unobserved, when the tenant moved out. The first of the last two cited cases is in some of its facts much like the case we have under consideration, but the facts of this case support more strongly the contention of the insurer than did the facts in those cases. For a further consideration of the questions discussed, we refer to the exhaustive note to *Moore v. Phenix F. Ins. Co.*, *supra*. At this point it may be well to say that we do not wish to be understood as holding that a temporary absence of the occupants of an insured dwelling, the furniture and other contents remaining undisturbed during such temporary absence, would render a policy of insurance thereon inoperative because of a condition against vacancy.

The point is made by counsel for the appellee that counsel for the appellant do not discuss in their brief the ruling of the court upon the motion for a new trial, and therefore waive it. In this contention counsel are mistaken as to the fact upon which it rests.

The judgment is reversed, with costs, with direction to the court below to overrule the demurrer to the complaint, and proceed in accordance with this opinion.

WISCONSIN SUPREME COURT.

Paul MUETZE, *Resp.*,

v.

Isaac TUTEUR *et al.*, *Appts.*

(....Wis.....)

1. The sending of a red envelope through the mails addressed to a merchant and indorsed for return to an organization "for collecting bad debts," these words being in very large type so as to attract special attention, constitutes a libel.
2. Communications sent to the members of an organization to compel delinquent debtors to pay up, showing the name of a debtor on the delinquent list, are libelous and not privileged, where the object is not to protect members from trusting such debtors, but merely to aid them in coercing payment, and the members of the association are not interested in the communications in any other way than to make their own debtors pay up.
3. Evidence that one who refused to give credit to the plaintiff exhibited to him a book in which he is named on the list of delinquent debtors is admissible in an action for libel in publishing such list.
4. A question on cross-examination of plaintiff as to how many men he owes besides defendant in the city where he lives is not proper in a suit for libel in publishing him as a delinquent debtor.
5. A member of an organization for the collection of bad debts is liable for libelous publications by the association, which are sent

for him and in his behalf, where he sets the proceedings in operation.

6. A question of special damages in an action for libel in publishing a person as a delinquent debtor is for the jury where he proves that one person has refused him credit on account of the publication.
7. In a charge of the court a mistake in stating the number of letters sent from a certain place, made not positively but by the qualification "I think," is not ground for reversal when no suggestion of the mistake was made in the court below.
8. A verdict for \$571, in an action for libel in publishing plaintiff on a list of delinquent debtors by an agency to collect bad debts, is not excessive where he proves that credit was refused him by one person on account of the publication.
9. A certificate to a bill of exceptions regularly signed by the judge need not state what it contains, except that it contains all the evidence.

(June 21, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for La Crosse County in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Losey & Woodward*, for appellants:

Some of the appellate courts of the country recognize the right to collect information about the standing of persons likely to ask for credit, and to impart such information to persons interested, and who ask for it in con-

NOTE.—Libel: publications imputing insolvency or want of credit. See note to *Hayes v. Press Co.* (Pa.) 5 L. R. A. 642.

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See also 9 L. R. A. 606; 20 L. R. A. 138; 34 L. R. A. 127.

fidence, but restrict the privilege to communications made under such circumstances only.

Taylor v. Church, 8 N. Y. 460; *Sunderlin v. Bradstreet*, 46 N. Y. 188.

There is, however, an undoubted tendency to relaxation of such rule in obedience to the demands of business as conducted in these times.

King v. Patterson, 8 Cent. Rep. 357, 49 N. J. L. 417; *State v. Lonsdale*, 48 Wis. 369; *Locke v. Bradstreet Co.* 22 Fed. Rep. 778; *Missouri Pac. R. Co. v. Richmond*, 4 L. R. A. 290, 73 Tex. 568; Townshend, Slander and Libel, § 241.

The publication imputed nothing to the plaintiff except that he owed a debt which he did not pay. The statement was true. It was not libelous *per se*, and was not published under circumstances capable of making it convey the impression that plaintiff had been guilty of dishonest practices either in contracting the debt or in withholding payment of it.

Zier v. Hoffman, 38 Minn. 66.

There was no proof whatever of special damages.

Platto v. Geilfuss, 47 Wis. 498.

Mr. E. C. Higbee, for respondent:

From the evidence the jury were abundantly justified in finding that the defendants authorized, instigated and contemplated all that was done under the expected cover of the alleged man Collin. The transactions are clearly libel *per se*.

Woodling v. Knickerbocker, 31 Minn. 268; *Bradley v. Cramer*, 59 Wis. 809; *Dennis v. Johnson* (Minn.) Jan. 8, 1890; Townshend, Slander and Libel, 4th ed. §§ 191, 192; *Brown v. Smith*, 13 C. B. 596; *Williams v. Davenport* (Minn.) Jan. 23, 1890; *Johnson v. Com.* (Pa.) May 25, 1888.

Under the statutes of this State, as well as at common law, it is blackmail and extortion.

Rev. Stat. § 4380 as amended by chap. 248, Laws 1887; § 4466a, as amended by chap. 287, Laws 1887.

There is no basis for a privilege that would allow defendants to assault, insult and outrage the feelings of the plaintiff, by sending through the mail these scurrilous notices and envelopes. No one had asked information from them. They were volunteers, and they were acting by no motive but the unlawful one of extorting this claim from the plaintiff.

King v. Patterson, 8 Cent. Rep. 357, 49 N. J. L. 417; *Montgomery v. Knox*, 22 Fla. 576; *Lynch v. Feibiger*, 89 La. Ann. 886; *Byam v. Collins*, 2 L. R. A. 129, 111 N. Y. 143, 7 Am. St. Rep. 726.

Orton, J., delivered the opinion of the court:

This action is for libel, and the plaintiff recovered \$571. The facts are substantially as follows: The plaintiff is a jeweler by trade, but at one time kept a saloon, and traded with the defendants, who were merchants in goods suitable to the saloon business; and finally, up to July, 1883, there was a balance of account against the plaintiff, which the defendants claimed amounted to the sum of \$23.18, but the plaintiff claimed 9 L. R. A.

to be much less than that amount. There was an association, with its central office at Chicago, called "The United States and Canada Dealers' Protective and Detective Association," claimed to have been incorporated under the laws of Illinois (but which had not been), the object of which is stated on an envelope used by it to inclose correspondence by mail to be "an organization of business and professional men for collecting bad debts." The answer in respect to the association is as follows: "These defendants admit that they were members of an association known [as above described] and allege that the same is organized for the purpose of protecting dealers giving credit against worthless debtors, and against those who contract debts and do not pay; and for the further purpose of communicating to the members of such association, for their mutual protection and safety, the names of all persons against whom unsettled claims remain outstanding and unpaid in favor of members of said association, and which names have been reported by members to the central office, after having taken the necessary steps required by the rules of said association to be taken by the members thereof before reporting such names, in order to give the debtor ample and full notice thereof, and ample opportunity to settle all claims, and avoid such report; that the said association publishes a book at regular intervals giving the names of all persons so reported by members, and against whom there are unsettled claims in favor of members; . . . that said book is distributed only to members of the association, and to no one else whatsoever, and all communications made by any member to said association, or by said association to any of its members, are strictly confidential and secret, for the purpose of their mutual protection and security."

On February 9, 1888, the defendants sent to the plaintiff, at La Crosse, one of the letters of said association, headed by its regular designation, signed by the firm of Isaac Tuteur & Son, in which they say that they have become members of such association, and then state its general purposes, and ask the plaintiff to call and settle, or they shall be obliged to report his name to the association before February 18, "after which date their matter goes to press." On said 18th day of February the plaintiff received another letter through the mail with a similar heading, and signed "Agent," in which it said: "I. Tuteur & Son, one of the members of our association, informs me that you have received our association letter in regard to your indebtedness, and that you have failed to respond. Now, before reporting your name to the main office for publication, allow me to inform you as to some of the consequences of being published in this manner as a delinquent." The letter then states the consequences as above stated, and that, if the plaintiff did not wish his name so published, he must by all means call on the defendants, and make some satisfactory arrangement in regard to the claim on or before the 29th day of February, or his name would go forward to the main office. On March 1 another letter was written to the plaintiff, dated at

Chicago, stating that the defendants, a member of the association, informed them about the claim, and that reasonable time had been given him to pay it, and notifying him that, if he did not pay by March 15, the consequences would be as previously threatened. This letter, with a similar heading, was signed by C. R. Collin, as secretary. Another letter was written from Chicago, dated March 10, notifying plaintiff to make immediate payment of the claim within twenty days, and another one dated Chicago, June 10, 1888, with a similar notice to pay within ten days. These two last letters were inclosed in an envelope, respectively, and passed through the mail to plaintiff in La Crosse, and the envelope was indorsed as follows: "Return in twenty days to the United States and Canada Protective and Detective Association, an organization of business and professional men for collecting bad debts. Central office, 189 Madison Street, Chicago. For Paul Muetze, La Crosse, Wis." Each of these letters or notices was also headed, "Main Office Notice."

There were two other letters received by plaintiff from the main office at Chicago,—the first dated August 10, and the other September 12, the first notifying plaintiff to pay within twenty days, and the other within eighteen days, inclosed in similar envelopes, excepting the clause, "for collecting bad debts," which is omitted. The envelope containing this clause, "collecting bad debts," is of red paper, and these words are in very large type, so as to attract special attention. After these communications, the plaintiff applied to a Mr. Borreson, a jeweler of La Crosse, for whom he had at one time worked, for credit, or to be trusted for a small amount, and he refused on account of his having received a book of said association containing the name of the plaintiff as a person unworthy of credit. The book was issued July 1, 1888, and contains the plaintiff's name among many others in various parts of the United States. In a preface to the book, addressed to members, it is stated that the association "is not a collection agency . . . but uses its influence to make your debtor pay you." When the debtor paid the claim, his name was taken out of the book. As stated in the answer, the debtor is given an opportunity to pay, if he will, before his name is inserted in the book. The several letters are so many threats that the plaintiff's name will be so published if he fails to pay. The defendants had demanded \$28.18, and the letters make the same demand; but the defendant admitted, as a witness, that he had made a mistake of \$8.05 in the account, and that the claim was only \$20.07.

I have stated the facts more fully and explicitly in order to show what are the objects of the association. It is claimed by the learned counsel of the appellants that its purposes were right and honorable, like a railroad company that issued a pamphlet containing the names of its discharged employes, to be circulated among other companies or commercial agencies and the like, for mutual protection against unworthy persons. The envelope of two letters from

Chicago contains a distinct libel in itself, which could have been read, and probably was read, by many persons not members of the association. They are made to attract special attention, and publish the fact that the association was in correspondence with the plaintiff for the purpose of collecting a bad debt of him, and imply that he is a bad debtor who fails or refuses to pay his honest debts, and that he is unworthy of credit. But this is not all. It is also a public statement that the object and purpose of the association are for "collecting bad debts." The several letters were written and sent to the plaintiff, and such letters are no doubt sent to others to collect bad debts; and, if they fail to pay, their names are published in the book also for the purpose of collecting bad debts, for, as soon as payment is made, the publication of their names is discontinued. They are then published in a list of those who have settled up. In the book in evidence there is such a list of those whose credit is restored by their having paid up their bad debts. The object is not to protect the members from trusting this class of debtors, but to aid them in coercing payment. This book of the association, with its list of delinquent debtors, is the pillory or punishment threatened and to be endured if they do not pay, and until they pay their debts, and then they are discharged. This object is too apparent to be disguised. Why write so many letters, or why write at all, to the debtors, if the object be to publish to the members a list of delinquent debtors, or of persons unworthy of credit, to protect them against trusting them? After a debtor has been thus coerced into reluctant payment, he is no more worthy of credit than he was before. Why discontinue his name among the bad debtors, and place it among those who pay their debts? They say, in their address to the members, "it is to make your debtor pay up." It follows that the members, to whom this publication is sent in book form, are not interested in it in any other way than to make their own debtors pay up. The communications of this association are not only libelous and not privileged, but they would seem to constitute the offense of "threatening communications," as defined in § 4380, Rev. Stat. The complications of this peculiar association, to bring it within the protection of the law, make it difficult to treat less briefly. As we now understand the real character of this association and of its publications, we may apply the law involved in the various exceptions.

1. Was it error to allow the plaintiff to testify that Borreson exhibited the book to him? The learned counsel of the appellant contends that such act could not constitute a libel or publication of a libel, and that the defendants cannot be charged with the responsibility for Borreson's violation of his obligation to keep the names in the book confidential. Probably not, and yet the plaintiff had the right to find out, if he could, why Borreson would not trust him; and it was certainly proper for him to prove, if he could, that it was on account of this publication.

2. Was it error to sustain the plaintiff's

objection to the question put to him on cross-examination: "How many men in this city did you owe besides Tuteur?" The object of this question must have been to justify or mitigate the libel by showing that the plaintiff had no credit or character for trustworthiness that could suffer by it. There is no principle better settled than that in such cases specific acts cannot be shown, and that it is a question of general character or reputation alone. *Wilson v. Noonan*, 27 Wis. 598; *Campbell v. Campbell*, 54 Wis. 90.

3. Was it error to overrule the motion for a nonsuit? It is contended that the letters of the defendants to the plaintiff were not in themselves libelous, and that the other letters sent to him from Chicago were not, and that the defendants were not shown to be responsible for them, and that there was nothing in the book that imputed any bad character to the plaintiff as being unworthy of credit, and that there was no evidence that any other copy of the book, except the one received by Borreson, had been sent to anyone, and, finally, that the envelopes inclosing two of the letters, containing the words, "for collecting bad debts," were not libelous. The letters were not libelous in themselves, but the defendants' letters were proper to show their connection with the association as one of its members, and with its proceedings against the plaintiff. The defendants set in operation the whole scheme, and caused the other letters to be written and sent to the plaintiff, and they were sent for them, and in their behalf. It was through the agency of the association and its officers that all the communications were made to the plaintiff, and finally his name placed in the bad-debtor list in the book of the association, and the defendants were directly responsible for all that was done. The learned counsel contends that the two envelopes containing the words, "for collecting bad debts," were not only not libelous, but a mere violation of the laws of the postoffice department, and which were changed as soon as it was decided about that time that it was an offense against the Postal Laws of the United States. Was it not decided that it was an offense because the words were abusive and libelous? There certainly could not have been any other reason. But I have already shown that the words imputed to the plaintiff a bad character, and a want of credit, which implied that he was a cheat and a swindler, and that the correspondence inclosed was for the purpose of collecting from him a bad debt. The book itself claims that they have members all over the country, in whose hands the book is placed; and, if Borreson had one, it was strong evidence that all the members were supplied with it. At least, such would be the presumption of fact from the declared intention of the association. The plaintiff was notified and threatened in the letter signed by Collin, the secretary, that if he did not pay up by the 15th day of March, 1888, he would be published in their "list of delinquent debtors, which will be delivered to all members of the association in the United States and Canada." The sending through the mail of these envelopes with such an imputation

of dishonesty, and the distribution of the book among the members with the plaintiff's name in the black-list of bad debtors, constituted sufficient publication of the libel. The effect, as well as the intention, of these libels was to discredit and disgrace the plaintiff among business men; and this was the punishment threatened if he did not pay as ordered. If it would work no injury to the delinquent, it would not operate as an inducement for him to pay up. It is claimed that no special damage to the plaintiff was proved by Borreson refusing to trust him for a small bill of jewelry, because it was not shown that Borreson had ever trusted him, or would have trusted him but for the book. It is sufficient if Borreson refused him credit on account of the book, and the question of special damages was for the jury. This disposes of the reasons urged in support of the defendants' motion for a nonsuit, and also in support of the motion that the court direct the jury to find for the defendants.

4. Errors are assigned on certain instructions to the jury. The learned circuit judge said to the jury: "The evidence shows that three letters, I think, were mailed from La Crosse by the defendants of this character." The learned counsel claims that this error of fact was very injurious to the defendants, because it would imply that all three of such letters were inclosed in that offensive envelope, when in fact there were only two of such letters. The jury would probably recollect that there were only two of such envelopes, whether they should be misinformed as to the number of letters or not. The statement was not positive, but made rather inquiringly by the qualification, "I think." In such a case, where the court mistakes the evidence in this way from the want of a distinct recollection of it, it is the duty of the counsel to suggest its correction at once, and not silently reserve it for a future exception. He owes this duty to the court. It is not an error of law. We may presume that the jury remembered the evidence for itself, and we cannot presume that they were at all affected by this mistake. The counsel, in such a case, should be held to have waived the error by his silence when he ought to have spoken. It is not very material anyway, and should be disregarded. The learned judge instructed the jury, in substance, that the communication could not be privileged if made to persons not interested in knowing the standing of the plaintiff, for instance the members in Canada. This instruction presupposes that the communication was privileged so far as the members were concerned who had an interest in knowing the standing of the plaintiff. This did the defendants no harm, for most clearly the jury correctly found that it was not privileged, and this question was submitted to them by the court. We have seen that there was no object or purpose of the association to protect or serve anyone except the creditor interested in collecting the debt. The authorities cited by the learned counsel have no application to such a case. There can be no question but that the communications were grossly libelous. On this general question, see the authorities cited in the brief

of the learned counsel of the respondent. In speaking further on the question whether the matter was privileged, the learned judge said to the jury: "Whether it was a communication that was desired, well, there is no evidence that it was desired by anybody." This is a little obscure, but its meaning was, probably, that no one was interested in the matter except the defendants, and that no one else had any reason to desire it. The jury could not have been materially misled by it, whatever it might mean.

The verdict is not excessive. The respondent's counsel omitted to argue these various exceptions, because he insisted that the cer-

tificate to the bill of exceptions is insufficient to make them a part of the record. The certificate is that "the above and foregoing was and is all the testimony given on the trial of the above-entitled action." But the bill of exceptions is regularly signed by the judge, as the law requires, and thereby became a part of the record (§ 2873, Rev. Stat.), and it contains all the exceptions, and the matters to which they relate. That is sufficient. What it contains need not be stated in the certificate, except whether it contains all the evidence. The objection is too technical. We can find no error in the record.

The judgment of the Circuit Court is affirmed.

MAINE SUPREME JUDICIAL COURT.

Arthur M. BURNHAM
v.
George W. HESELTON.

(82 Me. 495.)

The purchase by an attorney from his client of the subject matter of litigation, or any speculative bargain in relation thereto, is presumptively invalid, and to uphold the transaction as against the client the attorney must prove affirmatively by evidence its perfect fairness, adequacy and equity. No presumption of innocence or improbability of wrong-doing can be considered in his favor.

(March 15, 1890.)

EXCEPTIONS by plaintiff to a judgment of the Superior Court for Kennebec County in favor of defendant in an action brought to recover from an attorney-at-law the amount which he had collected upon a promissory note, which was alleged to belong to plaintiff. *Sustained.*

The case sufficiently appears in the opinion. *Messrs. W. Gilbert and W. C. Fletcher,* for plaintiff:

The burden of proof was upon defendant.

Dunn v. Record, 68 Me. 17; *Story*, Eq. §§ 308, 481, 1049; *Willard*, Eq. 172; 7 *Wait*, Act. and Def. § 2, p. 72, and cases cited; *Harper v. Perry*, 28 Iowa, 57; cases cited in *Pom. Eq. § 960; Low v. Hutchinson*, 87 Me. 196.

NOTE.—Transactions between attorney and client closely scrutinized.

A confidential relation existing between parties requires the greatest care, and transactions between parties where such a relation exists must be scrutinized closely, and condemned unless shown to be fair and aboveboard, and unless the client or injured party had equal knowledge and opportunity to protect himself. *Fisher v. Bishop*, 86 Hun. 114; *Post v. Mason*, 26 Hun. 191, affirmed, 91 N. Y. 539; *Mason v. Ring*, 3 Abb. App. Dec. 210; *Evans v. Ellis*, 5 Denio, 840; *Wright v. Proud*, 13 Ves. Jr. 138; *Howell v. Ransom*, 11 Paige, 538, 5 N. Y. Ch. L. ed. 227; *Wright v. Douglass*, 10 Barb. 104; *Brotherson v. Consalus*, 26 How. Pr. 219.

The law looks upon an agreement between an attorney and his client, providing for a large compensation upon the success of the former in conducting the cause, where the client was assured that the case was one which not only stood very strong for him, but in which he must succeed, with great suspicion, and the presumption is against its propriety. *Hitchings v. Van Brunt*, 5 Abb. Pr. N. S. 273, 88 N. Y. 342.

A gift or transfer of property, especially the property in litigation from a client, is presumptively nugatory and void. It will not be enforced on the application of the attorney and will be canceled on equitable terms on the demand of the client. *Anonymous*, 16 Abb. Pr. 423.

In some cases undue influence will be inferred from the nature of the transaction alone, in others from the nature of the transaction and the exercise of occasional or habitual influence. *Nexsen v. Nexsen*, 2 Keyes, 243, 3 Abb. App. Dec. 374; *Story*, Eq. Jur. §§ 308-324; *Howell v. Ransom*, *supra*; *Merritt v. Lambert*, 10 Paige, 352, 4 N. Y. Ch. L. ed. 1007.

9 L. R. A.

Transaction; when may stand.

If all the circumstances of good faith, absence of undue influence, a fair price, knowledge, intention and freedom of action by client, and that he gave client full information, are proved, the contract will stand; if not, it will be defeated or set aside. 2 *Pom. Eq.* 490; *Merritt v. Lambert*, 10 Paige, 352, 4 N. Y. Ch. L. ed. 1007; *Howell v. Ransom*, 11 Paige, 538, 5 N. Y. Ch. L. ed. 227; *Dunn v. Dunn*, 6 Cent. Rep. 94, 42 N. J. Eq. 431; *Wendell v. Van Benschelaer*, 1 Johns. Ch. 344, 1 N. Y. Ch. L. ed. 165.

Burden on attorney to show good faith, etc., of transaction.

An attorney, after the relation ceases, can acquire no rights and assume no obligations in regard to the subject matter of his advice and counsel antagonistic to the rights of the client, unless the most ample information has been afforded to place the client on her guard. *Gooch v. Peebles*, 105 N. C. 411.

Where an attorney purchased from his client a bond and mortgage, he must show that he gave his client full information and disinterested advice respecting the transaction. *Dunn v. Dunn*, 6 Cent. Rep. 91, 42 N. J. Eq. 431.

An attorney must show that he communicated to his client everything necessary to enable him to form a correct judgment as to the real value of the subject of the purchase and as to the propriety of selling for the price offered. *Wise v. Hardin*, 5 S. C. 329; *Howell v. Ransom*, 11 Paige, 538, 5 N. Y. Ch. L. ed. 227.

His neglect to ascertain the true state of the facts himself will not sustain his purchase. *Dunn v. Dunn*, 6 Cent. Rep. 94, 42 N. J. Eq. 431; *Condit v. Blackwell*, 22 N. J. Eq. 431; *Porter v. Woodruff*, 38 N. J. Eq. 174; *Farmer v. Farmer*, 39 N. J. Eq. 211.

The agreement was not valid.

Rev. Stat. chap. 122, § 12.

Messrs. Heath & Tuell, for defendant:

An agreement to charge a bill measured by the amount recovered is not illegal.

Blaisdell v. Ahern, 4 New Eng. Rep. 847, 144 Mass. 393.

The contract being executed the Statute cannot be invoked.

Miller v. Larson, 19 Wis. 466.

To adjudge a contract illegal, it must be clearly so; all doubts will be resolved in favor of its legality. Statutes of a penal character are always to be strictly construed.

Butler v. Bicker, 6 Me. 268; *Perley v. Jewell*, 26 Me. 101; *Abbott v. Wood*, 23 Me. 541.

The contract will bear a legal construction. The universal rule is to adopt the construction which will render it legal.

See *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Hamden v. Mervin*, 54 Conn. 418.

The agreement, if a sale, is not within the Statute.

Thompson v. Ide, 6 R. I. 218; *Taylor v. Gilman*, 58 N. H. 418; *Fowler v. Callan*, 8 Cent. Rep. 314, 103 N. Y. 895.

Emery, J., delivered the opinion of the court:

The plaintiff held a note of \$250 against the Burnham Shutter Worker Company, which, on the 23d day of March, 1888, he committed to the defendant, an attorney-at-law, for collection. The defendant ascertained that one Stone had for a consideration assumed and

agreed to pay all the company's debts, and that Stone was amply able financially, and entirely willing, to pay this note on presentation. After ascertaining these facts, the defendant, on the 26th day of May, 1888, made an agreement in writing with the plaintiff, by which the defendant was to collect what he could of the note at his own expense, and pay the plaintiff \$75, if so much was collected, and retain for his services and risks all he should collect over \$75. A short time after this agreement the defendant caused the note to be presented through a bank to Stone, who paid it in full, with interest, to the bank for the defendant. July 4, 1888, the defendant paid the plaintiff \$75, and took his receipt in full "for the note, according to agreement." The next fall, November 20, 1888, the plaintiff brought this action of assumpsit for money collected and money had and received by the defendant to his use. The object was to recover the balance of the money collected on this note by the defendant. The defendant pleaded the general issue only, and at the trial put the above agreement and receipt in evidence in defense. The plaintiff contended these were not valid against him on the ground that he was not informed of the facts known to the defendant in relation to the note, and the chances of its speedy and full collection. Whether the plaintiff was so informed of those facts was the real issue before the jury.

The presiding justice instructed the jury, in the first instance, that the burden was on

One who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. This rule is especially applicable to attorneys and solicitors purchasing from their clients. *Pollion v. Martin*, 1 Sandf. Ch. 571, 7 N. Y. Ch. L. ed. 438; *Merritt v. Lambert*, 10 Paige, 832, 4 N. Y. Ch. L. ed. 1007; *Greenfield's Estate*, 14 Pa. 490; *Hunter v. Atkins*, 3 Myl. & K. 113; *Newman v. Payne*, 3 Ves. Jr. 120; 1 Story, Eq. § 810.

The presumption is against the validity of a purchase or sale between client and attorney made during the existence of that relation. This must be removed by showing good faith, absence of undue influence, freedom of action of client and full information on the part of the client, and proof of diligence on the part of the attorney in doing the best for his client. *Kialing v. Shaw*, 33 Cal. 423; *Trotter v. Smith*, 59 Ill. 240; *Zeigler v. Hughes*, 55 Ill. 238; *Ryan v. Ashton*, 49 Iowa, 365; *Polson v. Young*, 37 Iowa, 186; *Dunn v. Record*, 63 Me. 17; *Roman v. Mall*, 63 Md. 513; *Payne v. Avery*, 21 Mich. 524; 2 Pom. Eq. Jur. 490; *Whitehead v. Kennedy*, 69 N. Y. 466; *Savery v. King*, 5 H. L. Cas. 627; *Starr v. Vanderheyden*, 9 Johns. 253; *Evans v. Ellis*, 5 Denio, 640; *Ford v. Harrington*, 16 N. Y. 235; *Nesbit v. Lockman*, 34 N. Y. 169; *Story*, Eq. Jur. § 811.

It is not necessary to show actual fraud in order to invalidate transactions between attorney and client. The whole burden of establishing the fairness of the sale and that it was made upon a full and adequate consideration is cast upon the attorney. *Brook v. Barnes*, 40 Barb. 629; *Story*, Eq. Jur. §§ 305-324; *Planters Bank v. Hornberger*, 4 Coldw. 568.

Statute forbidding purchase of clients' choses in action.

The prohibitory provision of the Statute preventing the purchase of choses in action by members of § L. R. A.

the bar applies to the purchase of a chose in action for the purpose of instituting a suit in equity, as well as with the intention of bringing a suit at law. *Mann v. Fairchild*, 14 Barb. 556; *Hall v. Bartlett*, 9 Barb. 299; *Waring v. Smyth*, 2 Barb. Ch. 119, 5 N. Y. Ch. L. ed. 580; *Baldwin v. Latson*, 2 Barb. Ch. 306, 5 N. Y. Ch. L. ed. 653.

The Statute expressly forbids such a purchase when the prohibited purpose is attempted to be accomplished, either directly or indirectly, by the attorney in person or through the agency of another; and no cause of action can arise out of a transaction thus prohibited. *Browning v. Marvin*, 1 Cent. Rep. 188, 100 N. Y. 149; *Wetmore v. Hegeman*, 88 N. Y. 73.

The object of the statute was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee. *Moses v. McDivitt*, 88 N. Y. 65; *Goodell v. People*, 5 Park. Crim. Rep. 211.

But the mere purchase of the chose in action, etc., is not, of itself, sufficient evidence of the intent mentioned in the Statute. The intent must be proved. *Warren v. Helmer*, 8 How. Pr. 421.

A mortgage is a chose in action (*Hall v. Bartlett*, 9 Barb. 299); and for an attorney intrusted with the duty of collecting or securing a client's claim to take a mortgage on property to secure his own debt, at the expense of his client, is such a transaction as cannot be sanctioned by a court of equity, which always scrutinizes closely dealings between parties occupying fiduciary relations towards each other, and requires the utmost good faith. *Taylor v. Barker*, 80 S. C. 228.

The purchase of a judgment by an attorney, for the purpose of enforcing it by execution, is not in violation of the Statute which prohibits attorneys from buying choses in action with the intent and

the defendant to establish the affirmative of the proposition that the plaintiff made the agreement or sale with full knowledge of all the facts known to the defendant, his attorney, and without concealment or suppression on the defendant's part. But in the same connection he used this further language: "But, gentlemen, while the burden is upon the defendant to do this, there is another principle which it is always the right and duty of the jury to consider in determining the question of burden of proof, and that is the question of presumption; that is, the probability or improbability involved in the charge of fraud. . . . In other words, there is in these cases, you will perceive, whether in civil or criminal procedure, where a fraud is charged,—where something wrong is charged,—an opposing presumption, an improbability, which you have a right to consider in determining when the burden of proof has been discharged. . . . You have a right to consider the element of the presumption of innocence and the element of improbability that is involved, if it is involved in your judgment. It is for you to say when the burden of proof is discharged." Again, in commenting on the credibility and bearing of the several testimonies, the presiding justice, after reminding the jury of the legal presumption of the innocence of the defendant, further said: "Gentlemen, I do not think it necessary to remind you that the time has not yet come when a fair and honorable char-

acter, which has been built up in the county by the process of years of worthy endeavor and honorable dealing, shall not count for something in a court of justice as well as out of it."

There was no evidence in the case touching the general character of the defendant, nor anything relating to his character at all, except the relations of the witnesses on the one side and the other, touching the transactions of the defendant in these premises. To the language above quoted the plaintiff excepted, the verdict being for the defendant.

The law hates fraud or deception of any kind. It will uphold no contract or seeming right obtained through fraud. When the parties to the contract are upon equal footing, each dealing for himself, without any relation of trust or confidence between them, the law will not permit any misleading, any deception, of one party by the other. It will not enforce any advantage so gained. But in such cases the law will not presume there was fraud. It will assume that each party acted for himself, upon his own judgment, without being misled by the other party, until such misleading is proved. Any such party, seeking to avoid any contract or other transaction on the ground of fraud, has the burden of proving the fraud. Such transactions are presumed to be valid until proved to be invalid.

When, however, the parties are not upon an equal footing, each acting for himself,

for the purpose of bringing suits thereon. *Brotherston v. Consalus*, 26 How. Pr. 215.

Attorney cannot purchase adverse title.

A right to sue for property adversely held cannot be the subject of legal transfer. *Foy v. Cochran*, 38 Ala. 552; *Franklin v. Pollard Mill Co.*, 38 Ala. 518.

An attorney can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. *Baker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1035.

A sale of lands which are in the actual possession of another who claims adversely to the extent of an easement to dig and use a ditch is *pro tanto* void as against the grantee of such easement. *Franklin v. Pollard Mill Co. supra*.

An attorney cannot buy in at a treasurer's tax sale, and hold as his own, the land of his client. *Elliott v. Tyler* (Pa.) 5 Cent. Rep. 543.

The purchase by an attorney of the land in litigation, at a tax sale, in opposition to the title of his client, is void. *Lynn v. Morse*, 76 Iowa, 635. See *Elliott v. Tyler* (Pa.) 5 Cent. Rep. 543; *Conlee v. Wright*, 7 West. Rep. 59, 108 Ind. 455.

An attorney who purchases property of his client *pendente lite* cannot be a bona fide purchaser. *Gay v. Parpart*, 106 U. S. 579, 27 L. ed. 256.

The record that discloses the relation of attorney and client touching a levy upon real estate and purchase by the attorney is a sufficient notice to a subsequent purchaser from the attorney that title inured for the benefit of the client. *Briggs v. Hodgdon*, 3 New Eng. Rep. 282, 78 Me. 514.

An attorney cannot become the purchaser of his client's property at a judicial sale thereof without full explanation and information given to his client. *Reed v. Warner*, 5 Paige, 650, 3 N. Y. Ch. L. ed. 369; *Page v. Stubbs*, 39 Iowa, 537; *Barrett v. Bamber*, 9 Phila. 203; *Taylor v. Boardman*, 24 Mich. 287; *Warren* 9 L. R. A.

v. Hawkins, 49 Mo. 137; *Banks v. Judah*, 8 Conn. 145; *Merritt v. Lambert*, 10 Paige, 353, 4 N. Y. Ch. L. ed. 1007.

This rule does not extend to a purchase made at a judicial sale, under the direction of an officer of the court. *Mann v. Fairchild*, 5 Barb. 100; *Baldwin v. Latson*, 2 Barb. Ch. 303, 5 N. Y. Ch. L. ed. 653.

Champertry and maintenance.

An assignment to an attorney, of a right of action, for the express purpose of enabling him to bring action upon it, under a stipulation that he and his law partner were to have more than two thirds of it for their services therein, is champertous and void. *Dahms v. Sears*, 13 Or. 47.

An attorney, under our system, has a right to contract for a contingent fee, or for a percentage upon the amount recovered, but cannot lawfully purchase a claim for the consideration that he will prosecute in his own name for a part of the amount recovered. *Ibid*.

No action is maintainable on a demand purchased by an attorney. That the purchase is in the name and made with the funds of another makes no difference if the transaction is managed by the attorney with the design of bringing suit. *Browning v. Marvin*, 1 Cent. Rep. 137, 100 N. Y. 144.

An action lies against an attorney on an agreement to prosecute the plaintiff's suit on shares and pay costs. *Willey v. Crane*, 13 West. Rep. 162, 69 Mich. 17.

Where the title to real estate is defective, and the attorney for the owner of the paramount title, at the latter's written instruction, commences an action in the name of such owner, signing the petition as his attorney, a subsequent conveyance by such owner to the attorney, the action being thereafter prosecuted in the attorney's name, is not affected with maintenance or champerty. *Richards v. Thompson* (Kan.) Feb. 8, 1890. See *note to Gilman v. Jones* (Ala.) 4 L. R. A. 113.

but some relation of trust or confidence exists between them, touching the subject matter of the contract, the law is not so considerate or trustful. Where such relations exist, it views the transaction with caution, if not with suspicion. In such cases it will not assume in favor of the agent or fiduciary that the contract was fairly made, and that there was no abuse of confidence. It waits for such party to satisfy it affirmatively,—to affirmatively show that there was in fact no abuse of confidence; that the contract was in fact fairly made; that the other party was in truth made acquainted with all the material facts and reasons known to the fiduciary. The very making of the contract is incongruous,—*prima facie* inconsistent with the fiduciary relation. The transaction may be valid, but there is no presumption in its favor. The presumption is of invalidity, which can only be overcome, if at all, by clear evidence of good faith, full knowledge, and of independent consent and action. *Pom. Eq. Jur.* §§ 955-957; *Adams, Eq. § 61, and notes*; *Story, Eq. Jur. § 310*.

Especially does the law require the highest degree of honor and good faith from its own ministers. It insists that the confidence of the suitor in the faithfulness and disinterestedness of his attorney and counselor shall be fully deserved. It deprecates any purchase of any matter of litigation by any attorney from his client. It greatly desires that the attorney should be satisfied with a reasonable compensation, without seeking to obtain speculative bargains from his client. As said by one writer, such a transaction may be valid, but it is presumptively invalid. Where any such bargain is made, the burden of sustaining it is on the attorney. No presumption will avail him. He cannot get behind the presumption of innocence, and await the coming of hostile evidence. He must be aggressive, and advance against the presumption of invalidity, and overcome it, if he can, by evidence of "the perfect fairness, adequacy and equity of the transaction;" and particularly must he show that his client was informed of all material facts known to himself. *Dunn v. Record*, 63 Me. 17; *Arden v. Patterson*, 5 Johns. Ch. 44, 1 N. Y. Ch. L. ed. 1002; *Rogers v. Marshall*, 3 McCrary, 76, 9 Fed. Rep. 721; 4 Kent, Com. notes on page 449; *Weeks, Attys. § 268, and notes*.

It has even been held by high authority that such transactions are conclusively invalid; that the presumption of invalidity cannot be overcome. *Newman v. Payne*, 2 Ves. Jr. 208; *Wallis v. Loubat*, 2 Denio, 607; *Wayne, J., in Michoud v. Girod*, 45 U. S. 4 How. 555 [11 L. ed. 1099].

Recurring now to the language of the instructions to the jury, and reading them as a whole, in the light of the principles above stated, it will be seen, we think, that the presiding justice gave the jury to understand that the presumably good character of the attorney, the presumption of innocence, the improbability of fraud, might in themselves be evidence, and perhaps sufficient evidence, to sustain the attorney's burden of proof, and hence establish the validity of the transaction in question. The whole charge is

made a part of the bill of exceptions, and it intensifies rather than lessens the force of the language excepted to. The jury would naturally receive the impression, from the language quoted, and from the whole charge, that the attorney was protected by the presumption of innocence and the presumption of improbability, which presumptions were to be regarded as greatly strengthened by the general good character of the attorney. The jury also might understand that they could, if they would, regard these presumptions as wholly sustaining, or at least balancing, the burden of proof, and as relieving the attorney of any further duty of showing that the transaction was fair, adequate and equitable.

We do not think the attorney had any such presumptions in his favor in this action. He was not on trial for any crime. He was not charged in the declaration with any fraud. The action was the equitable one of assumption for money had and received by him to his client's use. In defense he set up a transaction with his client which the law does not favor, and holds to be *prima facie* invalid. It was the law, not the plaintiff, that charged the fraud. The character of this particular transaction, not that of the attorney, was in issue. The act, not the person, was then on trial. The character of the attorney might aid him as a witness, but it could not prove his case for him as a party. While one may invoke the presumption of innocence in negation, and wait for the prosecution to overcome it by evidence, he cannot successfully invoke it in affirmation, as tending to prove any proposition cast upon him to prove. That presumption is a shield, not a weapon. To illustrate: It is wrong not to pay one's promissory notes; and yet when one is sued upon such a note, and the note is produced, he cannot rely upon the presumption of his innocence of wrong, as proving or tending to prove payment of the note.

As to the presumption of improbability, the law says it is against the attorney; that it is improbable that the client had the same knowledge and stood on the same footing as the attorney. Hence the requirement that the attorney shall affirmatively prove these propositions. In this case, however, the jury were in effect told that the presumption of improbability supported the attorney; that it was improbable that the transaction was invalid. If that were so,—if it were improbable that the transaction was invalid,—then of course it was probably valid, and must have been held valid until proved otherwise, and there was no burden on the defendant to establish its validity. There was, however, clearly no improbability that the bargain in this case, by which the client, the owner of the note, got only \$75, and the attorney got \$187 out of it, was unequal and inequitable.

It must be evident that the instructions excepted to deprived of all force and virility the correct and wholesome rule that was first laid down. Their effect was to relieve the attorney of a burden which the law plainly says he must bear, if he will make such contract. It may be that this contract, while *prima facie* invalid, was in truth "perfectly

fair, adequate and equitable." We hope it was. But the attorney must prove it so, and as he would prove any other affirmative proposition, by evidence, and not by invoking presumptions of his innocence, and of the improbability of his doing wrong.

Exceptions sustained.

Peters, Ch. J., and Walton, Virgin, Foster and Haskell, JJ., concurred.

Lovey A. PILLSBURY

v.

Irving J. BROWN *et al.*

(88 Me. 450.)

- *1. The use of ways, commenced under an actual and recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law, is presumed to be co-extensive with the location.
2. After the lapse of twenty years, accompanied by an adverse use, a location of a way *de facto* becomes a location *de jure*.
3. Thus, where a way was originally laid out three rods wide, — *Held*, that the public is entitled to a way of that width, notwithstanding the wrought part and the part actually used by travelers may have less than that; also, that the traveled path may from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out.
4. When a case is submitted to the law court on a report of evidence, or on an agreed statement of facts, technical questions of pleading will be considered as having been waived, unless the contrary appears.

(March 3, 1890.)

*OFFICIAL.

NOTE.—*Highway; right of public to use of its entire width.*

Where a highway was originally laid out three rods wide, the public is entitled to a way of that width, although the road part and the part actually used by travelers may have been less than that; and it may be widened and otherwise improved as the wants of the public require, up to the limit first laid out. *Pillsbury v. Brown*, 88 Me. 450.

The use of ways, commenced under an actual and recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law, is presumed to be co-extensive with the location. *Ibid.*

Where the owner of land took title subject to the easement of a highway, no act of obstruction on his part can deprive the public officials of their jurisdiction; and no acquiescence on their part, in any act of his, can deprive the public of the right to use the whole highway, or lessen their duty to remove obstructions. *Driggs v. Phillips*, 4 Cent. Rep. 237, 108 N. Y. 77.

No private occupancy for whatever time, either adverse or permissive, vests a title inconsistent with the public use. *Stevenson's App. (Pa.)* 8 Cent. Rep. 249.

No title can be acquired against the public by user alone, or loss to the public by nonuser. *Ibid.*

An acquired public right to any part of a road cannot be lost by negligence of public officers. 9 L. R. A.

REPORT from the Supreme Judicial Court for York County of an action brought to recover damages for an alleged trespass by defendants upon plaintiff's land. *Judgment for defendants.*

The facts sufficiently appear in the opinion. *Messrs. C. S. Strout, H. W. Gage and C. A. Strout* for plaintiff.

Mr. Hampden Fairfield for defendants.

Walton, J., delivered the opinion of the court:

The defendants, acting in behalf of their town, widened the street in front of the plaintiff's hotel at Old Orchard, and built a sidewalk. She claims that in so doing they did not keep within the limits of the street, but extended it onto her land, and she has sued them in an action of trespass for breaking and entering her close.

We do not think the action is maintainable. We think the defendants did keep within the limits of the street. The street was laid out three rods wide; and we have the testimony of one of the selectmen by whom it was laid out, and of others who have assisted in building it, and of others who have always known it, that the widening is within its limits as originally located. And we have other important evidence. It appears that, when the plaintiff's grantor caused the land to be surveyed into building lots, the surveyor placed the hubs by which her lots were bounded on the line within which the defendants kept in widening the street; and, if limited to that line, the plaintiff will get the full quantity of land and the full length of lines mentioned in her deed. It is possible that this line may be wrong, but we think the evidence is overwhelmingly in favor of its accuracy.

But the plaintiff claims that the location was not legal, and that only so much of its width as was actually prepared for travel, and had been so used for twenty years or more at the

Humphreys v. Woodstown, 7 Cent. Rep. 109, 48 N. J. L. 588.

Where the public have acquiesced in the partial occupation of a highway by adjoining owners for more than twenty-five years, a criminal indictment for obstruction will not lie. *Hamilton v. State*, 4 West. Rep. 496, 106 Ind. 361.

Merely permitting the original dedicatory to remain in possession—he at the time disclaiming hostility to the public—would not estop the public authorities subsequently to assert their title. He held by mere sufferance, and, in the absence of statutory requirements or express contract, one so holding is not entitled to notice to surrender possession. So, also, if his possession was unlawful, he was a mere trespasser, and not entitled to such notice. *Lee v. Mound Station*, 6 West. Rep. 329, 118 Ill. 304.

Where the boundary of a highway has become uncertain, and a vote is passed directing commissioners to adjust it, the town is not estopped to deny a party's alleged title to lands embraced within the new boundary, by the proceedings had in accordance with such vote. *Gaylord v. King*, 3 New Eng. Rep. 96, 143 Mass. 405.

The rule that a way shall be discontinued unless opened within six years from the time allowed therefor does not apply to a new way laid out over an old one. Traveling on the old way is traveling on the new. *Heald v. Moore*, 4 New Eng. Rep. 203, 79 Me. 271.

time of the widening, could then be held for a street.

We do not think this proposition can be maintained. It was long ago held, in a very able opinion by *Chief Justice Shaw*, that, where a way is established by adverse use alone, a jury might be justified in finding that the way extended beyond the part wrought and actually used for travel, and might include land which by reason of its formation or the existence of obstacles could not have been used for travel. *Sprague v. Waite*, 17 Pick. 809.

Still, we do not doubt that it is generally true that, when an easement of any kind is obtained by adverse use alone, its extent must be measured by its use. But this rule does not apply to ways which have commenced under an actual and a recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law. In such cases, the use is presumed to be co-extensive with the location, precisely as possession under an invalid deed is presumed to be co-extensive with the land purporting to have been conveyed by it. This result is sometimes reached by the presumption of a dedication, and sometimes by the presumption that the proceedings were all regular.

In this State the latter mode has been adopted. Thus, in *Gibbs v. Larrabee*, 87 Me. 506, where the records of the town failed to show a compliance with all the requirements of the law, still, inasmuch as the location had been acquiesced in for a long series of years, the court held that an inference might fairly be drawn that all the requirements of the Statute had in fact been complied with, and sustained the location on that ground. The point to be particularly noticed in this decision is the fact that it was the way originally located that was sustained, not such a way merely as had been used. It is the location *de facto* that by the

lapse of time ripens into a location *de jure*. To rest such a result on the presumption of regularity is to rest it on a fiction; and to rest it on the presumption of a dedication would be equally so. We think it would be better to avoid these unnecessary fictions, and let the result rest on a positive rule of law, which, like all Limitation Laws, has the public good and the public convenience for a foundation. The rule of law is this: that after the lapse of twenty years, accompanied by an adverse use, a location *de facto* becomes a location *de jure*. This way, at the time of the alleged trespass, had been located and opened and used by the public for more than forty years. The location *de facto*, if not in all particulars regular, had become by lapse of time and use, and the acquiescence of all parties adversely interested, a location *de jure*. "Where," said *Chief Justice Shaw*, in the case cited, "a tract three or four rods wide, such as is usually laid out as a highway, has been used as a highway, although twenty or thirty feet in width only have been used as a traveled path, still this is such a use of the whole as constitutes evidence of the right of the public to use it for a highway, by widening the traveled path or otherwise, as the increased travel and the exigencies of the public may require." This seems to us to be sound law as well as good sense; and we hold in this case that the public is entitled to a way three rods wide, as originally laid out, notwithstanding the wrought part of it, and the part actually used by travelers, may have been very much less than that; and that the traveled path may from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out. And, in this case, the evidence satisfies us that in widening the traveled path, and building the sidewalk, the defendants did keep within the limits of the way as originally laid

How. (Mich.) Stat., § 1315, providing that all roads that have been used as highways for ten years or more shall be deemed public highways, and shall be made four rods in width, authorizes the highway commissioner to widen a highway, where the return shows that it has been a public highway for thirty years, and is not four rods wide. *Dewey v. Kaner* (Mich.) April 25, 1890.

Right to use not lost by nonuser.

Neither the character as a public highway, nor the right of the public at all times to use it as such, can be lost by nonuser, where the highway was laid out and established by an Act of the Legislature. *Com. v. McNaughten*, 131 Pa. 55.

Under the California Political Code a public way is not discontinued by nonuser for less than five years. *McHose v. Bottyer*, 81 Cal. 123.

If nonuser of a road may work an abandonment of it, the nonuser must be shown to have extended over a period of twenty-one years. *Kelly N. & I. Co. v. Lawrence F. Co.* 5 L. E. A. 653, 46 Ohio St. 544.

Widening Highway.

Where an order is made merely widening a highway already existing, the method to be pursued for the removal of fences thereby brought within the limits of the highway is that prescribed by Rev. Stat., § 1284; and proceedings cannot be taken under Rev. Stat., §§ 1280, 1281, to charge the owner with the § L. R. A.

penalty for not removing an encroachment. *State v. Clark*, 67 Wis. 220.

An order confirming the report of the highway commissioners in respect to widening a road is not an adjudication that the road widened is a public highway, so as to estop the owner of the lands over which it passes from asserting that it was never dedicated to, or adopted by, the public. *Speir v. New Utrecht*, 81 N. Y. S. R. 414.

In a proceeding to widen a public highway, under How. Stat., § 1315, an objection that the application and notice and proof of service were not present on the hearing will not be sustained where it is shown that the commissioner informed the person objecting that he would go for the original papers if desired, but the party said that it would be unnecessary, and such party had sent and inspected them before the hearing. *Dewey v. Kaner* (Mich.) April 25, 1890.

Action for trespass on land.

In an action for a trespass upon land which the defendant claimed was a public street, it was not error to admit in evidence the plat of the village, merely to show the situation of the premises, and to enable the jury to get a better idea of the locality. *Eastland v. Fogo*, 66 Wis. 133.

Where the issue was whether defendant had a right of way by prescription, the burden of proof was on defendant to prove the alleged right of way. *Black v. O'Hara*, 2 New Eng. Rep. 563, 54 Conn. 17.

out, and were not, therefore, guilty of a trespass upon the plaintiff's land.

One other point remains for consideration. The plaintiff's counsel claim that there is a variance between the defendants' pleadings and the proof, the defendants having averred in their pleadings that the way in question was a highway, while the proof is that it was a town-way. We do not think this point is open to the plaintiff. It is generally considered, when a case is submitted to the law court on a report of evidence, or on an agreed statement of facts, that all technical questions of pleading are waived, unless the contrary appears. *Gartiner v. Nutting*, 5 Me. 140; *Moore v. Philbrick*, 32

Me. 102; *Machias Hotel Co. v. Fisher*, 56 Me. 321.

In this case it was agreed that, if the court should find that the defendants were justified in what they did, judgment should be ordered in their favor. We do so find. Under this agreement and this finding, we think the defendants are entitled to the judgment stipulated for, without regard to the pleadings, no question of pleading appearing by the report to have been raised or reserved in the court below.

Judgment for the defendants.

Peters, Ch. J., and Virgin, Emery, Foster and Haskell, JJ., concurred.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Godhardt EISNER *et al.*, *Piffs. in Err.*,
v.

John HEILEMAN.

(....N. J. Eq.....)

*A judgment debtor cannot defeat his own fraudulent conveyance by purchasing through another the property conveyed under a subsequent judgment against himself.

(June 31, 1890.)

ERROR to the Circuit Court for Camden County to review a judgment in favor of plaintiff in an action brought to set aside an alleged fraudulent conveyance and to recover possession of the land thereby conveyed. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. T. J. Middleton and John W. Wescott, for plaintiffs in error:

A conveyance originating in a plan to delay creditors is just as good between the parties as though no design to hinder or delay creditors ever existed.

Smith v. Espy, 9 N. J. Eq. 160; *Eyre v. Eyre*, 19 N. J. Eq. 42.

The equitable estoppel that a fraudulent deed will be good as between the parties applies to privies in estate.

Denn v. Lecony, 1 N. J. L. 111; *Tomlin ada. Co.*, 19 N. J. L. 82.

A plaintiff cannot recover at law in any case where, upon the same evidence of actual or constructive fraud, a court of equity would decree against him.

6 Wait, Act. and Def. 817; *Overshiner v. Wischart*, 59 Ind. 125; *Deatly v. Murphy*, 8 A. K. Marsh. 474; *Crosier v. Acer*, 7 Paige, 187, 4 N. Y. Ch. L. ed. 97; *M'Clure v. Purcel*, 3 A. K. Marsh. 65; *Flours v. Sproule*, 2 A. K. Marsh. 57.

Mr. P. V. Voorhees for defendant in error.

Van Syckel, J., delivered the opinion of the court:

This action was instituted in the Camden Circuit Court, by Heileman, to recover possession of lands in the County of Camden. The

*Head note by VAN SYCKEL, J.

9 L. R. A.

plaintiff derived his title to the lands through a deed from the sheriff to him dated February 9, 1886. The sheriff sold by virtue of an execution issued upon a judgment recovered March 27, 1882, by one Witham, against Frederick Fisher. The defendant's title rested upon a deed made by said Frederick Fisher to Francis Frey shortly prior to the rendition of said judgment. Heileman, in support of his action, showed on the trial below that the conveyance by Fisher to Frey was for the purpose of hindering and delaying Witham in the collection of his said debt, and therefore void. In this aspect of the case, no doubt could be entertained of Heileman's right to recover. But on the trial below Frey offered to show that Heileman purchased at the sheriff's sale, for and on behalf of Fisher, the fraudulent debtor, and that, although the sheriff's deed was made to Heileman, the consideration money was furnished by Fisher to Heileman, who held the title for Fisher. This evidence was overruled by the trial judge, and thereupon judgment was recovered by Heileman.

I am of opinion that there was error in excluding this evidence. In determining the competency of the proposed defense, we must regard Heileman and Fisher as one and the same person. This, then, was the posture in which the offered evidence would have presented the case. Fisher, in the name of Heileman, was attempting to overthrow a prior title derived from himself, by setting up his own fraud. Frey's title was paramount according to date, and it could not be postponed to the title acquired through the sheriff's deed only by showing Fisher's fraud. As against Fisher, the conveyance by him to Frey is good. Fisher would have no standing in a court of equity to put aside his own deed, nor could his fraudulent grantee appeal successfully to such a tribunal to lend him its aid in resisting any proceeding which Fisher might institute in a court of law. It is against the policy of the law to permit the fraudulent debtor to regain the property which he has attempted to put beyond the reach of the creditor. Therefore, neither in a court of law nor equity is he permitted to set up his own fraud in avoidance of the deed which stands in his way. If the scheme resorted to in this case could prevail, the effect of this salutary rule for the suppression of fraud will be

greatly diminished, and the fraud-doer will experience little difficulty in dispossessing his fraudulent grantee. In consequence of the attempted fraud, the law will regard this transaction as if no sale had been made under the judgment, and as if the fraudulent debtor had paid his money through Helleman in satisfaction of his just obligation. No valid title could pass to the debtor, nor to Helleman, who stood for him, by this device conceived in fraud on his part. The legal title cannot prevail which has its inception in a contrivance which the law condemns. It comes from a tainted source.

Mulford v. Tunis, 35 N. J. L. 256, is relied upon to support the plaintiff's case. The cases differ in this material respect: In *Mulford v. Tunis* the fraudulent debtor's lands were sold under a bona fide judgment against him to one

Pierson, who had no complicity with him. A valid legal title passed to Pierson, which was superior to the title of the debtor's fraudulent grantee. The supreme court held that the title thus acquired by Pierson, which was untainted by fraud, could not be lost by his attempt to transmit it to Tunis, his grantee, for a consideration paid by the judgment debtor. The title of Mulford, the fraudulent grantee of the debtor, was superseded and defeated by the operation of the sale and conveyance under the judgment to Pierson. In the case in hand, the fraud of the debtor rendered the sheriff's sale inoperative to pass the title for his benefit. The law leaves him in the position he made for himself by his fraudulent conveyance. The judgment below should therefore be reversed.

Reversed unanimously.

ALABAMA SUPREME COURT.

Savannah WILDER, *Appt.*,

v.

Sidney B. WILDER *et al.*, *Respts.*

(....Ala....)

A married woman is estopped to enforce a vendor's lien on land sold and conveyed by joint deed of herself and husband, when they were both active in making the sale, and by their declarations and conduct induced a third person to advance a part of the purchase money to the vendee under an agreement that he should have a first mortgage on the premises as security therefor, and that a second mortgage would be taken for the unpaid installments of the purchase money.

(May 6, 1890.)

A PPEAL by complainant from a decree of the Chancery Court for Lowndes County in favor of defendants in an action brought to enforce an alleged vendor's lien on certain land, and to have a mortgage given by the vendee declared to be subordinate thereto. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Clements & Brewer*, for appellant:

It being shown that the purchase money was not paid, the burden is on defendant to show that the vendor's lien was waived, and "if the waiver remains in doubt then the lien must be held to attach."

Tedder v. Steels, 70 Ala. 347; *Owen v. Bankhead*, 76 Ala. 143.

Among parties *sui juris* a waiver is the intentional relinquishment of a known right, and there must be both knowledge that the right exists and the intention to relinquish it.

Harris v. Home Ins. Co. 32 Conn. 21.

The telegram accepting the final proposition was sent by complainant's husband without consulting her. The bailee of the

escrow could not alter the terms of the contract so as to subordinate or waive complainant's rights.

Arrington v. Burton, 19 Ala. 114; *Robinson v. Murphy*, 69 Ala. 543.

A special agent does not bind his principal when he exceeds his powers.

McMillan v. Wooten, 80 Ala. 263; *Powell v. Henry*, 27 Ala. 612.

And it is the business of the person dealing with him to examine his authority.

Paley, Agency, *202; 2 Kent, Com. 620; *Wheeler v. McGuire*, 86 Ala. 398.

Authority to an agent to receive payment does not import power to release any security for the debt on part payment.

McHany v. Schenk, 88 Ill. 357; *Herring v. Hottendorf*, 74 N. C. 588; *Lang v. Wilkinson*, 57 Ala. 261; Benjamin, Sales, 4th Am. ed. 956.

Nor could the husband make an alteration of the contract in any way.

Rogers v. Peebles, 73 Ala. 529; *Ninsinger v. Norwood*, 73 Ala. 277; *Drake v. Glover*, 80 Ala. 382; *Williams v. Auerbach*, 57 Ala. 90; *Moses v. Noble*, 86 Ala. 407.

Even if the husband's telegram binds complainant, there is absolutely nothing in its "admissions" that waives her lien, and nothing inconsistent with her contract.

Ware v. Cowles, 24 Ala. 446; *Bailey v. Trammell*, 27 Tex. 317.

The taking of a mortgage on complainant's land back to her as security simultaneously with the delivery of the escrow left not a moment's interval for the intrusion of a prior or higher equity (*McRae v. Newman*, 58 Ala. 529); and she had three months in which to record the mortgage.

Code 1876, § 2166.

The attempted waiver of her rights and lien inserted in the return mortgage, not being by complainant's direction, assent or intention, would be an excess of the powers of the bailee or agent, and void as to the excess.

2 Kent, Com. § 619.

Such waiver was a material alteration of the contract, which would vitiate the whole if done by either of the parties to it.

Toomer v. Rutland, 57 Ala. 379.

NOTE.—Estoppel, as applied to married women.

See notes to *Speier v. Oppen* (Mich.) 2 L. R. A. 347; *Cook v. Walling* (Ind.) 2 L. R. A. 789. And see *Central Land Co. v. Laidley*, 3 L. R. A. 336, 32 W. Va. 104; *Dobbin v. Cordiner*, 4 L. R. A. 338, 41 Minn. 165; note to *Long v. Crossan* (Ind.) 4 L. R. A. 732. 3 L. R. A.

Acts *in pais* affect a married woman only when she is actively deceptive and the other party is ignorant of the facts.

Story, Eq. Jur. §§ 885, 886; *Smyth v. Oliver*, 81 Ala. 89; *Waddell v. Weaver*, 42 Ala. 298; *Blythe v. Dargan*, 68 Ala. 870; *Stoudenmire v. Delardelaben*, 85 Ala. 85; *Williams v. Baldrige*, 66 Ala. 828; *Bemis v. Cull*, 10 Allen, 512.

If complainant knew of the intrusion of defendant Mortgage Company into the transaction, her silence was not fraudulent, for they knew all the facts, and could not be misled or deceived.

Story, Eq. Jur. § 886; *Steele v. Adams*, 21 Ala. 584; *Hutchins v. Hebbard*, 84 N. Y. 24; *Pounds v. Richards*, 21 Ala. 424; 8 Brickell, p. 448, §§ 35, 36.

The purchase money has not been paid to complainant, and defendants had actual and constructive knowledge of this fact when they loaned money to S. B. Wilder on it.

Foster v. Stallworth, 62 Ala. 547; *McRae v. Newman*, 58 Ala. 529.

Retention of the partial payment was not ratification of the altered contract.

Wilkinson v. Williamson, 76 Ala. 163.

Messrs. Webb & Tillman for the Mortgage Company, respondent.

Somerville, J., delivered the opinion of the court:

The controlling question in this case involves the doctrine of equitable estoppel, or estoppel *in pais*, in its application to a married woman, where she appears as a complainant in a court of equity, seeking affirmatively to enforce a right inconsistent with her previous conduct, upon which one of the defendants in the suit has relied and acted. The subject is one in regard to which there is no little conflict of authority, and the magnitude of its importance grows with the changed policy of modern legislation, removing to a great extent the iron-clad disabilities of married women imposed by the rules of the common law.

The specific question here involved is whether a married woman is estopped to enforce a vendor's lien on land sold and conveyed by joint deed of herself and husband, in due form, prior to the Code of 1886, when she and her husband were active in making the sale, and by declarations and conduct induced a third person to advance to her vendee a part of the purchase money, with the understanding that her lien should be waived in favor of such person. In other words, if she agrees to have secured the unpaid installment of her purchase money on the land by a second mortgage, subordinate to a first mortgage of a third person, who, on the faith of such superior security, advances the money to her vendee to enable him to pay the first installment to her, can she afterwards repudiate this waiver of her vendor's lien, and enforce it as a prior lien over this other incumbrance, the superiority of which she had admitted, and on the faith of which admission she procured the money? We may add that the transaction is conceded to be governed by the law as it existed under the Code of 1876.

This court has uniformly held that the doc-

trine of estopped *in pais*, by conduct or admissions, cannot, when unaccompanied by fraud, be invoked against married women, so as to proclude them from denying the validity of conveyances of their statutory separate estates which do not conform to the requirements of the Statute governing the mode of its alienation. This prescribed mode, under the Code of 1876, was by the joint deed of husband and wife, attested by two witnesses, or acknowledged in due form. Code 1876, §§ 2707, 2708.

The reason upon which these decisions rest is that the Statute prescribes and restricts the mode of alienation by married women of their separate estates; and to allow title to be conferred by equitable estoppel would introduce a new mode of alienation, different from that thus prescribed, and would result in sanctioning indirectly the conveyance by *femes covert* of their property, when they were prohibited by statute from doing directly the same act in the mode attempted. *Canty v. Sanderford*, 37 Ala. 91; *Alexander v. Saulsbury*, Id. 375; *Drake v. Glover*, 30 Ala. 890; *Harden v. Darwin*, 77 Ala. 472; *Scott v. Battle*, 85 N. C. 184.

So it has been held in a former decision of this court that, where a husband and wife conveyed lands, with covenant of warranty, to which they had no title, the wife would not be estopped from setting up against the grantee a title to such land afterwards acquired by her. *Gonzales v. Hukil*, 49 Ala. 280.

The act of warranty, being purely contractual, could not operate by way of estoppel, because a married woman then labored under a legal disability to make such a covenant. But there are decisions of other courts opposed to this view. *Nash v. Spofford*, 10 Met. 192.

In the case of *Drake v. Glover*, *supra*, where the property of the wife was held not to be governed as to its mode of transfer by the Statute, because it was not her statutory separate estate, and might therefore be conveyed otherwise than by the joint deed of the husband and wife, it was held that the fraudulent silence of the wife when her personal property was sold in her presence by her husband would estop her from afterwards repudiating the sale. But her mere silence, unaccompanied by fraud, would have no such effect.

In *Strong v. Waddell*, 56 Ala. 471, a married woman who had purchased land, and executed, jointly with her husband, a mortgage as security for the payment of the purchase money, was held to be estopped from denying the title of her vendor, or to interpose her coverture in bar of the foreclosure of the mortgage. The practical effect of such a transaction is that the vendee takes the property burdened with the mortgage, being an estate on condition, to become absolute only on the payment of the purchase money. *Marks v. Coates*, 53 Ala. 499.

The estoppel is against claiming the estate, and repudiating the incumbrance by which it is burdened.

In *McCaas v. Woolf*, 42 Ala. 889, the doctrine of equitable estoppel was applied to a

married woman so as to preclude her from asserting title to certain personal property which the husband, under the rules of the common law, had reduced to possession and suffered to be sold, and which she, after his death, claimed by right of survivorship.

Mr. Bigelow, in his work on Estoppel (page 490), asserts that the weight of reason and authority confines the doctrine, when applied to married women, to cases of "pure tort," and excludes from its operation all cases where the "action sounds in contract."

Mr. Pomeroy, after calling attention to the conflict of authority on this subject, observes: "The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in States where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation, there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or maintain a defense." And he adds: "There are, however, decisions which hold, in effect, that, since a married woman cannot be directly bound by her contracts or conveyance, even when accompanied with fraud, so she cannot be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct, upon which the other party has relied. These decisions seem to be in opposition to the general current of authority." 2 Pom. Eq. Jur. § 814, and cases cited in note.

There are many cases, both English and American, which support this view of the law. *Boyd v. Turpin*, 94 N. C. 187; *Hodge v. Powell*, 96 N. C. 64; *Shivers v. Simmons*, 64 Miss. 52, 28 Am. Rep. 372, and note, 374-377; *Bradley v. Snyder*, 58 Am. Dec. 564, note, 569; *Lowell v. Daniels*, 61 Am. Dec. 448, note, 453; *Nash v. Spofford*, 48 Am. Dec. 426, note, 426; *Besson v. Eceland*, 26 N. J. Eq. 471; *Connolly v. Branstler*, 3 Bush, 702; 1 Story, Eq. Jur. § 885; Kelly, Cont. of Married Women, chap. 6, § 4; 2 Pom. Eq. Jur. § 814, and cases cited.

A vendor's lien for unpaid purchase money is not such an interest in land as to require an instrument in writing in order to waive or alienate it. It is a mere incident of the contract of sale implied by law, and it may be waived or abandoned by any suitable act or oral declaration showing an intention to do so on the part of one competent to contract. *Woodall v. Kelly*, 85 Ala. 868; *Ramage v. Toules*, Id. 588.

A married woman, as we have said, was at the time of this transaction invested with the power, under the laws of Alabama, to sell and convey her separate estate by the joint deed of herself and husband, duly attested or acknowledged. Code 1876, §§ 2707, 2708.

It is justly argued that this power to sell

embraces the power to sell for cash or on credit, or partly for both cash and credit. It includes the authority to retain the legal title as security for the payment of the purchase money, or to convey the legal title and take in return a mortgage from the vendee to secure it, or to take personal security on the notes for the purchase money. In other words, she may sell, and fix the terms of sale, according to any of the modes sanctioned by common usage. It is our judgment that she may, as an incident to this right to sell, waive her right to enforce her vendor's lien, if not by mere oral agreement, at least by conduct which would preclude her from subsequently asserting such lien upon the principle of equitable estoppel. If she could be estopped in no instance, the morality of the law would be placed upon a very low plane, and the disability of coverture, instead of being, as it ought to be, a shield for her protection against legal wrong, would become a sword of injustice for the license of fraud. While, therefore, a married woman may not always be estopped to deny her capacity to contract, especially so as to convey her property in a mode prohibited by law, she may be estopped by any positive act of fraud, as a person *sui juris* would be. Whether, in any case not involving a transfer of title to property in a mode prohibited by law, she may be estopped by acts *in pais*, unaccompanied by fraud or other tort, we do not now decide.

The application of these principles to the facts of this case do not seem to us to be attended with any great difficulty. The complainant, Mrs. Savannah Wilder, a resident of Texas, and a married woman, agreed to sell to the defendant Sidney B. Wilder, her brother-in-law, certain lands in Lowndes County, Ala. The correspondence was conducted on the one hand through the complainant's husband, at Bartlett, Tex.; but she asserts in her testimony that she in fact supervised this correspondence, and controlled the terms of the trade. It was conducted on the other through the defendant Sidney Wilder and H. C. Semple, Esq., practicing attorney at Montgomery, Ala., who acted for the complainant. It was first agreed that the vendee should pay as much as \$4,000 cash, and \$500 on credit, for the land. The deed was drawn by Semple, sent to Texas, and, being executed in due form, sent back to him for delivery on compliance with the terms of sale. The consideration was recited in the deed, but was not stated to have been paid. The vendee, Sidney Wilder, was to obtain the money which he expected to pay from the American Freehold Land Mortgage Company of London, which had an agent in Alabama, so as to comply with the law as to foreign corporations doing business in this State, but did all business, in fact, through an agency in New York. To secure the loan from this Company, he was to give a first mortgage on the land. The Company declined to advance him more than \$3,500. Of this sum, he needed all but \$2,000 to carry on his farming business, and pay other expenses. He thereupon proposed, through Semple, to modify the contract so as to pay Mrs. Savannah Wilder only \$2,000 cash, and

to secure the balance by a second mortgage. This was communicated to the complainant by letter to her husband, and they authorized the delivery of the deed on these terms, telegraphing Semple to that effect. The deed was delivered accordingly, a second mortgage being taken to secure the deferred payments, which contained the recital that it was to be subordinate to the mortgage given to the London Company. This mortgage was received by Semple as the agent of the complainant. The cash payment was transmitted to her, and she received it with a knowledge of the facts. We need only say that the testimony in the case satisfies us that, when the complainant received this money, she either knew, or was charged with notice of, the fact that her vendor's lien was abandoned by the taking of this second mortgage subordinate to that of the American Freehold Land Mortgage Company of London, which advanced the money on the faith of the assurance that its mortgage was to be superior to hers. The deed executed by the complainant and her husband to Sidney Wilder, and the mortgage executed by the latter to his vendors, reciting that it is subordinate to the first mortgage of the London Company, being contemporaneously executed, would in equity constitute but one transaction. "The two are read together, as if they were but parts of a common instrument." *Marks v. Cowles*, 53 Ala. 502, 503, *supra*.

As matter of contract, therefore, the vendor's lien would seem to be waived. But, apart from this, these papers contain within themselves a positive representation that the lien is waived by the declaration that a second or subordinate mortgage was taken to secure the unpaid purchase money. The complainant, as we have said, had notice of this fact, and authorized the transaction in order to induce the London corporation to advance the money, which was to come to her through her vendee, Sidney Wilder. The Company did act on it, and was drawn in to lend its money on the faith of its truth. To allow the complainant now to repudiate the transaction, by gainsaying the truth of the fact that such lien had been waived, as the papers in question import, would be a fraud on this corporation which equity and good conscience ought not to permit. In our opinion a court of equity ought to prevent the complainant from affirmatively asserting the alleged priority of this lien, as she now attempts to do, in contravention of her conduct, upon which the defendant Company has relied, and been induced to act. 2 Pom. Eq. Jur. §§ 814, 815; *Bradstreet v. Clarke*, 12 Wend. 602.

The decree of the chancellor subordinates her lien for the purchase money to the first mortgage of the defendant Corporation. There is no error in this decree of which she can take advantage on this appeal, and the decree is accordingly affirmed.

TENNESSEE SUPREME COURT.

EAST END STREET R. CO., *Appt.*,

v.

DOYLE.

(....Tenn.....)

1. A railway whose cars are propelled by a dummy steam-engine and used for passengers only will constitute a burden or servitude, if operated on a public street or highway, in addition to that contemplated in the original dedication of the land to public use, for which

the owners of the fee are entitled to compensation.

2. A charter from the State, and a contract with a city and county authorizing the construction and operation of a railway in a street, cannot authorize such use without compensation to the owner of the fee.

(May 3, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Shelby County in

NOTE.—Use of streets in municipalities.

The first use of a street is for the ordinary travel over it. The right of a railroad to operate its trains across it is subordinate to the use of the general public. *H. & T. C. R. Co. v. Carson*, 66 Tex. 845.

Abutting owners have such an easement in the street as to enable them to insist, as against the municipality, that it should be devoted to such use only as was consistent with its purposes as a public street. *Hussner v. Brooklyn City R. Co.* 114 N. Y. 437; *Story v. New York R. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan R. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 233.

Where the fee of the land was not taken, but an easement only, for the purposes of the highway, the owners of the fee may enjoin the use of the land for a railway. *Washington Cemetery v. Prospect Park & C. I. R. Co.* 7 Hun, 655. See also *Same v. Same*, 68 N. Y. 591.

The dedication of land for street purposes does not authorize the Legislature to permit construction of a steam railroad thereon, without compensation to the owner of the fee. *Fanning v. Osborne*, 9 L. R. A.

3 Cent. Rep. 453, 102 N. Y. 441; *Chamberlain v. Elizabethport S. C. Co.* 4 Cent. Rep. 370, 41 N. J. Eq. 43.

The Legislature cannot confer upon individuals or private corporations acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. *Pennsylvania R. Co. v. Angel*, 5 Cent. Rep. 86, 51 N. J. Eq. 316. See note to *Kiel v. Jackson* (Colo.) 6 L. R. A. 254.

A corner-lot owner is an owner of property abutting on a street occupied by a railroad, where a railroad crosses diagonally the junction of the two streets, and as such abutting owner is entitled to prepayment of compensation, under Iowa Code, § 464. *Enos v. Chicago, St. P. & K. C. R. Co.* 73 Iowa, 23.

The fact that a railroad embankment is above high water, and that a lot abutting on the street in which the road is built is below it, is no defense to a claim for damages to the lot, although it may mitigate the damages. *Idol*.

favor of plaintiff in an action brought to recover damages for the alleged wrongful construction and operation of a railway on the street in front of his property. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Myers & Sneed and Turley & Wright for appellant.

Messrs. F. T. Edmondson and J. P. Houston, for appellee:

Where the fee is in the abutter, the occupation of the street by a steam railway is an additional servitude, and is such taking of private property as requires compensation.

Railroad v. Bingham, 87 Tenn. 526, and cases cited; *Smith v. Street Railroad*, Id. 632, and cases cited, Thomp. Cas. (Tenn.) 253.

He is entitled to compensation for a use which was not contemplated when the street was condemned or dedicated.

9 Am. & Eng. Encyclop. Law, 409.

Dedication gives nothing more than a right of the public to pass and repass, and the municipal or state authorities cannot authorize the taking of a highway so dedicated for railway purposes without consent or compensation.

2 Wood, Railway Law, 738-740, citing *Story v. New York R. Co.* 90 N. Y. 126, 43 Am. Rep. 146.

Taking and using a street for a railroad is not one of the modes of enjoying the public easement, but imposes additional burdens requiring compensation.

2 Wood, Railway Law, 724, 740, note 1; *Mills*, Em. Dom. § 204; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 64, 31 Am. Rep. 310; 6 Am. & Eng. Encyclop. Law, pp. 552, 553, and cases cited; *Railroad v. Bingham*, 87 Tenn. 522; 1 Rorer, Railroads, 518; 2 Dillon, Mun. Corp. §§ 703, 724, 725.

The test is whether or not the burdens upon the estate of the owner of the fee are increased by such change, in a manner not contemplated by the condemnation of the land for the original purpose.

2 Wood, Ry. Law, 722.

Caldwell, J., delivered the opinion of the court:

Action by Doyle, an abutting lot owner, to recover damages from the East End Dummy

Railway Company for the alleged wrongful and unlawful construction and operation of its railway line along and upon the highway in front of his property. Verdict and judgment for plaintiff, and appeal in error by defendant.

On the trial below the defendant requested the trial judge to instruct the jury as follows: "If the jury find that the defendant constructed its road through a part of the city to a point five miles into the country, in accordance with its contract with the city and county, its cars being propelled by steam-motor, and used only for carrying passengers, stopping at street crossings to take on passengers, then the court charges you that its construction is not an additional servitude upon the streets or public roads from that contemplated in the dedication." The court refused to give this instruction, and his action in that behalf is assigned as error.

This presents the question reserved in the *Smith Case*, 87 Tenn. 626, namely, whether a railway whose cars are propelled by dummy steam-engine, and used for passengers only, is a burden or servitude on a public street or highway in addition to that contemplated in the original dedication of the land to public use. The reservation was made in that case because the plaintiff therein did not own the ultimate fee in the street, and was not, therefore, in an attitude to be affected by a decision of the question. For reasons stated in that case and in the *Bingham Case*, to be hereafter cited, an abutting land owner whose line is in the side, and not the center, of the public highway, is not entitled to compensation for the imposition of an additional burden on the ultimate fee. Not owning the fee, he can justly claim no compensation for its impairment by a new burden imposed upon it. That is a matter for the owner of the estate out of which the public easement was originally carved, and not for the abutting owner, whose title-papers take him only to the side of the highway, as was true in the *Bingham* and *Smith Cases*. In the present case the plaintiff's line is in the center of the highway, and to that line he owns the ultimate fee; that is, he has such ownership of the soil that he may resume

In Iowa, railroad tracks cannot be laid in a city street until abutting owners have had their damages assessed and have received payment, and until the city has given consent, under Iowa Code, § 464. *Ibid.*

The operation of a street railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use, only, of the street as a public highway, and affords to the owner of abutting property, though he may own the fee of the street, no legal ground of complaint. *Williams v. City Electric S. R. Co.* 41 Fed. Rep. 433.

The construction and operation of a street railroad is not a new use of a street, so as to give the owner right to additional compensation. *Briggs v. Lewiston & A. H. R. Co.* 4 New Eng. Rep. 542, 79 Me. 353.

The fact that a proposed street has been located on a city plan, with a view to be fully opened in the

future, gives a railroad company no power to take and occupy the unopened portion without first making compensation to the owners of the land on which the street is located, although the councils have assented and a bond has been given to protect the city, etc. *Beidler's App.* (Pa.) 23 W. N. C. 451.

That the abutting owner is entitled to compensation, for construction of a railroad in a highway, as for a servitude, even without proof of special damages, see *note* to *People v. Newton* (N. Y.) 8 L. R. A. 175.

A city by virtue of its right merely to lay out streets, alter and repair them, etc., cannot grant the right to construct railroads thereon. See *note* to *Ottawa, O. C. & C. G. R. Co. v. Larsen* (Kan.) 2 L. R. A. 59.

City ordinance authorizing construction of railway in streets. See *note* to *People v. O'Brien* (N. Y.) 2 L. R. A. 255.

Grant of franchise to street railroads. See *notes* to *People v. Newton*, *supra*; *Arbans v. Wheeling & H. R. Co.* (W. Va.) 5 L. R. A. 371.

absolute possession and dominion of it to the center of the highway whenever the original use for which the highway was set apart shall be finally abandoned. The appropriation vested the public with only such part of his fee-simple estate as was necessary to the full enjoyment of the use then in contemplation. Consequently, anything which diverts the highway from that use, or applies it to another or different use, is the imposition of an additional burden on the reserved estate of the owner, and constitutes a taking of his property for which he may demand and receive just compensation. So, then, the proposition contained in the request for special instruction is a material one in this case, and should have been given or refused, as it may be sound or unsound in law.

It is well settled that an ordinary steam or commercial railway is, and that an ordinary street railway operated with horses is not, an additional servitude on the ultimate fee in the public street or highway, the former being a new and different use, while the latter is but an improved and consistent mode of enjoying the original or ordinary use. *Railroad v. Bingham*, 89 Tenn. 522; *Smith v. Street Railway*, 84 Tenn. 326, and authorities cited.

The distinction between the use by the commercial railway, and that by the horse railway, is so wide and plain that it needs no further comment or illustration. Confessedly, the railway involved in this case is on the line between the two; the equivalent of neither, but partaking largely of the nature of both. Like those upon the commercial railway, its cars are propelled by a steam-engine, with its unavoidable smoke, noise and vibration, though in a less degree; and, like the horse-car line, it transports passengers only, stopping at short intervals upon the highway to take them on and let them off, while the commercial railway carries both passengers and other freight, receiving and discharging them at regular depots further apart. The size, weight and speed of appellant's trains, consisting usually of a small "boxed" engine and two coaches, are much less than those of the commercial railway trains; but, at the same time, its trains are much longer, heavier and more rapid in transit than the ordinary horse-car. Alike, the commercial railway, and that operated by the appellant, are obvious hindrances to other modes of travel and traffic rightfully enjoyed upon the public highway. Alike,

they endanger the lives and property of individuals, for whom, in the aggregate the original dedication or condemnation was made. There is a difference, it is true; but the difference is in the degree, and not in the kind, of interruption and peril. From the very nature of the case, it is perfectly manifest to our minds that the presence of appellant's track and trains is entirely inconsistent with, and a perpetual embarrassment to, the ordinary use of the public highway. It is utterly impossible to operate such a railway with such trains without greatly obstructing and rendering more dangerous other business and travel usually seen, and always allowable, on a public highway. To the extent of this obstruction, and this increase of danger by its appropriation of the highway for its own purposes, there is necessarily a diversion from and inconsistency with the original use; and to that extent the construction and operation of appellant's road is the imposition of an additional servitude upon the ultimate fee of the owners of the soil in the public highway. This does not mean that the trains of appellant are to be banished as unauthorized by law, but simply that their presence and operation in the public highway is an additional burden on the ultimate fee, for which the owner is entitled to compensation.

The charter from the State, and contract with the city and county, authorize the proper construction and use of this railway; but they do not purport to warrant the appropriation of the owner's property without paying him therefor. Even if such were their purport and intent, that could not alter the case, and would afford no sufficient answer to the plaintiff's demand, because the Constitution forbids the taking of private property for public use without just compensation. Const. art. 1, § 21.

The instruction requested was properly refused. Counsel for appellant have called our attention to the case of *Neuell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112, which we find to be an authority for the proposition requested and in conflict with the conclusion reached in this opinion. Not agreeing to the reasoning in that case, and the decision of a sister State being at most only persuasive authority, we prefer not to follow it. We have carefully considered the several other assignments of error. None of them are well taken.

Let the judgment be affirmed.

MICHIGAN SUPREME COURT.

Max E. POLLASKY *et al.*, *Appts.*,

v.

George H. MINCHENER.

(.....Mich.....)

1. A privilege as to communications by a commercial agency to those persons who

are interested in obtaining information, and to whom it is furnished upon special request, does not extend to false communications made to patrons who have no such interest in the subject matter.

2. Express malice may be inferred by a jury where a notification sheet containing false statements as to a chattel mortgage is sent out to

NOTE.—Privileged communications of commercial agency. See *notes to Bradstreet Co. v. Gill* (Tex.) 2 L. R. A. 406.
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Malice as an element. See *notes to Lovell v. Houghton* (N. Y.) 6 L. R. A. 333; *Byam v. Collins* (N. Y.) 2 L. R. A. 129.

the patrons of a commercial agency advising caution in dealing with the party alleged to have executed it, and prompt action on the part of creditors, if although the correspondent who sent the information merely advised caution in dealing and the agent who made the report to be sent out knew that the information was incorrect in one particular at least, because there was no such bank as that to which it was said that the mortgage was given, and although a request to the correspondent to investigate the matter further and report was made, the publication was made without waiting for the result thereof, and when it would seem that plenty of time had elapsed to ascertain the truth.

3. The liability of the general manager of a commercial agency in a certain district for a false publication in respect to a chattel mortgage alleged to have been given by a certain party should be submitted to the jury where the publication was made by a notification sheet sent to the patrons of the agency by the chief clerk of such manager on information sent to the manager, addressed to him in his name, without anything to indicate that it was intended for the commercial agency, and the clerk, who was authorized to open his letters and prepare such notification sheets without consulting the manager unless there was something exceptional in connection with the matter, sent out the report without consulting him.

(June 12, 1890.)

TERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are fully stated in the opinion.

Mr. Henry M. Duffield, for appellants:

The notification sheet, which was sent to all subscribers, was not a privileged communication.

Townshend, Slander and Libel, §§ 248, 415; Cooley, Torts, 1st ed. p. 217, 2d ed. pp. 254, 255; Taylor v. Church, 8 N. Y. 452; Ormsby v. Douglass, 87 N. Y. 477; Sunderlin v. Bradstreet, 46 N. Y. 188; Bradstreet Co. v. Gill, 2 L. R. A. 405, 72 Tex. 115; Beardsley v. Tappan, 5 Blatchf. 499; King v. Patterson, 49 N. J. L. 417, 8 Cent. Rep. 357; Erber v. Dun, 12 Fed. Rep. 526, 28 Am. L. Reg. N. S. 258.

In every case where a communication would otherwise be privileged, falsehood and the absence of probable cause will amount to proof of malice.

White v. Nicholls, 44 U. S. 3 How. 266, 11 L. ed. 591.

Commercial agencies must see to it that they communicate nothing that is false, and if they do they will be liable in damages to the party injured.

Johnson v. Bradstreet Co. 77 Ga. 172, 4 Am. St. Rep. 77.

Minchener had entire control of the work, R. G. Dun & Co. not interfering, and he is liable for the acts of his employees.

Wharton, Ag. §§ 537, 538.

Everyone who requests, procures or commands another to publish a libel is answerable as though he published it himself, and such a request need not be express, but may be inferred from the defendant's conduct.

Odgers, Libel and Slander, p. 164; Town-

shend, Slander and Libel, § 115; Cooley, Torts, pp. 194, 195.

For a newspaper libel, the proprietor, the editor, the printer and the author are all liable to be sued, either separately or together.

Odgers, Libel and Slander, 157; Townshend, Slander and Libel, § 167; Rez v. Gutch, Moody & M. 483; Scripps v. Reilly, 88 Mich. 10; Com. v. Kneeland, Thacher, Crim. Cas. 846; Nevitt v. Spieckemann (Pa.) 30 Alb. L. J. 56; Rez v. Walter, 3 Esp. 21; Rez v. Dover, 6 How. St. Tr. 546.

In England the acting editor is always held liable.

Watts v. Fraser, 7 Car. & P. 369, 7 Ad. & El. 223, 1 Macl. & R. 449.

The same principles prevail where the defamatory matter is published in the absence of the proprietor or editor of the publication, and without his knowledge or contrary to his orders.

Dunn v. Hall, 1 Ind. 845; Andres v. Wells, 7 Johns. 260; Bigelow, Torts, p. 168, see p. 109; Huff v. Bennett, 4 Sandf. 120; Curtis v. Mussey, 6 Gray, 261; Sheekell v. Jackson, 10 Cush. 25; Newell, Slander and Libel, p. 393; Odgers, Libel and Slander, p. 407; Philadelphia, W. & B. R. Co. v. Quigley, 62 U. S. 21 How. 202, 16 L. ed. 78.

The republisher of a libel is equally liable with the original publisher.

Townshend, Slander and Libel, 4th ed. p. 274, note, §§ 113, 115.

The act of Minchener amounted to a republication, and he is liable as a republisher.

M. Coombs v. Tuttle, 5 Blackf. 431; Stevens v. Hartwell, 11 Met. 542; Gough v. Goldsmith, 44 Wis. 262.

Messrs. Dickinson, Thurber & Stevenson, for appellee:

A case of privilege may be said to be one in which the circumstances rebut the presumption of legal malice. By legal malice is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact.

Atkinson v. Detroit Free Press Co. 46 Mich. 876.

A publication made in good faith, with a proper purpose, is privileged, even though untrue.

Whitmore v. Weiss, 83 Mich. 348; Odgers, Libel and Slander, 182.

All the authorities relied upon by plaintiff in the court below recognize the privilege of a party who, in good faith, communicates to any person defamatory matter, even though it be false, provided the party to whom the communication was made had an interest in knowing of the matter, if it were true.

See State v. Lonsdale, 48 Wis. 369; Locke v. Bradstreet Co. 22 Fed. Rep. 772; Com. v. Stacey, 8 Phila. 617; Wieman v. Mabee, 45 Mich. 484; Shurtless v. Stevens, 51 Vt. 501; Hamilton v. Eno, 81 N. Y. 116; "Count Joannes" v. Bennett, 5 Allen, 169.

Defendant neither received the communication upon which the alleged libelous publication was based, nor had any hand or part in the publication of the libel complained of; and under such a state of facts, there can be no liability upon the part of any persons

other than those who are actually parties to the publication, except such person as may have sustained the relation of master or principal to the parties actually engaged in the publication of the alleged libelous matter.

Stone v. Cartwright, 6 T. R. 411; *Blake v. Ferris*, 5 N. Y. 48; *Quarman v. Burnett*, 6 Mees. & W. 499; *Laugher v. Pointer*, 5 Barn. & C. 560; *Joslin v. Grand Rapids I. Co.* 50 Mich. 517; *Hofer v. Dodge*, 52 Mich. 878; *Huff v. Ford*, 126 Mass. 24; *Bath v. Eaton*, 57 Mich. 200; *Mecabe v. Jones*, 10 Daly, 222.

Champlin, Ch. J., delivered the opinion of the court:

The plaintiffs sued Minchener and Robert G. Dun to recover damages for a libel published by the R. G. Dun Co. Mercantile Agency, of which Minchener was the general manager of a district in Michigan, of and concerning the plaintiffs. Max E. Pollasky and Frank E. Pollasky composed the firm of Pollasky Bros., carrying on mercantile business at the Village of Alma, Gratiot County, Mich. They had been engaged in business at that place since 1882. They were in good credit, and had never filed or placed a chattel mortgage upon their property, and in carrying on their business bought mostly upon credit, and had established a business reputation for prompt payment of their bills. R. G. Dun & Co. is a mercantile agency well known in the mercantile community, and have a clientage throughout the United States estimated at 25,000 subscribers, and in the State of Michigan of about 600. The alleged libel consists in R. G. Dun & Co. sending from their Detroit office to their subscribers what is known as a "Notification Sheet," under date of February 23, 1887, which under the head of "Items of Record" "Michigan," among other items contained the following: "Alma—Pollasky Bros. Chat. Mort., \$10,000. D. G., clothing, and B. & S." This item was wholly false. R. G. Dun & Co. were nonresidents, as also was Robert G. Dun, and no service of process was had upon him in this suit, and he did not appear to the action. Minchener was general manager of a district of the Michigan business, and was located at Detroit. He was paid a salary, and a further compensation for his services, depending upon the amount of business done in Michigan. He had authority to employ clerks and to discharge them. Notification sheets were sent direct to subscribers from the Detroit office. Reports were made to, and all letters containing information affecting the credit of tradesmen were mailed to, his address individually in Detroit. He had a chief clerk, who opened these letters and noted their contents. Minchener based his defense upon two grounds: *first*, that the communication was privileged; *second*, that the libel, if libel it was, was published by R. G. Dun & Co.; that he was not a member of that company, and had no proprietary interest therein, and was not responsible for its publication. The trial court took the case from the jury, and directed a verdict for defendant upon the ground that Minchener was not liable.

9 L. R. A.

1. Was the notification sheet, which was sent to all subscribers, a privileged communication? In *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 9 West. Rep. 709, I discussed the subject of privilege in actions for libel, and shall not go over the ground again. I adhere to what I there said, both as to absolute and qualified privilege. There is no foundation for the claim that the libel set forth in the declaration is absolutely privileged. The question is, Do the facts of this case bring the publication within the class of communications which are qualifiedly privileged? Qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty; and embraces cases where the duty is not a legal one, but is of a moral or social character, of imperfect obligation. *Bacon v. Michigan Cent. R. Co.* 66 Mich. 170, 9 West. Rep. 709, and cases cited. The mercantile agency does not stand in such relation, either of interest or duty, with its subscribers generally, that communications from it to them generally are privileged. Exceptions exist in relation to those persons who are interested in obtaining the particular information, and to whom it is furnished upon special request. To this extent, and no further, are such communications protected by a qualified privilege.

Consider for a moment the relation of the mercantile agency to its subscribers. It undertakes to furnish them, for a consideration paid in advance, such information relative to the responsibility and credit of merchants and others as it obtains from its sub-agents, servants and correspondents, without guaranteeing the accuracy, reliability or correctness of such information, or being responsible for any loss caused by the neglect of its agents and servants, or for their want of verity. It expressly stipulates that it will not reveal to such subscribers the sources of its information, nor the names of the persons from whom they received it, and requires a pledge from the subscribers that they will never, under any circumstances, communicate to the persons reported the information received concerning them from the mercantile agency. It also adopts measures to prevent the particular communities from ascertaining the name or identity of the person reporting the standing of business men in that community. These secret and inquisitorial agencies ramify every part of the United States and the Dominion of Canada, and possess the power of destroying with falsehood or calumny the credit of any business man in the country, and of bringing him a bankruptcy and ruin. To hold such vast secret inquisitions exempt from liability for false publications respecting the character and standing of a business man would be to sanction the highest injustice. The business man's integrity, his reputation for fair and honest dealing, his prosperity in the transaction of his business, are of the utmost importance to him, and are oftentimes his best capital with which to carry on his business. Commercial credit is based upon confidence and all know

upon how frail foundation commercial confidence is builded. A breath of suspicion may destroy it. Confidence is withdrawn, and the party is ruined. And so, in a broader field, a breath of suspicion is directed against the public credit, suspicion gives place to rumors of disaster, rumors disseminated undermine the general confidence, and a panic is the result. On the other hand, these same commercial agencies, which always have their fingers upon the business pulse of the country, are a most potent factor in keeping up public confidence. They issue their manifestoes of encouragement, and scatter them broadcast over the land. They are read by the business men of the country. The newspapers assist the circulation among all classes of people, and public confidence is strengthened, or, at least, fears of disaster are allayed. In this they exert a strong influence for good, and are recognized institutions in carrying on the business of the country. But they are also potent for evil to the individual. They send out their notification sheets containing a false statement respecting a particular person, and he is undone, no one will trust him and all claims are pressed for immediate payment. His business character is sullied, confidence is withdrawn and his business career has received a blow which it will require a long time to repair.

The notification sheet containing the false statement respecting the acts of Pollasky Bros. was not alone sent to those who were dealing with them and extending them credit, but to between six and seven hundred subscribers in Michigan, and others residing out of the State, from some of whom they might wish to purchase goods upon credit, and this without any request being made to be informed of the standing or credit of Pollasky Bros.; and others of whom, and by far the greater number, were engaged in different lines of business, and who were in no manner interested in knowing their standing, or financial ability or business integrity. To all such the communication was not privileged. It cannot be said that a blacksmith, a saw-miller and a lumber dealer, a furniture manufacturer, a dealer in hardware, a chemist, mineral-water bottlers, butchers, book agents, physicians or druggists, or other business men mentioned in the notification sheets, who are not engaged in wholesale or retail dealing in dry goods, clothing or boots and shoes, are at all interested in the business standing of a dealer in dry goods, clothing and boots and shoes. No court has gone so far as to hold all communications made by a mercantile agency to their subscribers, if made in good faith, but made generally, without request, or to those inquiring concerning or interested in knowing the condition and financial standing of a person, are privileged. On the contrary, courts have uniformly held that privilege does not extend to false publications made to patrons who have no such interest in the subject matter. *Goldstein v. Foss*, 2 Car. & P. 252; *Com. v. Stacey*, 8 Phila. 617; *Taylor v. Church*, 8 N. Y. 452; *Ormsby v. Douglass*, 87 N. Y. 477; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *King v. Patterson*, 49 N. J. L. 417; *Bradstreet Co. v. Gill*, 9 L. R. A.

2 L. R. A. 405, 72 Tex. 115; *Johnson v. Bradstreet Co.* 77 Ga. 173; *Erber v. Dun*, 13 Fed. Rep. 526; and see 26 Am. L. Reg. N. S. 681, 28 Am. L. Reg. N. S. 259.

It was strongly urged upon us at the hearing that we should adopt the able opinion of Van Syckel, J., in which he dissents from the majority of the court in *King v. Patterson*, in which he goes the whole extent of giving immunity to commercial agencies for all publications made in good faith to their subscribers, whether true or false. In his desire to keep abreast of the progressive state of society, and the new and varying conditions that may arise in the progress of the age, he has entirely overlooked the rights of the individual, forgetting that "society is organized and courts established for the protection of the rights of individuals." It is all very well to advance the interests of the wholesale dealers as a class, and afford them information which will reasonably protect them from loss. But there is no principle of justice or of law which requires this to be done at the expense of the individual. It would be a harsh and tyrannical rule that would protect one person from loss at the pecuniary ruin of another. The welfare of society does not require that a few great wholesale dealers shall thrive by the sacrifice of many or of any small purchasers.

The Code of Georgia defines "privilege" very much the same as it signifies at common law. Section 2980 declares as privileged communications: "(1) statements made bona fide, in the performance of a public duty; (2) similar statements in the performance of a private duty, either legal or moral."

In *Johnson v. Bradstreet Co.*, *supra*, the commercial agency sought to justify a false charge made against the plaintiff under the plea of privilege. After showing that the false charge was not made in the performance of a public duty, Jackson, Ch. J., said: "If one makes it his business to pry into the affairs of another in order to coin money for his investigations and information, he must see to it that he communicates nothing that is false." And he held that the communication made under a contract similar to the one introduced in evidence in this case was not the result of a private duty, either moral or legal, in the sense of the Statute, and was not privileged.

If we should advert to the circumstances of the publication of this libel, we could point out circumstances from which a jury might infer express malice. The information was obtained from Mr. Balke, an attorney at Alma, where Pollasky Bros. carried on business. He was their correspondent at that place. On February 20, 1887, he sent a letter by mail from Alma, addressed to George H. Minchener, Detroit, in which he stated: "I write to inform you that there has been a chattel mortgage of \$10,000 filed in this township upon the stock of dry goods and clothing, boots and shoes, of Pollasky Brothers, running to Citizens' National Bank, Detroit. Think it is the forerunner of a failure. Would advise caution in dealing with them." This was received at the Detroit office of Dun & Co. on the 21st, and the letter was opened by the

chief clerk, Thomas, who knew that there was no Citizens' National Bank in Detroit. He knew that the information was not correct in that particular. Notwithstanding, he took this letter, and directed a type-writer to make a report to send out in proper form, as follows: "Pollasky Brothers, dry goods, clothing, boots and shoes, Alma, Gratiot County, Michigan.—A chattel mortgage of \$10,000 has been filed in this township, covering their stock of dry goods and boots and shoes, running to Citizens' National Bank, Detroit. It is thought that this may be the forerunner of a failure. Would advise caution in dealing with them, and *prompt action on the part of creditors.*" The words in italics were added in the Detroit office, and were very pernicious in their effect upon Pollasky Bros., for they not only found their credit ruined, but their creditors took prompt action in presenting claims that were not due as well as those that were. R. G. Dun & Co., at Detroit, advised Balke that there must be some mistake, as there was no such bank in Detroit, and requested him to investigate further, and report, and instead of waiting for the result of such investigation, sent out the notification sheet uncorrected, and containing the wholly false statement, on the 28d of February. It would seem that plenty of time had elapsed, where daily mails and telegraphic wires connect the two points, to ascertain the truth of the report.

2. Is George H. Minchener liable for the publication of this libel? The attorney for the plaintiffs insists that the facts in the case directly connect the defendant, Minchener, with the publication, and establish an implied consent to and authorization of the publication of the libel complained of. He claims that "the evidence was uncontradicted that the information contained in the item in the notification sheet concerning plaintiffs was sent to the office of the defendant, Minchener, in Detroit, in a letter by one Balke, an attorney at Alma, Mich. It is addressed to 'George H. Minchener, Detroit, Mich.,' not to R. G. Dun & Co., or to Geo. H. Minchener, Agent R. G. Dun & Co., but to Geo. H. Minchener personally and individually. There is not a line or word in the letter to indicate that it was intended for R. G. Dun & Co. The defendant swears he did not receive it, but found it in the office of R. G. Dun & Co., of which he was the manager, and, when he found it, that it was opened. And, in explanation of this, he says that stamped envelopes are furnished to the attorneys of the agency, in which to reply to inquiries, and that those envelopes, for the Detroit office, and sent out therefrom, were addressed 'George H. Minchener,' and he leaves it to be inferred that this letter came in one of these envelopes, and was opened by his chief clerk, Charles F. Thomas, who prepared the notification sheet from it, and also sent out the notices to the other offices of R. G. Dun & Co. Minchener testifies that all letters in envelopes, with the printed address, 'Geo. H. Minchener, Detroit, Mich.,' would go into his chief clerk's hands, whose duty it would be to open them, and, unless there was something exceptional in connection with the

matter, Minchener's attention would not be called to it." And he contends that, "if we believe Minchener's testimony, the case therefore stands thus: Minchener authorizes Thomas to open all letters addressed to him, and to incorporate in the notification sheets whatever items of news he finds in such letters without consulting him, 'unless there was something exceptional in connection with the matter.' Thomas, acting under this authority, receives the Balke letter, prepares the notification sheet from the information therein, and sends out this false and wicked libel broadcast all over the United States. When sued for the serious damage which the libel has caused the plaintiffs, he replies: 'I knew nothing whatever about it. You must sue Thomas, my chief clerk, or R. G. Dun & Co., my principal, but you can't sue me because of anything my chief clerk did.'"

The plaintiff's counsel also contends that the principles of *respondet superior* do not apply in cases for libel; that the proposition is general and elementary that "everyone who requests, procures or commands another to publish a libel is answerable as though he published it himself, and such a request need not be expressed, but may be inferred from the defendant's conduct,"—citing *Odgers, Libel and Slander*, 155.

The same work, at page 359, lays it down as the law that "if any agent or servant be in any way concerned in writing, printing, publishing or selling a libel, he will be both civilly and criminally liable. If a clerk or servant copy a libel, and deliver the copy he has made to a third person, he will be liable as a publisher. That his master or employer ordered him to do so will be no defense." It is not necessary to go to the full extent of the text to hold an agent liable severally or jointly with the principal.

"In general," says *Mr. Justice Cooley*, "all persons in any manner instrumental in making or procuring to be made the defamatory publication are jointly and severally responsible therefor. Therefore one, in the course of whose business a libel is published by his agent, may be joined with the agent in an action for the publication." *Cooley, Torts*, 194.

There was testimony in the case sufficient to be submitted to the jury upon the question whether Minchener published, or caused to be published, the publication alleged to be libelous, and the court erred in taking the case from them.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

PEOPLE OF the State of MICHIGAN

v.

Felix BOUCHARD, *App't.*

(.....Mich.....)

A scow on which intoxicating liquors are sold, anchored in water about five feet deep and about one half mile from shore upon the waters of the Saginaw Bay, is not within any township in Michigan, and no prosecution can be

had for such sales under the Statute which makes the shore the boundary line of municipal corporations, although rights of land owners for fishing purposes are extended by the statutes over the water a mile from shore.

(August 1, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Bay County, convicting him of the offense of selling intoxicating liquors without paying the requisite tax for the privilege. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Van Kleeck and McCormick* for appellant.

Mr. Curtis E. Pierce, Pros.-Atty., for appellees.

Cahill, J., delivered the opinion of the court:

The defendant was convicted in the Circuit Court for Bay County of selling spirituous, intoxicating, brewed and fermented liquors at retail without having paid the tax required by law.

The People, to maintain and prove the issue on its part, introduced evidence showing that the defendant was the owner and master of the scow *Ida May*; that on the 7th day of July, 1889, said scow was anchored and stationed on the waters of Saginaw Bay, about one half mile from the west shore of the Saginaw Bay, opposite the Township of Bangor, in the County of Bay. The water where the boat was anchored was about five feet in depth. That on the day aforesaid the defendant was on board of, and had charge of, said boat, and had in said boat a load of spirituous and intoxicating, and malt, brewed and fermented liquors. On the west side of Saginaw Bay, in said township and county, there are three summer resorts, known as "Oa-at-ka," "Belle View" and "Reservation Beach;" and, on the day aforesaid several hundred persons were sojourning at such places. On that day defendant's boat was anchored opposite Oa-at-ka Beach, and was easily accessible both by persons rowing out in small boats and by bathers. And that persons who rowed out in small boats, and bathers, boarded the scow *Ida May*, and purchased intoxicating, malt, brewed and fermented liquors from defendant, and that the persons purchasing such liquors became and were intoxicated. It was also shown that the defendant had not paid the tax required by law for the sale of spirituous and intoxicating liquors, or for malt, brewed and fermented liquors. The defendant offered no evidence. The defendant, by his counsel, then requested the court to instruct and charge the jury that there was no evidence in said cause which would entitle the People to a verdict, and that the defendant was entitled to a verdict of not guilty; which request the circuit judge then and there refused, and thereupon charged and instructed said jury that, if they believed the testimony, they might bring in a verdict of guilty. The jury rendered a verdict of guilty.

The defense relied on by defendant is that he was not carrying on the business of selling

liquors in any city, village or township of this State; that the boundaries of Bangor Township, opposite which his boat was anchored, do not extend beyond the shore line of Saginaw Bay; that there was no reason, therefore, why he should pay the tax required by law to that township rather than another; that the Statute of 1887 (Laws 1887, p. 445), making it unlawful to engage in the business of selling spirituous and intoxicating liquors "without having paid in full the tax required by the Act," does not apply to this case.

The sole question, then, to be decided, is, Does the Township of Bangor extend beyond the shore line of Saginaw Bay, so as to include within its boundaries and jurisdiction the place where respondent was doing business? This is an interesting and important question in this State, which has a coast line bordering upon the Great Lakes aggregating more than 1,600 miles. If the claim made by respondent is good, then it may be possible to conduct the business of selling liquors, without any restraint or regulation of law, at many points in this State opposite pleasure resorts, where the presence of large numbers of idle persons will make such business especially dangerous.

The Township of Bangor was organized by the board of supervisors of Bay County in 1859. It included at that time the following surveyed townships: 14 N., ranges 4 and 5 E., lying west of Saginaw River; fractional township 15 N., ranges 4 and 5 E.; and fractional township 16 N., ranges 4 and 5 E. Laws 1859, p. 1120.

The boundaries of these surveyed townships bordering on the bay extended only to the shore line, according to the government survey. 1 Lester, Land Law, 714.

The Township of Bangor was organized, and its boundaries defined, by reference to lines already established by official surveys. It is difficult to see how such boundaries can properly be extended by judicial construction to include territory, whether of land or water, outside such surveyed lines. There is a practical difficulty in establishing any rule as to the distance that the boundaries of a township shall extend into the water on a shore line when the indentations by bays and otherwise are so frequent as to cause such lines to intersect each other at irregular distances from the shore. The same difficulty operates with reference to county lines. It was this, no doubt, that led the legislative council, as early as in 1831, to provide, in an Act for the organization of various counties, that the boundaries of the Counties of Allegan, Ottawa, Oceana, Saginaw and Arenac (now Bay) so far as they bordered on the Great Lakes should run to the shore line. 8 Ter. Laws, 871, 872.

Limiting the boundaries of counties by the shore lines also led to the provision in the Revised Statutes of 1888, giving to certain counties bordering on the Great Lakes a common jurisdiction of all offenses committed on such lakes within this State. Rev. Stat. 1888, p. 84; How. Stat. §§ 442 451.

These Statutes not only do not operate to

extend the territorial boundaries of the shore counties into the Great Lakes, but they are an express legislative recognition that such boundaries do not so extend, by placing over the territory covered by water a new and peculiar jurisdiction.

It may be claimed that as the rights of the owners of the land bordering on the bay extend into the bay for a distance of one mile from the shore for the purpose of fishing (How. Stat. § 2172), that perforce the boundaries of the township are likewise so extended. But this cannot be true. The boundaries of a municipal corporation are

fixed by law, and cannot be made to depend upon the fact that the owners of land within the limits have rights appurtenant extending beyond such limits.

I am of the opinion that, under the law as it now is, the respondent is not guilty of the offense charged; and the attention of the Legislature is respectfully called to this apparent slip in the Statute, which may be easily remedied.

The conviction of the respondent must be set aside, and the prisoner discharged.

The other Justices concurred.

KENTUCKY COURT OF APPEALS.

FIDELITY TRUST & SAFETY VAULT CO., Assignee of the Kentucky Flour Co.,
App't.,

v.

MERCHANT'S NATIONAL BANK.

(...Ky....)

A bank can set off deposits made by one who subsequently makes an assignment for creditors against a debt owing to it by the insolvent, but which had not matured at the time of the assignment.

(May 24, 1890.)

APPEAL by plaintiff from a judgment of the Louisville Law and Equity Court in

favor of defendant in an action brought to recover the amount of a deposit made with defendant by plaintiff's assignor. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Thomas B. Fairleigh and Fairleigh & Straus for appellant.

Messrs. Brown, Humphrey & Davie for appellee.

Holt, J., delivered the opinion of the court:

The Kentucky Flour Company, on June 15, 1888, made a general assignment for the benefit of its creditors. Among them was the appellee, the Merchant's National Bank, to the amount of nearly \$30,000. It had in its hands at the time, arising from cash deposits made

NOTE.—Set-off of unliquidated cross-demand.

It is a rule in equity that cross-demands, though unliquidated by judgment, will be set off against each other, if from the situation of the parties justice cannot otherwise be done. Memoranda of causes not reported in full, 80 N. Y. 632; Gay v. Gay, 10 Paige, 368, 4 N. Y. Ch. L. ed. 1014; Knapp v. Burnham, 11 Paige, 330, 5 N. Y. Ch. L. ed. 153; Seaman v. Van Rensselaer, 10 Barb. 83; Lindsey v. Jackson, 2 Paige, 581, 2 N. Y. Ch. L. ed. 1038; Williams v. Davies, 2 Sim. 464; Clark v. Cort, 1 Craig & P. 154; Rawson v. Samuel, Id. 161.

Insolvency of a party would authorize a court of equity to interfere independently of statutory regulations. Wolcott v. Sullivan, 1 Edw. Ch. 403, 6 N. Y. Ch. L. ed. 188.

It is the foundation for the interposition of a court of equity on an application to compel a set-off, and thus satisfy both demands. Wulschner v. Sells, 37 Ind. 75; Keightley v. Walls, 27 Ind. 387; Gay v. Gay, 10 Paige, 376, 4 N. Y. Ch. L. 1018; Smith v. Felton, 43 N. Y. 422; Schieffelin v. Hawkins, 1 Daly, 200, 14 Abb. Pr. 114; Story, Eq. § 1436; Russell v. Conway, 11 Cal. 102; Robbins v. Holley, 1 T. B. Mon. 194; Second Nat. Bank of Cincinnati v. Hemmingsway, 34 Ohio St. 361; White v. Wiggins, 32 Ala. 424; Pond v. Smith, 4 Conn. 207; Pom. Rem. 163; Jordan v. Sharlock, 84 Pa. 266; Smith v. Mosby, 9 Heisk. 501; Platt v. Bentley, 11 Am. L. Reg. N. S. 171; Morse, Banks and Banking, § 336; Warman, Set-Off, § 431; Bradley v. Angel, 3 N. Y. 475; Smith v. Fox, 43 N. Y. 874; Colt v. Brown, 12 Gray, 233; Van Wagener v. Paterson Gas Light Co. 23 N. J. L. 233; Rappy v. Rappay, 46 Mo. 571; Skiles v. Houston, 1 Cent. Rep. 373, 110 Pa. 254.

A bank against which suit is brought is liable to the same rule of set-off as other defendants. Ryrich v. Capital State Bank (Minn.) Oct. 23, 1890.

9 L. R. A.

A bank holding a check for collection against an insolvent bank, when sued by the assignee of the latter, may use such check as a set-off where no defense is shown against the check. Farmers Deposit Nat. Bank v. Penn Bank, 2 L. R. A. 273, 123 Pa. 236.

In an action against a bank by an administrator of a deceased depositor, to recover the amount of the deposit, the bank may set off the amount of a note of such depositor which was due at the time of the latter's death. Traders Nat. Bank v. Cresson, 76 Tex. 208.

A claim acquired after assignment cannot be set off against assignee, even if it becomes due before suit commenced. Chipman v. Ninth Nat. Bank, 13 Cent. Rep. 293, 120 Pa. 83.

Where part of the property assigned is a cash bank balance, which assignee immediately demands, the bank cannot set off the assignor's unmatured commercial paper which it holds. *Ibid.*

A bank cannot set off a firm debt against a deposit made by a partner alone after dissolution of the firm. The partner could lawfully vest a bona fide creditor with full power to collect such deposit. Internat. Bank of Chicago v. Jones, 7 West. Rep. 633, 119 Ill. 407.

A bank has a right of set-off as against a deposit only when the individual who is both depositor and debtor stands in both these characters alike in precisely the same relation, and on precisely the same footing, towards the bank. *Ibid.*

Equity requires cross-demands to be set off. See note to Merwin v. Austin (Conn.) 7 L. R. A. 84.

Though unliquidated cross-demands will be set off. See note to Farmers Deposit Bank v. Penn Bank (Pa.) 2 L. R. A. 273.

Doctrine of set-off discussed. See note to Memphis & C. R. Co. v. Greer (Tenn.) 4 L. R. A. 333.

by the Flour Company on and before the day of the assignment, and from commercial paper left by it with the Bank for collection, \$8,453.79; and the assignee sues to recover this sum. The Bank claims the right to credit it upon its debt. The facts above stated appear from the petition. It is by no means certain whether, upon its averments, the debt owing to the Bank should be considered as having been due, or not due, at the time of the assignment. We will, however, with a view to a full consideration of the question, but with some doubt, assume, as contended by the appellant's counsel, that the petition shows it had not then matured. The lower court dismissed the petition upon demurrer.

The question before us is whether a bank can apply deposits, made with it by one who subsequently makes an assignment for the benefit of his creditors, as a credit upon a debt owing to it by the insolvent, but which had not matured at the time of the assignment. Courts of equity in this State applied the doctrine of equitable set-off prior to the existence of our Statute. It was found to be necessary to complete justice in cases where some fact existed impairing the efficacy of the legal remedy. Grounds must exist for its application, and insolvency has long been recognized as one of them. It is urged that equality among creditors is equity, and that to allow the Bank to apply the deposit upon the indebtedness to it would defeat an equitable distribution of the insolvent's estate. It is true that equality in such a case is the policy of the law, but it would

be inequitable to extend it so far as to disregard existing equities. It would be unconscientious for an insolvent to coerce the payment of his claim from one to whom he is indebted in a larger sum, although the debt of the latter might not be due. The insolvent should not, *ex æquo et bono*, have such a right.

In the case of *Chenault v. Bush*, 84 Ky. 528, two parties executed a joint obligation. Before its maturity, one of them made an assignment for the benefit of his creditors. After the assignment the other joint obligor paid the entire debt. In an action against him by the assignee upon a note executed by him to the assignor, it was held that he could set off one half the joint debt paid by him. Here the claim of the party asking the set-off had not matured at the time of the assignment. A right of set-off would, however, have existed as against the assignor in the event of no assignment; and the assignee merely took the estate, for the benefit of the creditors, subject to all existing equities and discounts. He is not an assignee for value, but a volunteer, and any claim of the insolvent upon a party coming to his hands is subject to the same right of set-off which would have existed against it if no assignment had been made.

It is contended, however, that a bank stands in a different attitude from a mere individual, because its depositor would have the right to check out his deposit at any time prior to the assignment, and the bank would have no right to refuse it upon the ground that he was owing it an unmatured debt. If this be so,—and it doubtless would be in case checks were

Relation between the depositor and the bank.

The relation between the depositor of money in a bank and the bank is that of debtor and creditor, and nothing more. *Phoenix Bank of New York v. Raley*, 111 U. S. 125, 28 L. ed. 374; *Lynch v. First Nat. Bank*, 9 Cent. Rep. 568, 107 N. Y. 179; *Ætna Nat. Bank v. Fourth Nat. Bank*, 48 N. Y. 82; *Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 56; *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 683. See note to *Fifth Nat. Bank of Pittsburgh v. Ashworth* (Pa.) 2 L. R. A. 491.

A deposit of money not being special, entitling the depositor to a return of the same money deposited, *in specie*, creates the relation of debtor and creditor between the depositor and the bank; the latter, becoming a debtor to the former for the amount deposited, is liable to pay on demand. *Marsh v. Oneida Central Bank*, 34 Barb. 800; *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 217; *Ketchum v. Stevens*, 6 Duer, 463, affirmed, 19 N. Y. 489; *Beckwith v. Union Bank*, 4 Sandf. 604, affirmed, 9 N. Y. 211; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Dykens v. Leather Mfrs. Bank*, 11 Paige, 612, 5 N. Y. Ch. L. ed. 252.

The bank has the absolute and legal title, and is liable only in the character of an ordinary debtor. *Egerton v. Fulton Nat. Bank*, *supra*; *Re Franklin Bank*, 1 Paige, 249, 2 N. Y. Ch. L. ed. 635; *Chapman v. White*, 6 N. Y. 412; *Graves v. Dudley*, 20 N. Y. 78; *Lunt v. Bank of North America*, 49 Barb. 221.

The right of the depositor is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depository. *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 157, 19 L. ed. 890; *Rosenthal v. Mastin Bank*, 17 Blatchf. 322; *Butterworth v. Peck*, 5 Bosw. 341; *Bullard v. Randall*, 1 Gray, 605; *Barker v. Anderson*, 21 Wend. 373; *National Bank v. Eliot Bank*, 5 Am. L. Reg. 711; *Bellamy v. Ma-* 9 L. R. A.

Joribanks, 8 Eng. L. & Eq. 522, 523; *Wharton v. Walker*, 4 Barn. & C. 163; *Warwick v. Rogers*, 5 Man. & G. 374.

There is no privity of contract between the holder and drawee, whatever there may be between drawer and drawee. The drawer may stop the payment of his check, and the banker is bound by the countermand (*Finlay v. American Exch. Bank*, 11 How. Pr. 473); and the rule as to the assignment of a particular fund by an order drawn thereon does not apply to bank checks. *Harrison v. Wright*, 100 Ind. 522; *Chapman v. White*, 6 N. Y. 412; *Risley v. Phenix Bank*, 58 N. Y. 318; *Duncan v. Berlin*, 60 N. Y. 151; *People v. Merchants & M. Bank of Troy*, 78 N. Y. 269; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Re Merrill*, 71 N. Y. 325; *Tyler v. Gould*, 48 N. Y. 632; *Ætna Nat. Bank v. Fourth Nat. Bank*, 48 N. Y. 82, 87; *Harris v. Clark*, 3 N. Y. 96, 2 Barb. 94; *Winter v. Drury*, 5 N. Y. 525; *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; *Marine Bank of Chicago v. Fulton County Bank*, 69 U. S. 2 Wall. 252, 17 L. ed. 736; 3 Pom. Eq. Jur. 296.

Checks are of the same character as bills of exchange, and therefore do not have the effect to transfer the funds, and the banks upon which they are drawn are under no obligation and cannot be compelled to pay them before they become due. *Curry v. Powers*, 70 N. Y. 218; *Lunt v. Bank of North America*, 49 Barb. 221; *Woodruff v. Merchants Bank*, 25 Wend. 673; *Winter v. Drury*, 5 N. Y. 530; *Moses v. Franklin Bank*, 34 Md. 551.

An unaccepted check does not operate as a transfer or assignment of any part of the debt, or create a lien at law or in equity upon the deposit. *Ætna Nat. Bank v. Fourth Nat. Bank*, 48 N. Y. 87; *Harris v. Clark*, *Winter v. Drury*, *Chapman v. White* and *National Bank of the Republic v. Millard*, *supra*; *Thornhill v. Hall*, 2 Clark & F. 28; *Lowery v. Steward*, 3 Bosw. 513.

given to third parties,—yet we fail to see how it can affect the question here, inasmuch as the money was not withdrawn from the Bank. It is true this seems to have been the ground upon which the case of *Beckwith v. Union Bank*, 9 N. Y. 211, was determined; but the opinion of that case is meager in argument, and, so far as reason is given, it is unsatisfactory. In the case of *Jordan v. National S. & L. Bank*, 74 N. Y. 487, cited by counsel, no ground for equitable set-off was presented. The opinion expressly says so. It is unquestionably the law that, as between individuals, the right of equitable set-off exists, although the debt had not matured at the time of the insolvency. Ordinarily, of course, a debt not due cannot be set off against one already due. To allow it would be to change the contract, and advance the time of payment. But, where the party asserting the due debt is a nonresident or becomes insolvent, then either of these conditions, *ipso facto*, gives to the other party the right of equitable set-off, although his debt had not matured when his debtor became insolvent, or the condition arose giving the right of equitable set-off. In the application of the rule there should be no difference between an individual and a bank. There is no ground for a distinction. The bank is merely a debtor to its depositor. It is true the debt is payable on demand, but, if the money

be not withdrawn, and the depositor becomes insolvent, the right of equitable set-off exists, just as in case of co-existing demands between individuals; and, in case the depositor assigns for the benefit of his creditors, his assignee takes the estate subject to any equities which existed against the assignor at the time of the assignment.

It is said, however, that such a rule will lead to inequitable preferences, and, in effect, destroy the efficacy of what is generally known as the "Statute of 1856," relative to a preference of a creditor. We think the alarm of counsel is groundless. If a deposit were made with a bank in contemplation of insolvency, and with a design to prefer it, those being the grounds upon which that Statute declares the entire estate of the debtor, including that transferred, shall inure for the benefit of his creditors generally, a state of case would be presented not now before us. We cannot presume this is such a case, because here the Company was evidently engaged in a considerable business, having numerous transactions with its Bank, and the deposit in question is a comparatively small one. This question is not presented by the petition, and it would be improper, therefore, to intimate any opinion as to it.

Judgment affirmed.

RHODE ISLAND SUPREME COURT.

SULLIVAN

v.

HERGAN.

(....R. L....)

A clerk and bar-tender hired for one entire consideration by a dealer in groceries and intoxicating liquors, the sale of the latter being illegal, cannot recover any compensation for his labor, even upon *quantum meruit*, for services in the grocery part of the store.

(July 12, 1890.)

PETITION for a new trial of an action brought to recover compensation for services rendered as clerk in a grocery store, in which judgment had been recovered by plaintiff. *Granted.*

The facts sufficiently appear in the opinion.

Mr. Patrick J. Galvin for plaintiff.

Messrs. Francis B. Peckham and William P. Sheffield, Jr., for defendant.

Matteson, J., delivered the opinion of the court:

This is an action of assumpsit to recover moneys claimed to be due to the plaintiff from the defendant under a contract of hiring. It appears from the evidence reported that the plaintiff was employed by the defendant in his business of a dealer in groceries and liquors, as a bar-tender and clerk, from November 27, 1886, until April 19, 1888, and was to receive as wages \$18 per month until May 1, 1887, and \$25 per month thereafter. At the trial the defendant set up as a defense

the illegality of the contract, the sale of liquors being prohibited by law when the contract of hiring was made, and during the period of the plaintiff's employment. The jury returned a verdict for the plaintiff for \$187.84. The defendant moves for a new trial, on the ground that the verdict is against the law and the evidence.

The principle that if a contract or promise be founded on a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal, and rejected, the illegality of part vitiates the whole, so that no action can be maintained upon it as a contract, is conceded; but it is suggested that, inasmuch as the contract is illegal and void, and is therefore, as it is contended, a nullity, the plaintiff is entitled to recover for that portion of his services performed as clerk in the grocery part of the business, upon a *quantum meruit*, what such services were reasonably worth, and therefore that the verdict may be supported. We do not, however, agree with the suggestion. Although a contract thus infected with illegality is regarded in law as a nullity, in so far that the law will not lend its aid to enforce it, it is nevertheless not treated as if it had no existence in fact. The illegality extends to every part of the transaction, and it cannot, therefore, be made the foundation of an assumpsit. Both parties are *in pari delicto*, and the law will, for that reason, not aid either party to enforce the contract, but leaves them where it finds them. It may sometimes happen, in consequence, that a defendant may gain a pecuniary benefit by reason of his

wrong-doing, or of that in which he has equally participated; but it is not for the sake of the defendant that his objection to his own illegal contract is sustained.

In *Holman v. Johnson*, Cowp. 341, 343, Lord Mansfield remarks: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*."

Bixby v. Moor, 51 N. H. 402, is a case strongly in point. In that case it appears that the defendant kept a billiard saloon and a bar for the sale of liquor. The liquor traffic was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon. There was no special agreement that he should or should not sell liquor, or what particular duty he should do. But he was accustomed to work gener-

ally in and about the saloon, taking care of the room, building fires, taking care of the billiard tables, tending bar and waiting upon customers, and, in the absence of the defendant, he had the whole charge of the business. In assumption, upon a *quantum meruit*, it was held that he could not recover compensation for any portion of his services. The court says: "In the present case, however, there is room for but one conclusion, namely, that the agreement was that the plaintiff at the defendant's request should perform all the services which he did in fact perform, and that the defendant, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services. This entire promise (and the performance thereof) formed an entire consideration for the defendant's promise to pay, and a part of this indivisible consideration was illegal." In the present case the sums which the defendant promised to pay formed one entire consideration for all the services to be rendered by the plaintiff, both those in tending the bar, which were illegal, and those as clerk in the grocery store, which were legal. Had one price been agreed upon for the services as bar-keeper, and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for the services which were legal; but, as it is, the defendant's promise being entire, and the consideration for it being partly legal and partly illegal and indivisible, both parties are to be regarded as equally in fault, and the law will lend its aid to neither.

Petition granted.

CONNECTICUT SUPREME COURT OF ERRORS.

Lucius A. HUNTLEY, *Appt.*,

v.

Alfred HOLT and Wife.

(38 Conn. 445.)

1. A mechanic's lien on premises of a married woman for the erection of a building under a personal contract with her husband, whom the contractor supposed to be the owner, cannot be claimed under Gen. Stat., § 3018, on the ground that the building was erected with her "consent," where she has consented to the erection of the building on the husband's express agreement to pay the expense thereof.
2. A woman whose title appears on the records is not estopped from contesting a mechanic's lien on her property by the fact that she knew of the erection of a building thereon without giving notice of her ownership, or that she would not pay therefor where the work was done under a contract with her husband, who had promised her that he himself would pay for it, although the contractor supposed the husband was the owner.

(February 17, 1890.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant in an action brought to foreclose an alleged builder's lien. *Affirmed.*

The facts fully appear in the opinion.

Mr. J. W. Ailing for appellant.

Messrs. W. B. Stoddard and S. C. Loomis for appellees.

Andrews, Ch. J., delivered the opinion of the court:

Mary A. Holt, the wife of Alfred Holt, is the owner of certain land in the Town of New Haven which she holds "to her sole and separate use, free from any control of her husband." Sometime prior to the 8th day of September, 1887, Mr. Holt proposed to his wife to build houses on two of her lots, to which she objected. He urged the building of the houses and informed her that he was himself to pay for them. She then made no further opposition, though she still did not wish the houses to be built. On the said 8th day of September, 1877, Mr. Holt entered into a written contract with the plaintiff to

build two houses for him, which were to be placed on the above land of Mrs. Holt. The plaintiff proceeded according to the contract, furnished the materials for and erected the houses, and in due time filed his lien thereon. He made no agreement respecting the houses with Mrs. Holt; on the contrary, in making the contract, and in performing the services and in furnishing the materials, he gave the sole personal credit to Mr. Holt. Mr. Holt did not represent that he was the owner of the land on which the houses were to be placed. In making the contracts he acted in his individual capacity, and did not act or assume to act as the agent of Mrs. Holt, nor had he in making the same any authority from or right or authority to act or contract for her. The plaintiff relied as security for the payment for his work and materials upon such lien on the land as by law he might have. Prior to the time he had completed the houses he supposed that Mr. Holt was the owner of the land. He made no examination of the records to ascertain in whom the title to the lots was, and until after the houses were finished he did not know that Mrs. Holt was the owner.

Mrs. Holt learned that the houses were being built and that the plaintiff was building them about the time work thereon was commenced. She then, and at all times, supposed that the work was being done upon the personal credit of her husband and not upon her credit or upon the credit of her interest in the land; and she gave no notice to the plaintiff of her disapproval of the work or of the fact that she owned the land, or that her husband had no authority to act for her.

On these facts the plaintiff asked the court to decide that the labor and materials furnished by him were furnished by the consent of Mrs. Holt within the meaning of the Statute concerning mechanic's liens. The court did not so decide, but rendered judgment against the plaintiff. He appeals, and assigns as his reason of appeal the refusal of the court to rule and decide according to his request.

The Statute concerning mechanic's liens (Gen. Stat. § 3018) is as follows: "Every building, in the construction or repair of which or of any of its appurtenances any person shall have a claim for materials furnished or services rendered exceeding \$25 in amount, by virtue of an agreement with or by consent of the owner of the land upon which such building is erected, or some person having authority from or rightfully acting for such owners in procuring or furnishing such labor or materials, shall, with the land on which the same may stand, be subject to the payment of such claim; and such claim shall be a lien on such land, buildings and appurtenances, and shall take precedence of any other incumbrance originating after commencement of such services or the furnishing of any such materials, subject to apportionment, as provided in section 3021; and said premises may be foreclosed by such person in the same manner as if held by mortgage."

The facts exclude any agreement by the plaintiff with Mrs. Holt; exclude also any

rendering of services or furnishing of materials by virtue of any agreement with or the consent of any person having authority from or rightfully acting for her. His claim then must be sustained, if it can be sustained at all, as he seems to admit, upon the theory that he rendered the services and furnished the materials "by consent of the owner of the land," within the meaning of the Statute just cited.

Consent means the unity of opinion—the accord of minds—to think alike—to be of one mind. Consent involves the presence of two or more persons, for without at least two persons there cannot be a unity of opinion, or an accord of minds, or any thinking alike. When the Statute uses the words "by the consent of the owner of the land," it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it. The words "consent of the owner" are used in the Statute as something different from an agreement with the owner; and while it may be urged that they do not require such a meeting of the minds of the parties as would be essential to the making of a contract, there must be enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense. It cannot be supposed that the Statute was designed to be made a cover for entrapping a party into a seeming consent when there was no real one. Without this degree of unanimity there could be no real consent. *Gilman v. Desbrow*, 45 Conn. 563; *Flannery v. Rohrmayer*, 46 Conn. 560.

It is plain from the finding that Mrs. Holt never consented to the thing which the plaintiff claims. She consented, indeed, to the building of houses on her land by her husband upon his promise that they should be built without any expense to her and without any risk to her interest in the land. She did not consent even that her husband should build them at her expense or upon the credit of her land. Much less did she ever consent that the plaintiff should build them at her charge.

Nor is there anything in the facts to estop Mrs. Holt. She had made an arrangement with her husband in the nature of a contract between herself and him by which he was to build the houses at his own expense. She knew that the plaintiff was at work on the houses, but she supposed he was acting upon the sole credit of Mr. Holt. She never knew that he had or claimed to have any right of lien on her land. She knew that if he was a sub-contractor he would have to give her notice in order to bind her land by any lien. She had the right to act upon the belief that the plaintiff had not neglected to examine the records or to ascertain the exact authority which Mr. Holt had in the premises. An estoppel implies some fraud or neglect of duty in the party estopped. Neither is chargeable to Mrs. Holt. There could be no duty resting upon her to communicate facts to the plaintiff of which he was ignorant only by his own negligence. One setting up an estoppel *in pais*, is himself bound to

the exercise of good faith and due diligence to know the truth. *Moore v. Bowman*, 47 N. H. 494.

To sustain the plaintiff's claim would be equivalent to a fraud on Mrs. Holt. It

would be to visit on her the result of the plaintiff's own negligence.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

MAINE SUPREME JUDICIAL COURT.

Alicia C. CAREY

v.

Jonathan I. MACKEY.

(83 Me. 516.)

1. Where a bond provides a penalty for failure to perform its covenants, recovery cannot be had upon the covenants and for the penalty also.

2. Where one binds himself under seal to the well and true payment of a certain sum of money monthly during the good behavior of another, under a penalty of \$5,000, the instrument constitutes a good penal bond, and the \$5,000 is a penalty and not liquidated damages.

3. An agreement between a husband and wife who have separated, or who are in contemplation of an immediate separation, for a separate support for the wife, is valid, at least where there is good cause for the separation and the contract therefor does not offend public policy.

4. An agreement for separation, entered into by a husband and wife in a State where they are temporarily abiding, for causes arising there, and where it is partly performed, will be interpreted by the law of such State when before its courts, and not by that of the State of their domicile, if by the latter it would be invalid; and it may be legally enforced, at least if no attempt

was made to evade the laws of the latter State and the contract would not have been criminal there.

5. A decree of divorce which is silent upon the subject does not, of its own force, terminate a prior agreement between the parties for a separate support.

6. Contracts between husband and wife for separate support, which are formal enough to be enforced in equity before divorce, may be enforced at law after divorce.

(April 15, 1890.)

REPORT from the Supreme Judicial Court for York County of an action brought to recover the penalty of a bond to secure payment of a separate support to a wife. *Judgment for plaintiff.*

The case sufficiently appears in the opinion.

Messrs. G. C. Yeaton and H. H. Burbank, for plaintiff:

A wife may contract with her husband, and maintain an action upon the contract after divorce.

Webster v. Webster, 58 Me. 139; *Guptill v. Horne*, 68 Me. 405; *Carlton v. Carlton*, 72 Me. 115; *Lane v. Lane*, 76 Me. 521.

The bond was valid.

Van Valkenburgh v. Smith, 60 Me. 97.

NOTE.—Husband and wife; articles of separation.

A contract of separation of man and wife must be untainted by fraud, and the contract must be fair and reasonable, considering the circumstances of the parties. *Daniels v. Daniels*, 9 Colo. 133.

A separation agreement made in consideration of separation and of an agreement to continue to live apart, by which the property is equitably and fairly divided between the husband and wife, is valid. *Rains v. Wheeler*, 76 Tex. 390.

As to validity of agreement, see notes to *Clark v. Foadick* (N. Y.) 6 L. R. A. 123.

An agreement between husband and wife, part of the entire consideration of which is that they shall live separate and apart, is void. *Friedman v. Bierman*, 43 Hun. 387.

Articles of separation are valid without the intervention of a trustee. Authorities cited in *Agnew's App.* (Pa.) 11 Cent. Rep. 59.

In articles of separation between husband and wife through the intervention of a trustee the covenant on the part of the husband to pay a stipulated sum for the wife's support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy. *Dupre v. Rein*, 7 Abb. N. C. 256, 66 How. Fr. 280; *Champlin v. Champlin*, 1 Hoffm. Ch. 55, 6 N. Y. Ch. L. ed. 1022; *Carson v. Murray*, 3 Paige, 483, 3 N. Y. Ch. L. ed. 241; *Calkins v. Long*, 23 Barb. 97; *Simmons v. McElwain*, 36 Barb. 419; *Cropey v. McKinney*, 30 Barb. 47; *Wallace v. Bassett*, 41 Barb. 25; *Anderson v. Anderson*, 1 Edw. Ch. 380, 6 N. Y. Ch. L. ed. 179; *Heyer v. Burger*, Hoffm. Ch. 1, 6 N. Y. Ch. L. ed. 1023.

6 L. R. A.

A valid tripartite agreement for separation of husband and wife is not affected by a subsequent decree of absolute divorce, where no relief is asked in the suit against the agreement, or its validity attacked in any way. *Galusha v. Galusha*, 6 L. R. A. 457, 116 N. Y. 635.

Articles of separation containing no express stipulation against divorce are not bar to divorce for causes prior to execution. *Foadick v. Foadick*, 1 New Eng. Rep. 33, 15 B. L. 130; *Galusha v. Galusha*, *supra*.

They are not *per se* a bar to divorce for causes previously existing and known to the petitioner, but they may be taken in connection with lapse of time and other circumstances as evidence to show that the petitioner is not prosecuting the petition in good faith, and is therefore not entitled to the favorable consideration of the court. *Johnson v. Johnson*, 4 Paige, 461, 3 N. Y. Ch. L. ed. 516; *Foadick v. Foadick*, *supra*; *Beeby v. Beeby*, 1 Hagg. Eccl. 739; *Nash v. Nash*, 1 Hagg. Consist. 140; *Anderson v. Anderson*, *supra*; *J. G. v. H. G.* 33 Md. 401; *Kremelberg v. Kremelberg*, 62 Md. 553; *Wilson v. Wilson*, 40 Iowa, 230.

Effect of divorce on articles of separation. See notes to *Clark v. Foadick* (N. Y.) 6 L. R. A. 123; *Galusha v. Galusha* (N. Y.) 6 L. R. A. 459; *Cumington v. Belchertown* (Mass.) 4 L. R. A. 131.

While a judgment for divorce simply will not annul articles of separation, the allowance of alimony given by the judgment will have the effect to defeat the operation of the agreement and put an end to it. *Galusha v. Galusha*, 43 Hun. 181.

While it was not usual for the court to direct, by judgment the payment of alimony beyond the

Such bonds payable to a trustee were good at common law. They may now be payable to the wife.

Rev. Stat. chap. 61, § 1; *Blake v. Blake*, 64 Me. 177; *Clark v. Duelling-House Ins. Co.* 81 Me. 378; Russell & Russell's Macqueen, Husband and Wife, 3d ed. 1885, chap. 18, § 1, p. 337, and citations; Peachey, Settlements, chap. 20; *Vansittart v. Vansittart*, 2 DeG. & J. 249, and citations; Kelly, Cont. of Married Women, chap. 6, § 9; 1 Bishop, Mar. and Div. bk. 5, chap. 82; 1 Bishop, Married Women, § 760; Schouler, Husband and Wife, pt. 9, chap. 1; Reeves, Dom. Rel. Eaton's 4th ed. 181; Stewart, Husband and Wife, § 106; Cord, Married Women, 2d ed. 114-152; Endlich & Richard, Married Women in Pa. 219-221, 266, note 3, and citations; *Mann v. Hurlbert*, 88 Hun, 27; *Carpenter v. Osborn*, 3 Cent. Rep. 804, 102 N. Y. 552, and citations; *Page v. Trufant*, 2 Mass. 159; *Ayer v. Ayer*, 16 Pick. 327; *Hollenbeck v. Pixley*, 3 Gray, 521; *Albee v. Wyman*, 10 Gray, 222; *Holbrook v. Comstock*, 16 Gray, 109; *Fox v. Davis*, 113 Mass. 255; *Alley v. Winn*, 184 Mass. 77; *Merrill v. Peaslee*, 6 New Eng. Rep. 120, 146 Mass. 460; *Miller v. Miller*, 64 Me. 484, approving *Carson v. Murray*, 3 Paige, 488, 3 N. Y. Ch. L. ed. 241.

The validity and construction of the agreement are governed by the law of Maine.

Stickney v. Jordan, 58 Me. 106; *Milliken v. Pratt*, 125 Mass. 874; *Tenant v. Tenant*, 1 Cent. Rep. 596, 110 Pa. 478; *Ryan v. M. K. & T. R. Co.* 65 Tex. 13; *Jackson v. Green*, 11 West. Rep. 850, 112 Ind. 841; *Gibson v. Sublett*, 82 Ky. 596; *The Brantford City*, 29 Fed. Rep. 373; *Blackwell v. Webster*, Id. 614; *Story*, Conf. L. § 102; *Wharton*, Conf. L. § 504, n;

Phinney v. Phinney, 4 L. R. A. 348, 81 Me. 450.

Meurs. R. P. Tapley and H. Fairfield, for defendant:

The contract was to be performed in Florida. *Story*, Conf. L. §§ 280, note, 299, 301, 304; *Wharton*, Conf. L. § 401; *Parsons*, Notes and Bills, 324; *Milliken v. Pratt*, 125 Mass. 874; *Lawrence v. Bassett*, 5 Allen, 140; *Bell v. Packard*, 69 Me. 105; *Shoe & L. Nat. Bank v. Wood*, 3 New Eng. Rep. 118, 142 Mass. 568; *Hill v. Chase*, 3 New Eng. Rep. 207, 143 Mass. 129.

Its validity and obligation must be determined by the laws of that State.

Story, Conf. L. §§ 243, 296-301b, 304, 305; 2 Kent, Com. p. 574; *Wharton*, Conf. L. §§ 401, 498, 504; *Akers v. Demond*, 103 Mass. 818; *Martin v. Martin*, 1 Me. 894; *Johnson v. Stillings*, 35 Me. 427; *Allen v. Hooper*, 50 Me. 371; Florida Laws, chap. 188, § 7; *Pritchard v. Norton*, 106 U. S. 136, 27 L. ed. 108; *Kennedy v. Cochran*, 65 Me. 594.

Peters, O. J., delivered the opinion of the court:

The plaintiff declares on the instrument adduced below as a penal bond, and also upon the covenants expressed in it:

This agreement, made this 12th day of September, 1893, between Jonathan I. Mackey and Alicia C. Mackey, both of Florida, and residents of Jacksonville in said Florida, witnesseth that, whereas my wife, Alicia C. Mackey, has this day expressed her desire to me that a separation of relations of man and wife between ourselves might be effected, and for good reasons known to herself, be it

period of the joint lives of the parties, it had power to direct that to be done in the lifetime of the defendant which would result in making an effectual provision for such payments. *Ibid.*

A contract by a husband and wife who had separated, on the abandonment of a divorce suit, to live apart and that he shall pay her a part of his estate for her maintenance, is not against public policy. *Pettit v. Pettit*, 10 Cent. Rep. 285, 107 N. Y. 677.

It is no defense to an action to enforce such contract, that the wife had refused to indemnify the husband against liability for future maintenance, where the contract between them gave him no right to demand such indemnity. *Ibid.*

Maintenance is a vested right in the wife founded on the marriage contract. This is the legal duty of the husband, and the wife has the right to demand it, but when her remedy is denied in law equity will enforce her right. *Garland v. Garland*, 30 Miss. 710.

Where, during pendency of an action for a limited divorce, an agreement was entered into between a husband and wife, whereby the husband bound himself to pay the wife an annuity, and gave a bond and mortgage as security, a judgment recovered by the wife on such securities is conclusive as to the validity of the agreement as against the husband, and is not impeachable collaterally on creditor's bill by her to enforce the judgment against land of the husband fraudulently transferred. *Decker v. Decker*, 10 Cent. Rep. 509, 108 N. Y. 128.

After separation known to the insurance company, an attempt of the husband (insured) to surrender the policy taken out for the benefit of the

wife is inoperative. *Manhattan L. Ins. Co. v. Smith*, 3 West. Rep. 116, 4 Ohio St. 156.

That a wife again married and thereby subjected herself to an indictment does not prevent her from exercising her remedies in a court of equity. *Charruau v. Charruau*, 1 N. Y. Leg. Obs. 137.

Enforcement of articles of separation. See note to *Galusha v. Galusha* (N. Y.) 6 L. R. A. 437.

Penal bond: recovery in action on.

No set form of words is necessary to make a penal bond. A promise to pay certain sums, with words binding the obligor to do so under the penalty of a certain sum, may be sufficient. *Carey v. Mackey*, 33 Me. 516.

An intention to treat the sum named in a bond as a penalty to secure the performance of the condition, and to be discharged on payment of damages arising from non-performance, cannot be inferred as a rule of law, or a conclusive presumption from the mere form of the obligation. *Clark v. Barnard*, 106 U. S. 436, 37 L. ed. 790.

In an action of debt on the bond, the demand is for the penalty; the condition is no part of the obligation. *Farni v. Tesson*, 66 U. S. 1 Black, 309, 17 L. ed. 67; *State v. Frank*, 4 West. Rep. 294, 22 Mo. App. 46; *Kiehl v. Com. (Pa.)* 4 Cent. Rep. 695.

As to the surties on a penal bond, judgment cannot be rendered against them beyond the penalty, to be discharged on payment of what is actually due. *Farrar v. United States*, 30 U. S. 5 Pet. 373, 8 L. ed. 159.

Interest may be allowed on the penalty after the time for performance of the contract has expired. *Perit v. Wallis*, 2 U. S. 2 Dall. 223, 1 L. ed. 370.

known that I hereby consent to said separation, and, in consideration of my duty to her as her husband, I hereby agree to pay to her monthly, through the Hon. M. A. McLain, of Jacksonville, aforesaid, the sum of \$30 per month, on the first day of each month, the first installment or payment being and to become due November 1, 1882. And I hereby bind myself to the well and true payment of \$30 aforesaid monthly, so long as she shall maintain good behavior and shall (not) have remarried, and this I bind myself to do under a penalty of \$5,000 to be recovered by her in any court of law by attachment upon my property and of myself, which sum of \$5,000 aforesaid I hereby agree shall be considered a forfeiture upon my part to her. And this \$30 per month is in addition to the \$150 which I have already paid her at the making of this agreement. And this I do freely and understandingly.

Witness my hand and seal this 12th September, 1882.

J. I. Mackey. [Seal].

The instrument was acknowledged before H. M. Sylvester, a notary public, and witnessed by him.

The plaintiff cannot recover on both forms of declaration.

She elects to recover the penal sum. We have no doubt the instrument declared on is a penal bond. It contains all the elements of one, though perhaps not expertly put together.

"If I, by deed, covenant or promise to do a thing, and then say, 'to perform which promise I bind myself in twenty pounds,' this is a good obligation in law." No set form of words is necessary, as see numerous illustrations in Bacon's and Dane's Abridgements, title *Obligation*. We are of opinion that the \$5,000 are a penalty, and not liquidated damages.

Passing the points made on the pleadings, an important question arises, whether an agreement for separate support is valid in this State. We do not see why not. It is said in argument that there has never been a judicial decision in the State touching the question. That indicates that the danger of a frequency of such cases must be small indeed.

Certainly such an agreement comes within the spirit of our late Statute, which provided for a divorce from bed and board, the marital tie remaining. There never has been any judicial expression in this State against an agreement for separate support. The doctrine is upheld in an early Massachusetts case, when this State was a part of that Commonwealth, and the precedent is therefore as binding here as it is there.

In *Page v. Trufant*, 2 Mass. 159 (decided in 1806), it was held that "a bond from the husband to the father of the wife for her maintenance, after a voluntary separation, is a valid contract." According to the practice of that day, each judge sitting expressed his opinion on the question, and all favored the doctrine. Parsons, *Ch. J.*, closed the discussion in these words: "It in fact appears upon the record that the consideration was

legal and meritorious, as it was made to secure a separate maintenance for the wife, who separated from her husband for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them."

In *For v. Davis*, 113 Mass. 255, the doctrine is fully recognized, and was applied in that case.

Mr. Bishop, in 1 Bishop, Mar. and Div., 6th ed., bk. 5, chap. 39, enumerates the States, citing their cases, where the doctrine is either allowed or disallowed; and it appears to have been accepted by most of the States. In England it is established by Act of Parliament. The condition on which it rests is that separation has already taken place, or that the agreement is made in contemplation of an immediate separation which takes place as contemplated.

The only objection to such contracts is the encouragement which may be afforded for married parties to separate from each other. We think that amounts to little or nothing under our liberal divorce system. Parties greatly prefer divorce and alimony to mere separation.

There may be a distinction to be observed. Some contracts of separation might offend public policy, and others not. Certainly there are cases where a wife would be justified in separating from her husband, and asking a support from him notwithstanding the separation. There was undoubtedly good cause for separation in the present case. The evidence in the divorce case, to be alluded to hereinafter, which is a part of the record of this case, shows that the separation was caused by cruelties inflicted by him upon her. He had frequently choked her severely, and habitually abused her in different ways. She proves that she has been a person of good behavior since separation, as the contract requires of her, and that she has not married again.

It is contended, however, by the defendant, that the contract is to be interpreted, not by the law of Maine, but by the law of Florida, where by its terms it was to be performed, and that such a contract is invalid by the law of the latter State.

While it may be admitted that the general rule is that contracts are to be interpreted according to the law of the place where performance is to be had, there are some exceptions when the question pertains to the validity of the contract rather than to the meaning of its provisions. We are satisfied that the general rule invoked by the defendant's counsel does not govern the case before us. That rule is more applicable to commercial contracts than to agreements like this.

Prof. Wharton lays down, and supports with authorities, this proposition: "That parties who enter into a contract are to be presumed to do so bona fide, intending the contract to be performed, and that they are supposed, if two systems of law are before them, by one of which the contract would be good, by the other of which it would be bad, to incorporate in the contract the law which would make the contract operative." Wharton, *Ev.* 2d ed. § 1250.

The same author states the same proposition again (Wharton, Conf. L. 2d ed. § 429) in these words: "It is always to be presumed that persons agree effectually to do that which they contract, and if so this agreement becomes part of the contract, overriding such local law as does not rest on a ground distinctively moral or political; and when there is a conflict of possible applicatory laws the parties are presumed to have made part of their agreement that law which is most favorable to its performance."

Prof. Parsons (2 Cont. 6th ed. 588) accepts and strongly advocates this view. There are also late cases supporting it.

In *Hunt v. Jones*, 12 R. I. 265, it is held that, when a vendor sold goods in Rhode Island to be delivered in New York, and the contract was valid in Rhode Island and void in New York on account of the Statute of Frauds in that State, the sale should be regarded as a Rhode Island contract. A note made in Connecticut on Sunday after sunset was held to be valid, though, had it been made in the same circumstances in Rhode Island, it would have been invalid.

Brown v. Browning, 15 R. I. 422; *Blackwell v. Webster*, 23 Blatchf. 537, 29 Fed. Rep. 614, and *Scudder v. Union Nat. Bank*, 91 U. S. 406 [23 L. ed. 245],—bear with weight on this question.

There are strong circumstances—features in the contract, and facts about it—which strengthen the presumption that the parties intended to be governed by the laws of Maine in their contract. The paper was made here (at Portland), and delivered here. It was partly performed here, \$150 having been paid at its delivery. The cause producing the agreement occurred in Maine, being principally his treatment of her while temporarily residing at Old Orchard. The separation took place in Maine, and there was nothing preventing her thereafterwards residing in Maine or out of Florida.

The parties were not at the time merely traveling through the State, but were temporarily abiding here. No evasion of the law of Florida was intended, nor is the contract a criminal one under her laws. It is merely contended that that State has adopted a part of the old common law, which disapproves such agreements upon grounds of public policy.

That State has no statute on the subject, and no case touching it has ever been in any form before any of its courts.

We think the contract is legally enforceable in this State.

It is contended for the defendant that the agreement for separate support was terminated by the divorce obtained by the plaintiff in a court in Florida in 1888. The agreement does not provide for its rescission or

termination upon the wife's divorce. A failure of good behavior or re-marriage are the only causes provided for its termination. The promised support would be just as much needed after divorce as before. There is no agreement of parties in the provisions of the divorce, nor was there any in the negotiations preceding divorce, that the contract should be annulled thereby, although the defendant attempted to prove such an understanding. The court could have imposed such condition,—a not uncommon thing,—but failed to do so. Nor does the decree of divorce, of its own force, have the effect of terminating the prior agreement for separate support. On this point the doctrine is stated by Mr. Bishop, and the authorities fully cited. 1 Mar. and Div. 6th ed. § 637; 2 Mar. and Div. §§ 717-722, 741.

The counsel for the defendant argue at great length that an action cannot be maintained on the agreement because not of legal form in all respects, very properly contending that all contracts made between husband and wife do not become valid merely because the marital tie has been sundered by a decree of divorce. But all contracts of the kind which equity would uphold before divorce, the law recognizes after divorce.

This agreement is substantially a legal agreement, and, at all events, a good equitable agreement. Had the promise in it been made to the plaintiff's agent as her trustee, it would have been a perfectly formal instrument at law. But the promise is to her, though the delivery of the money was to be to the agent for her. Equity would have readily supplied formality.

In the divorce proceedings the plaintiff received allowances towards her support of \$690, the terms of divorce having been arranged by the counsel of the parties. Here, then, was a decree of court for support, and also an agreement of parties for the same purpose. It does not clearly appear what was in the minds of the parties about a double allowance; but, from what was said and done in the negotiation, and because there would be much apparent justice in thus interpreting the transaction, we think we are justified in concluding that it was the tacit understanding of the parties that the allowances in the divorce suit should be a credit to that extent upon the amounts payable by the contract. *Albee v. Wyman*, 10 Gray, 222.

The result must be that judgment is to be entered for the penal sum of the bond, execution to issue for the sum due on the bond, less the credit of \$690.

Defendant defaulted for the penal sum. Damages to be assessed at *nisi prius*.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Willard T. SEARS

v.

KINGS COUNTY ELEVATED R. CO.

(....Mass.....)

1. To make a vote of a corporation a contract which will be binding on it, the obligation which it undertakes to assume must be offered to, and accepted by, the intended beneficiary.
2. In an action by an officer of a corporation to recover salary which is alleged to have been fixed by a vote of the board of directors, parol evidence is admissible to show that the vote was never communicated to or accepted by the plaintiff, and for this purpose proof of the circumstances attending the transaction may be given.
3. Evidence that the treasurer of a corporation prepared a statement of its liabilities in which he did not include any claim of his own for salary, and that he afterwards assented to as correct a statement of such liabilities which did not include his claim, is admissible in an action brought to recover salary alleged to have been due him at that time upon the question of whether or not there was a contract that such salary should be paid him.

(September 4, 1890.)

EXCEPTIONS by defendant to a judgment of the Superior Court for Suffolk County entered upon a verdict directed for plaintiff in an action brought to recover salary alleged to be due and unpaid to plaintiff as treasurer of defendant corporation. *Sustained.*

Plaintiff based his right to recover upon a vote of the board of directors of the corporation passed June 6, 1879, as follows:

"Resolved, That the salary of the president be fixed at the sum of \$6,000 to date from the organization of the Company, and subject to future adjustment.

"That the salary of the treasurer be fixed at the sum of \$6,000, to date from the organization of the Company, and to be subject to future adjustment.

"That there be credited to the secretary the sum of \$500 for services to the present time."

The case sufficiently appears in the opinion.

Messrs. B. Wadleigh, S. C. Eastman and F. B. Hayes, for defendant:

When an officer of a corporation performs the usual and ordinary duties of his office, he cannot recover any compensation therefor unless it has been so agreed.

Citizens Nat. Bank v. Elliott, 55 Iowa, 104; *Pew v. Gloucester First Nat. Bank*, 180 Mass. 391.

And a subsequent vote of the board of directors to pay a director or other officer for his services, when there was no previous agreement, is not binding.

Loan Association v. Stonemets, 29 Pa. 584; *Dunston v. Imperial Gas Co.* 8 Barn. & Ad. 126; *Kilpatrick v. Penrose Ferry Bridge Co.* 49 Pa. 118; *Holder v. Lafayette, B. & M. R. Co.* 71 Ill. 106; *Moss Ferry Gravel Road Co. v. Brangan*, 40 Ind. 861; *New York & N. H. R. Co. v. Kelchum*, 27 Conn. 170.

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The passage of the resolution, even without the clause "to be subject to future adjustment," would constitute no contract to pay the plaintiff the salary named.

Commonwealth Ins. Co. v. Orane, 6 Met. 64; *Com. v. Eagle F. Ins. Co.* 14 Allen, 844.

The court erred in excluding the testimony that the vote fixing the plaintiff's salary was to be binding and operative only on condition that the negotiations then pending went through, and if they did not it was to be of no effect, and that the plaintiff assented thereto. This occurred before the passage of the vote. It was an agreement that the vote was not to take effect except in a certain contingency, and evidence of it should have been received.

Murray v. Stair, 2 Barn. & C. 82; *Pym v. Campbell*, 6 El. & Bl. 870, 378; *Davis v. Jones*, 17 C. B. 625; *Wallis v. Littell*, 11 C. B. N. S. 869; *Rogers v. Hadley*, 2 Hurlst. & C. 227; *Cleaver v. Kirkman*, 83 L. T. N. S. 672; *Pawling v. United States*, 8 U. S. 4 Cranch, 219, 3 L. ed. 601; *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 568; *Wilson v. Powers*, 181 Mass. 539; *Commonwealth Ins. Co. v. Crane*, 6 Met. 64.

Messrs. L. S. Dabney and Horace G. Allen, for plaintiff:

The vote of the corporation was a contract, and the record could not be varied or contradicted by parol evidence.

Mayhew v. Gay Head Dist. 18 Allen, 129, 184, and cases cited; *Gould v. Norfolk Lead Co.* 9 Cush. 338-345; *Coffin v. Collins*, 17 Me. 440; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Delano v. Smith Charities*, 188 Mass. 63, 64.

W. Allen, J., delivered the opinion of the court:

The plaintiff's contention is that the vote of the defendant constitutes a written contract which cannot be varied by parol evidence. But the vote is not a contract. It is the act of the defendant alone, and it requires the act of both parties to make a contract. The vote must have been communicated by the defendant to the plaintiff, and accepted by him, to constitute a contract between them. To make a vote of a corporation a contract binding on it, it is necessary, as in the case of a deed or promissory note, that there should be the offer of the obligation by the one party to the other, and its acceptance by the other. In the case of written instruments the usual evidence of offer and acceptance is proof of the manual delivery of the instrument. There can be no actual delivery of a vote and there need be no symbolical delivery of it, but to make a written vote binding as a promise it must be communicated to the other party,—that is offered to him for his acceptance—and accepted by him, which is the equivalent of the delivery and acceptance of a written instrument. Proof that the writing was offered and accepted as a contract between the parties is equally necessary whether the writing be a vote or a deed. The fact that a party knows of and claims under a vote of a corporation, as in *Delano v. Smith Charities*, 188 Mass. 63, may be prima facie proof that it was communi-

cated to and accepted by him, as the possession of and claiming under a deed may be prima facie proof of its delivery and acceptance; but it is proof by verbal evidence, and verbal evidence is competent to control it and to show that the vote was not communicated to the party, or that it was not accepted by him. As the circumstances attending the transaction may afford an inference that the vote was communicated to and accepted by the other party, so they may be such as to afford an inference that it was not communicated by the corporation to the other party for his acceptance, and that it was not accepted by him. Parol evidence of such circumstances does not vary the written vote, but only shows that it never took effect as a contract. The case at bar furnishes a sufficient illustration.

The vote was not in form a contract with or promise to the plaintiff. It purported only to fix the salary of the treasurer of the corporation. The circumstances attending the vote, which were in evidence and of which the defendant offered evidence, were in brief and substance as follows. The object of the corporation was, as its name imports, to build an elevated railway or railways. It was organized under its charter, and the plaintiff was chosen and acted as its treasurer. Before exercising or fully acquiring its franchise to build railways it was necessary to do certain things, which were not done while the plaintiff remained in office, and there was very little for him to do as treasurer. "It was agreed at the time of the election of officers that no salary should be paid to the president or treasurer until such time as the charter of the Company should be fully completed and the Company should get upon its feet." About five months after the organization of the Company there were negotiations with outside parties looking to the sale to them of a large part of the stock of the corporation, but nothing came of them. About two years later and about the time of the plaintiff's resignation of the office of treasurer, there were similar negotiations which came to nothing. The plaintiff testified that under the former negotiations an agreement was executed which looked to perfecting the franchise of the corporation and commencing the construction of railways under it, which was dated June 5, 1879. The vote of the Company fixing the salary of its treasurer was passed on the sixth day of June, 1879, and the defendant offered to prove that it "was to be binding and operative only on condition that the negotiations then pending went through, and that if they did not it was to be of no effect, and that the plaintiff assented thereto." What the defendant wished to prove, then, was that the plaintiff was chosen treasurer of a corporation which was not prepared to commence its business under an agreement that he should receive no salary until arrangements for doing business were perfected. The amount of the salary which was to be paid him was not fixed; that, afterwards, when negotiations were pending which it was believed would result in the commencement of business by the corporation, the vote fixing the amount of the salary

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of the treasurer was passed by the directors with the understanding on their part and on the part of the plaintiff, who was present at the meeting as one of the directors, that it should not supersede the agreement under which the plaintiff was elected and should not be operative until such time as under that agreement the plaintiff should be entitled to a salary; as the plaintiff was present when the vote was passed he of course knew of it, but the jury might have found upon the offered proof that he also knew that it was not passed to be communicated to him for his acceptance until the time when he should be entitled to a salary, and that he did not in fact accept it as a promise to pay him a salary. We think that the evidence excluded was competent upon the question whether there was a contract between the parties that the plaintiff should be paid a salary. It tended to show that the promise contained in the vote was not offered to and accepted by the plaintiff while he continued in office. See *Wilson v. Powers*, 181 Mass. 589; *Commonwealth Ins. Co. v. Crane*, 6 Met. 64.

It would seem that the court might have admitted evidence of the conduct of the plaintiff in regard to the statements of indebtedness of the corporation. The evidence was offered as admissions by the plaintiff that the defendant was not indebted to him. If the jury believed that he as treasurer furnished a statement of the liabilities of the corporation and did not include among its liabilities any claim of his own for salary, when, as, he now claims, more than two years' salary was due to him, and that after he ceased to be treasurer he was shown and assented to a statement of the liabilities of the Company, which did not include his salary, we think that the evidence would be competent to be considered by the jury upon the question whether there was a contract that salary should be paid to him.

Exceptions sustained.

Mason S. SOUTHWORTH, *App't.*

v.

Rodney EDMANDS *et al.*

(....Mass....)

1. The taxes upon real estate occupied as a family residence are properly assessed to the husband and not to the wife under a statute permitting it to be assessed to the owner or to the person in possession of it, although she holds an unrecorded deed to it, the record title being in a third person, in the absence of anything to overthrow the presumption that he, as head of the family, is in possession, for which purpose the undisclosed title of the wife is insufficient.

(*Knowlton and O. Allen, JJ., dissent.*)

2. The insufficiency of an affidavit of the giving of notice of a tax sale is immaterial if it is satisfactorily shown that the notice was in fact given.

3. The collector may sell the whole of a tract of land for delinquent taxes under Gen. Stat., chap. 12, although a part only would be sufficient to satisfy the demand and could conveniently be sold separately.

4. A sale for taxes is not rendered void by the fact that a portion of the assessment was for the payment of interest on a debt contracted for the purchase of a park, for which purpose the municipality could not lawfully raise money.

5. The announcement by the collector at a tax sale that he hopes no person will bid more than the amount of taxes, interest and charges on a piece of property will not avoid the sale where there is no reason to suppose that the remark was intended to, or does in fact, influence the bidding.

(September 5, 1890.)

APPEAL by demandant from a judgment of the Superior Court for Middlesex County in favor of the tenants in a proceeding by writ of entry to recover possession of certain land in the Town of Wakefield. *Reversed.*

Demandant claimed title under certain tax sales of the property under assessments made against defendant Rodney Edmands. The tenants who defended Rodney Edmands and his wife, Josephine A. H. Edmands, claimed, *inter alia*, that the title to the property was in Mrs. Edmands, and that it was improperly assessed to Mr. Edmands and consequently that the sales were void.

The further facts appear in the opinion.

Mr. S. K. Hamilton for appellant.

Mr. George M. Hobbs, for appellees:

Edmands ceased to be owner of the estate upon the foreclosure in 1861. The assessors in each year had the means of knowing in whom the record title of the premises stood, and might have ascertained in whom the legal title stood.

Oakham v. Hall, 113 Mass. 535; *Forster v. Forster*, 129 Mass. 559; *Desmond v. Babbitt*, 117 Mass. 233.

He was not in possession. Mere residence by the husband upon the wife's separate property is not possession.

Lynde v. Brown, 8 New Eng. Rep. 366, 143 Mass. 337; *McIntyre v. Knowlton*, 6 Allen, 565; *Boos v. Gomer*, 23 Wis. 284; *Hamilton v. Fond du Lac*, 25 Wis. 496; *Feller v. Alden*, 23 Wis. 302.

W. Allen, J., delivered the opinion of the court:

The taxes are properly assessed to Rodney Edmands. The record title was in Strong, and he was the person taxable as owner, and not Mrs. Edmands, who held an unrecorded deed of which the assessor had no notice. Gen. Stat. chap. 11, § 8; *Forster v. Forster*, 129 Mass. 559, 566; Stat. 1861, chap. 304, § 4; Pub. Stat. chap. 11, § 13.

The potent facts upon which the assessments must be made were that Strong was the owner of the premises and that the Edmands family occupied them, and there was nothing to overthrow the presumption that the head of the family was in possession.

The tax could not properly have been assessed to Mrs. Edmands as the person in possession. Even if Mrs. Edmands' deed had been recorded and she taxable as owner, Mr. Edmands would still, upon the facts found, have been taxable as in possession. It appears that Mr. Edmands and his wife occupied the premises, and with their young children resided on the place. There is nothing to show that he, as the head of the family, was not in possession of the family home. The fact that the wife owned the place would not afford an

inference that she had taken her husband's place in the family. Undoubtedly she would have the right to take and retain possession even if it were necessary therefor to compel her husband to furnish another home for her. But if she permitted her estate to be occupied as the family home the presumption, in the absence of evidence to the contrary, is that she permitted the possession of it to be in her husband. Her consent that her husband should be in possession would be presumed. He would not be her tenant, but would be in by her license. *Plaisted v. Hair*, 150 Mass. 276, 5 L. R. A. 664. He was under legal obligation to provide a home for his family. She was under no legal obligation to allow him to use her estate for that purpose. She might have refused it to him; perhaps she might as a condition of admitting him to it have exacted his consent that she should be the master of the house. Perhaps she could by an ante-nuptial contract have settled the possession of the house upon herself after the pattern of the plaintiff in *McIntyre v. Knowlton*, 6 Allen, 565, who married her hired man under an agreement that he was to have only his board and lodging and a home with her and nothing more. But no such relation between husband and wife will be presumed. If nothing appears but that the husband and wife and children occupy a house owned by the wife, the inference will be that the husband is the person in possession of it, and that he is what his name imports, master of the house.

At the time of this occupancy the wife could not have conveyed her real estate or let it for a longer term than one year without the concurrence of her husband. Gen. Stat. chap. 108, § 8; Stat. 1874, chap. 184, § 1.

If she used her property for carrying on a boarding house or a farm the property employed in the business would be conclusively presumed to be her husband's as against his creditors, unless a certificate that it was her business had been filed. Stat. 1862, chap. 198; *Snow v. Sheldon*, 126 Mass. 332.

Like his children she took and followed the settlement of her husband. Gen. Stat. chap. 69, § 1.

We cannot follow the decision in *Hamilton v. Fond du Lac*, 25 Wis. 496, nor adopt the doctrine there laid down that "a husband merely residing with his wife upon her separate property is no more the occupant of the property within the meaning of the Statute allowing lands to be assessed to occupants than she would be of his lands if residing with him thereon."

The circumstances of the occupancy stated in the report, meagre as they are, show that the actual possession was in the husband. Before March, 1861, he was the owner. In that year the record title passed by the foreclosure of a mortgage to Strong, and it remained in him until 1893. In 1869 Strong gave the deed to Mrs. Edmands which was recorded in 1893. The taxes were assessed to Strong and paid by him until 1864. Since then they have been assessed to Edmands and were paid by him until the tax for 1878, for which the first sale was made. It does not appear how long Edmands had lived upon the place, only for some years prior to 1899. It is said the place was "purchased from Strong" in

1864 although the deed was not given until 1869. The inference is that Edmands occupied the place continually since 1864, if not from before the foreclosure of the mortgage, and with Mrs. Edmands at least since 1864. Neither Mr. nor Mrs. Edmands ever objected to the taxes being assessed to Mr. Edmands, or claimed in any way that they should be assessed to Mrs. Edmands. It must be assumed that both of them knew to whom the taxes were assessed. In the instances, probably common throughout the Commonwealth, in which the real estate of the wife is assessed to the husband, there can hardly be found one which would not furnish more plausible ground than this for holding the tax to be illegal and void. In 1873 the assessors found Edmands occupying the place with his family, he had so occupied it for nine years or more and during that time the taxes had been assessed to him and paid without objection. They were not bound to look further. If they had notice from the record that Strong was the owner they were not bound to inquire if there was not an unrecorded deed from him to Mrs. Edmands and if they had had notice of such a deed they may well have doubted whether they could have assessed the tax to her as owner, while the right to assess to the occupant in possession was clear. It has not been argued that the taxes could have been assessed to Mrs. Edmands except as owner, or that they could have been assessed to anyone as in possession unless to Mr. Edmands.

The demandant asserts Mr. Edmands' possession by making him a tenant in the action, and he admits that he is in possession by pleading the general issue without a specification of disclaimer.

It is objected that the affidavits of notice of the sales provided for by Gen. Stat., chap. 12, § 27, were insufficient because the attorney of the collector by whom they were made was not a disinterested person. The Statute does not require that an affidavit should be filed. It only makes a proper affidavit evidence that notice was given, but does not exclude proof by other evidence. As it is found that notice was in fact given it is immaterial if the affidavit is insufficient.

It is further objected that the sales were void because the collector sold the whole of the land when a part might conveniently have been sold. But it was optional with the collector to sell the whole or a part. Gen. Stat. chap. 12, § 88; *Crowell v. Goodwin*, 8 Allen, 585.

It is also objected that the sales were illegal because there was included in each annual appropriation a sum of money to pay interest on a debt contracted for the purchase of land for a public park, it being contended that the town could not lawfully raise money for that purpose. If this were so it would not avoid the sale. Gen. Stat. chap. 12, § 56; *Cone v. Forest*, 126 Mass. 97.

It is further objected that the sales are void because the collector at each sale announced that he hoped that no person would bid more than the amount of taxes, interest and charges, on account of the inconvenience of disposing of the surplus. There is no reason

to suppose that this remark did in fact, or was calculated to, influence the bidding. It was apparently intended only for the class of bidders who meant to advance about the amount due, and to hold the land for redemption, when they would recover back their advance, and ten per cent interest upon it, and it might have influenced such a bidder to offer the exact amount due instead of a round sum that would cover it; but that would be no detriment to the owner. It could not have influenced any bid made with the intention of purchasing and holding the property. It is better for the owner if he redeems the property that the sale should be for no more than the amount due, for when he redeems he will have to repay the surplus, with interest at the rate of 10 per cent per annum; and this seems to have been the opinion of the Legislature, for before the last sale the collector was authorized to take the land for the town for the amount due. Stat. 1878, chap. 266.

No other objection is made to the validity of the tax sales, and in the opinion of a majority of the court there must be judgment for the demandant.

Knowlton, J., dissenting:

I do not agree to that part of the opinion of the majority of the court which seems to hold that, when a man and his wife live together on her real estate, the possession is deemed to be in the husband and not in the wife. There can be no doubt that when two men, or two women, or a man and a woman who are not married to each other are residing in a house owned by one of them, and nothing else appears, the owner is held to be in possession and the other to be there in the owner's right. By Pub. Stat., chap. 147, § 1, it is provided that "the real and personal property of a woman shall upon her marriage remain her separate property, and a married woman may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if she were sole, except that she shall not without the written consent of her husband destroy or impair his tenancy by the curtesy in her real estate." Under this section, except as to her husband's right by the curtesy and the making of contracts with her husband, a married woman stands in precisely the same position in regard to her real estate as if she were a man. Pub. Stat. chap. 147, § 2.

The Statute has abolished all rights which the husband once had in his wife's property, and has swept away all presumptions against her possession and control growing out of the marriage relation. In the ownership of her property, with the two exceptions above stated, and in all the rights, duties, benefits and presumptions which the law attaches to the ownership of property, a wife is as if she had never married. The law assumes that she and her husband will live together. Where is the provision that if they live on her real estate the express words of the Statute giving her control of her property shall immediately lose their effect?

It is true that in some particulars the com-

mon law in regard to the domestic relations remains unchanged. It is still the legal duty of the husband and father to support his wife and children. He is still the head of the family, and as such has certain rights of control. He is entitled to the custody of his minor children unless the court for good reasons sees fit to give it to his wife or to a guardian. Pub. Stat. chap. 146, §§ 29, 30, chap. 147, §§ 33, 36, chap. 139, § 4; Stat. 1887, chap. 332, § 2. How far he can enforce any right of control of the person of his wife under recent statutes and decisions is doubtful. But the principle of the common law that a wife is presumed to act under the coercion of her husband may be invoked in her favor and against him when she is charged with a crime committed in his presence; and this principle will apply in a criminal case when her conduct in which she is presumed to have been coerced takes effect upon her property and constitutes a criminal use of the property. *Com. v. Wood*, 97 Mass. 225; *Com. v. Hill*, 145 Mass. 305, 5 New Eng. Rep. 277.

This principle, however, is quite distinct from that which determines the legal possession and right of control which ordinarily pertain to the ownership of property. The husband is under no liability as an owner or possessor of his wife's estate. He is under such liability only as results from the fact that, as head of the family, he is supposed to influence the conduct of his wife, and to be responsible for her acts done in his presence and with his knowledge and consent. Her conduct may give a character to the house in which they live, and render it a common nuisance, and he may be so responsible for her conduct that her act becomes his, and makes him punishable as keeper of a nuisance, although the ownership and the legal possession of the real estate viewed as property are all the time in her. If a married woman should file a certificate that she was carrying on the business of selling intoxicating liquor on her separate account, and obtain a license, and buy the necessary property, and conduct the business as her own, her husband would be liable for any unlawful sales made by her in his presence, unless it appeared that they were made without his consent. Would it therefore be held that he was in possession of the utensils used in the business, so that he could maintain trover against a wrong-doer who should carry them away? Manifestly not. Neither could he properly be deemed to be in possession of real estate owned by her, so that he could maintain trespass for an injury to it; or take the rents and profits, merely because he might be liable criminally for her act of keeping it as a common nuisance. In *Com. v. Hill*, *supra*, which is the most recent case in this Commonwealth in regard to the criminal liability of a husband for a wife's act, it seems to be assumed that the legal possession of the real estate was in the wife as owner, and the decision is made to turn on the question whether the husband consented to her criminal conduct, so as to make him liable for it under the principle of the common law above referred to.

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The only ground on which it is argued that this Statute should be deprived of its effect is the existence of the principles of the common law which I have mentioned. But the common law must yield to the Statutes whenever they come in conflict, and the principles which are still operative are not at variance with this Statute. The fact that a husband ought to provide a home for his wife does not tend to show that a wife ought to lose her possession of her property if she allows it to be occupied as a home for the family. She ought not to lose nor he to gain because of his neglect of duty.

A husband's right of control as head of the family relates only to the conduct of the family and gives him no possession of their property. If his minor children have property their guardian alone can manage it. If his wife has property she can do with it as she chooses, so long as she violates no law. His right to control her conduct, whatever in other respects that right may be, is expressly limited by the Statute which gives her the control of her property for any lawful use, and precludes him from interfering with her possession.

Gen. Stat., chap. 108, § 1, provides that not only a wife's property, but the "rents, issues, profits and proceeds thereof, . . . shall remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts." While these words are not retained in chap. 147 of Pub. Stat., their meaning is there. There is nothing in the language of the Statute limiting the prohibition of interference by the husband to property not occupied as the home of the family. Under this language how can it be held that if a wife goes to live on her farm with her husband the possession thereby passes to him and he becomes entitled to the income of the property? In my opinion, so to hold would nullify the Statute, and greatly disturb the harmony of our decisions.

No doubt a married woman may give up the possession of her real estate to her husband, notwithstanding that she can make no binding contract with him. But in cases where a husband and wife have lived together on her property she has been treated as in possession, and has often been held liable for acts done by him as her managing agent. *Snow v. Sheldon*, 126 Mass. 332; *Arnold v. Spurr*, 180 Mass. 349; *Wheaton v. Trimble*, 145 Mass. 345, 5 New Eng. Rep. 381; *Jeffords v. Alford*, 151 Mass. —.

In *Plaisted v. Hair*, 150 Mass. 275, 5 L. R. A. 664, it was found that the wife owned the farm, that she lived on it with her husband, who by her "consent was carrying on said farm in his own name, on his own account and for his own benefit." It was held that he was a licensee of his wife, and that hay raised and appropriated by him before the license was revoked was his property. But the opinion plainly implies that this was because he was managing the farm as his own by her express consent, and that

she could have revoked the license at any time, and it nowhere intimates that he would acquire any possession merely because she permitted the farm to be occupied as their home.

In *McIntyre v. Knowlton*, 6 Allen, 565, where a husband and his wife lived together on her land, it seems to have been assumed by the court that the possession was in her, and the question discussed was whether the hay raised on the land became his because he had done work in raising and curing it, and it was held that it did not.

By Pub. Stat., chap. 11, § 18, real estate is to be assessed "to the person who is either the owner or in possession thereof on the first day of May." The Statute declares what shall constitute ownership within the meaning of this section, and substantially adopts the provision of Pub. Stat., chap. 120, § 4, that an unrecorded deed shall not be valid against third parties who have had no notice of it. To be subject to taxation for real estate one must have such ownership, or must be in actual possession. He cannot be taxed on mere appearances which do not accord with the facts. The word "possession" is used in this Statute in its ordinary sense. *Lynde v. Brown*, 148 Mass. 387, 3 New Eng. Rep. 866. The fact for which it stands is fraught with important possible consequences. Not only may a lien upon the real estate be founded on this possession, but by reason of the possession a debt may be created, collection of which is enforceable against the person and property of him to whom the tax is assessed. *Richardson v. Boston*, 148 Mass. 508. Possession which will warrant taxation under this section will entitle the possessor to the income and profits of the property, and will enable him to maintain an action for a trespass.

There is no reason for any other than a natural construction of this Statute. There is no practical difficulty in assessing taxes on real estate under it. The assessors may always safely assess to the person who appears of record as owner or to the person in actual possession. If with reasonable diligence they cannot ascertain the owner or possessor they may tax it as the property of an unknown proprietor. *Desmond v. Bab-bitt*, 117 Mass. 283. If for any reason they make a mistake, there is still an ample and easy remedy; for the invalid assessment does not affect the validity of the remainder of the tax, and the erroneous tax may afterwards be reassessed by the assessors for the time being as it should have been assessed originally. Pub. Stat. chap. 11, §§ 79, 84.

Under a similar statute in Wisconsin the Supreme Court of that State unanimously held that a man living with his wife on her real estate, under circumstances like those in the present case, was not liable to taxation as an occupant of the property. *Hamilton v. Fond du Lac*, 25 Wis. 496.

I am authorized to say that Mr. Justice Charles Allen concurs in this opinion.
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Thomas E. PROCTOR *et al.*, Assignees of
E. & A. H. Batcheller & Co.,
v.

NATIONAL BANK OF THE REPUBLIC
of Boston.

(...Mass....)

1. Where a creditor knowing his debtor to be insolvent attaches an asset belonging to the latter in a foreign State, and then sells and delivers his claim together with all rights acquired by the attachment suit to a nonresident, no action can be maintained against him, by the assignee in insolvency of his debtor, either to enjoin the further prosecution of the suit or the lending of his name for such purpose, or to recover the amount which he has realized from the claim, although the sale was made for the purpose of obtaining an advantage over other creditors of the debtor and to avoid being enjoined from the further prosecution of the attachment suit in case insolvency proceedings against the debtor were instituted.

2. A bill to enjoin a creditor from proving his claim in insolvency proceedings cannot be maintained unless brought under Pub. Stat., chap. 157, § 15, which does not permit the supervisory jurisdiction of the supreme judicial court to be invoked in such proceedings until after the question of the allowance of the claim has been passed upon by the insolvency court.

(September 5, 1890.)

RESERVATION from the Supreme Judicial Court for Suffolk County (Holmes, J.) for the opinion of the full court of an action brought to enjoin the prosecution of an attachment suit instituted for the collection of a debt from an insolvent debtor or to recover the amount realized by such attachment. *Bill dismissed.*

Defendant held six promissory notes aggregating in amount \$81,587.52, made by the firm of E. & A. H. Batcheller & Co. That firm became insolvent and amongst its assets was a debt amounting to about \$20,000 due it by the firm of J. & A. Simpkinson of Cincinnati, Ohio. Defendant brought suit on four of its notes in Ohio and garnished J. & A. Simpkinson. Learning that Batcheller & Co. contemplated filing a voluntary petition in bankruptcy, defendant, before judgment had been reached in the Ohio suit, sold and delivered the four notes upon which suit had been brought to the Continental National Bank of New York, together with all right to control the further proceedings in the attachment suit, agreeing at the same time to pay the Continental Bank the amount of any deficiency of principal or interest arising from a failure to recover in the Ohio action and also the amount expended by that bank for costs, counsel fees and other expenses of prosecuting the suit. The sale was completed on September 23, 1889. The first publication in the insolvency proceedings was made on September 24, 1889. Plaintiffs were appointed assignees in such proceedings. On October 10, 1889, this suit was instituted by the assignees praying that the Ohio suit be treated as still subject to defendant's control, and that it be enjoined from further prosecuting it; or that defendant be en-

joined from allowing its name to be used in the further prosecution of the suit in Ohio; or that it be required to assign to plaintiffs all the right which it has acquired under its claim so that plaintiffs may receive all moneys due by J. & A. Simpinkson to Batcheller & Co. without any interference upon the part of defendant therewith; or that defendant be ordered to pay over to plaintiffs the amount collected by its so-called sale to the Continental Bank.

The bill further prayed that defendant might be enjoined from attempting to prove against the insolvent estate any claim upon the two notes still held by it without first paying over to plaintiffs the amount already received by it.

On October 11, Batcheller & Co. made a composition with their creditors and on October 19 received their discharge in insolvency.

On October 21, judgment was entered in favor of the Continental National Bank in the Ohio suit.

Further facts appear in the opinion.

Messrs. John Lowell, M. F. Dickinson, Jr., and Hollis R. Bailey for plaintiffs.

Messrs. Lauriston L. Scaife and Bancroft G. Davis for defendant.

Field, J., delivered the opinion of the court:

We think it appears that the notes were actually sold and delivered by the defendant to the Continental National Bank of New York; that the intention of the defendant in making the sale was to obtain an advantage over the other creditors of E. & A. H. Batcheller & Co.; that this intention was known to the Continental National Bank at the time it purchased the notes, and that it bought them for the purpose among others of enabling the defendant to carry this intention into effect. The defendant knew that Batcheller & Co. were insolvent in fact, and might be adjudged insolvent debtors in this Commonwealth, and that if this were done before it obtained judgment in Ohio, it might be enjoined from prosecuting the action in Ohio to judgment; and in order to avoid this, it sold the notes to the Continental National Bank. This sale included all the rights which the defendant had to prosecute the action then pending in Ohio. The agreement of the defendant with the Continental National Bank to pay to it any deficit if it should not recover the full amount of the notes, and also to pay to it a sum equal to all its costs, charges and expenses, is an agreement collateral to the sale, and does not affect the title of the Continental National Bank to the notes, or the absolute right of control, which, after the sale, it had over the action pending in Ohio.

When, therefore, this bill was brought, an injunction against the defendant's prosecuting the action in Ohio would have been ineffectual, because the defendant had no control over the action. It has been held in *Lawrence v. Batcheller*, 181 Mass. 504, that if the defendant had prosecuted the suit in Ohio to judgment, and the judgment had been satisfied out of the funds there garnished, the plaintiffs could not recover of the defendant the amount of the judgment. It is also settled that if the defendant, after Batcheller & Co. had been adjudged insolvent debtors, had retained control of the suit, the plaintiffs could have obtained an injunction L. R. A.

tion against the further prosecution of it by the defendant. *Dehon v. Foster*, 4 Allen, 545, 7 Allen, 57; *Cunningham v. Butler*, 142 Mass. 47, 2 New Eng. Rep. 388; *Cole v. Cunningham*, 133 U. S. 107 [33 L. ed. 539].

If there seems to be any inconsistency in principle between these two classes of cases it arises, in part at least, from the limitations imposed by the Constitution of the United States upon the power of the Commonwealth to pass laws relating to bankruptcies and laws which shall impair the obligation of contracts, and from a want of jurisdiction over citizens of other States. It also has been contended that as by article 4, sec. 1, of the Constitution of the United States, full faith and credit must be given to the judicial proceedings of other States, it is beyond the power of the Commonwealth to declare void an attachment of property made in another State pursuant to its laws or to make an attachment inure to the benefit of an assignee in insolvency of a citizen of Massachusetts.

The Commonwealth by its statutes has not undertaken to prohibit under a penalty Massachusetts creditors from selling their claims to the citizens of other States when the debtors being citizens of Massachusetts are in fact insolvent and intend to take the benefit of its statutes relating to insolvency, nor do the statutes provide that the consideration received by the vendors when they sell such claims shall be held in trust for the benefit of the estate in insolvency of such debtors, or that assignees in insolvency may recover anything of the vendors on account of such sales. The statutes are entirely silent with reference to the effect of the proceedings in insolvency upon any such transaction as is shown in the case at bar. It is not, therefore, now necessary to consider how far it is within the legislative power of the Commonwealth to prohibit such a transaction, or to provide civil remedies which shall enable assignees in insolvency to recover, for the benefit of estates in insolvency, compensation for any property of the insolvent debtors which Massachusetts creditors may obtain by prosecuting suits against such debtors in other jurisdictions, or by selling their claims to persons not citizens of the Commonwealth.

Jurisdiction in equity was maintained in *Dehon v. Foster* wholly on the ground that there was no remedy at common law or under the statutes, and that as it was against equity that the defendant, who was a citizen of Massachusetts should obtain an advantage over other creditors by his proceedings in another State, the court could properly prevent this by the control which it had over his person, and this was done by injunction.

If then, by proceedings taken in another State, a Massachusetts creditor of an insolvent debtor acquires under the laws of that State an absolute title to property situated there, and this title under the laws of that State is paramount to that of the assignee in insolvency, the property or its value cannot, under existing laws, be recovered here by the assignee. The case at bar falls within the principles declared in *Lawrence v. Batcheller*. The defendant sold the notes and received

the proceeds of the sale in New York before the assignment in insolvency took effect, and thereafter retained no control over the suit in Ohio; an injunction against the defendant's prosecuting that suit cannot be issued because the Continental National Bank of New York has acquired the right to prosecute it for its own benefit, and the proceeds of the sale or of the suit cannot be recovered of the defendant.

The bill cannot be maintained for the purpose of enjoining the defendant from proving against the estate in insolvency of Batcheller & Co. the notes which it still holds or of deciding the terms on which, if at all, such notes may be proved, because it is not a bill brought under Pub. Stat., chap. 157, § 15.*

*That section reads as follows:

Sec. 15. The supreme judicial court shall have a general superintendence and jurisdiction of all cases arising under this chapter; and, except when special provision is otherwise made, may upon the bill, petition or other proper process of any party aggrieved, hear and determine the case as a court

of equity. It may from time to time make such general rules and forms as it deems necessary to establish and maintain a regular and uniform course of proceedings in all the counties. The powers thus granted may be exercised by said court or by a justice thereof in term time or vacation, except that general rules and forms shall be made only at a law term. [Rep.]

We have not considered whether, on the facts of this case, the plaintiffs must not be held to represent only the insolvent debtors on the ground that, as the debtors have deposited in the court of insolvency the money necessary to carry out the compromise which has been sanctioned by that court, and have obtained their discharge, whatever the assignees would recover if the bill were maintained must be paid by the debtors. For these reasons a majority of the court are of opinion that the bill must be dismissed.

NEW YORK COURT OF APPEALS.

Re Petition of The THIRD AVENUE R. CO., *Appl.*, for a Writ of Mandamus to Compel Thomas F. GILROY, Comr. of Public Works, *Respt.*, to Issue and Deliver to It a Permit to Open Streets.

(....N. Y....)

A statute conferring on a street railway company the right to adopt a new motive power in place of animal power does not violate a constitutional provision that no law shall authorize "the construction or operation of a street railroad" without the consent of the local authorities having control of the portion of the highway upon which it is proposed to operate the railway, although no provision is made for obtaining such consent.

(June 17, 1890.)

APPEAL by petitioner from an order of the General Term of the Supreme Court, First Department, affirming an order of the New York Special Term denying a petition for a writ of mandamus to compel the Commissioner of Public Works of New York City to issue and deliver to petitioner a permit to open streets. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Hoadly, Lauterbach & Johnson*, for appellant:

The Constitution, art. 3, § 18, does not forbid modifications either in the structure or motive power of "street railroads" authorized by general law, after they have been completed and are in operation.

Re Gilbert Elev. R. Co. 70 N. Y. 861; *Re Kings County Elev. R. Co.* 82 N. Y. 95.

State Constitutions are to be construed neither

strictly nor liberally, but reasonably; and the reasonable construction of the clause now under consideration is that it is to prohibit an independent grant of the right to lay down railroad tracks.

See *Henshaw v. Foster*, 9 Pick. 312; *Cooley Const. Lim.* p. 84; *Houseman v. Com.* 100 Pa. 222; *People v. Fancher*, 50 N. Y. 288; *Astor v. Arcade R. Co.* 2 L. R. A. 789, 118 N. Y. 113.

Section 12 of the Act of 1884, as amended June 15, 1889 (chap. 531, Laws 1889), is not a law authorizing the "construction or operation of a street railroad."

People v. Newton, 112 N. Y. 896.

The clause of the Constitution under consideration involves a grant of power to the local authorities in derogation of the power of the Legislature, and should for that reason be strictly construed.

People v. Draper, 15 N. Y. 532.

Mr. David J. Dean, with *Mr. William H. Clark*, for respondent:

It is not within the power of the Legislature to confer upon the relator the franchise of constructing and operating a cable railway in the public streets without the consent of the local authorities.

Const. art. 3, § 18.

The Act of 1889 cannot be sustained by the contention that it confers power to change the method of operation of the franchise already possessed by the relator, and does not undertake to confer an additional franchise.

Astor v. Arcade R. Co. 2 L. R. A. 789, 118 N. Y. 93.

Earl, J., delivered the opinion of the court:

The Third Avenue Railroad Company was

NOTE.—Motive powers of street railways.

A municipality having control over its streets may prescribe the motive power to be used in property L. R. A.

selling street cars thereon, and when it prescribes one kind of power no other can be used. *Indianapolis Cable St. R. Co. v. Citizens Street R. Co. (Ind.)* 3 L. R. A. 539, and *note*.

duly organized under the laws of this State long before January 1, 1875, and had constructed its road, and for many years prior to that time had operated it by horse power. In February, 1887, it resolved to adopt the cable system for the movement of its cars, instead of horses; and in May of the same year it applied to the supreme court for a writ of mandamus to compel the commissioner of public works then in office to issue a permit authorizing it to open the streets along the route of its road to introduce the cable system. The writ was denied in the supreme court, and the decision of that court was affirmed in this court. *People v. Newton*, 112 N. Y. 896.

We affirmed the decision on the ground that the Company did not have the power under its charter to interfere with the streets in the mode proposed for the introduction of the cable system. We held that there was want of legislative authority to do what the Company proposed at that time, and our decision goes no further. Thereafter the Company applied to the Legislature for the necessary power, and procured the passage of the Act, chapter 631 of the Laws of 1889, which provides as follows:

"Any street surface railway company may in any case operate any portion of its railroad by cable or electricity, or by any power, other than locomotive steam power, instead of by animal or horse power, which may be approved by the state board of railroad commissioners, and consented to by the owners of one half in value of the property bounding on that portion of the railroad as to which a change of motive power is proposed; and in case the consent of the property owners cannot be obtained, then the determination of three disinterested commissioners, appointed by the general term of the supreme court in the department in which said railroad is located, in favor of such motive power, confirmed by said court, shall be taken in lieu of the consent of said property owners. . . . It shall be lawful for any such railroad company to make any changes in the construction of its road or roadbed at any time rendered necessary by a change in its motive power."

Subsequently the Company procured the consent of the owners of one half of the property bounded on the route of the railroad, and the approval of the railroad commissioners for the substitution and introduction of the cable system for moving its cars. The commissioner of public works again refused to permit the Company to open the streets and to introduce the cable, and the Company again applied to the supreme court for a mandamus to compel him to issue the permit, which was denied on the ground that under the Constitution of the State the change to the cable as a motive power could not be lawfully made without the consent of the local authorities, which had not been obtained. The constitutional provision referred to came into operation January 1, 1875, and is found in § 18 of art. 8 of the Constitution, and is as follows:

"But no law shall authorize the construction or operation of a street railroad except
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upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of, a street or highway upon which it is proposed to construct or operate such railroad, be first obtained."

The Act of 1889 did not authorize the construction of this railroad. It was already constructed, and had been in operation for many years. It was a street surface railroad before, and was to remain so. The Company was to continue to operate its cars as before,—that is, cars of the same general character, carrying passengers, moved upon iron rails at a moderate rate of speed back and forth through the streets. All this it had the right to do under its original charter. It took no right to operate its road under the Act of 1889, and resting upon that Act alone it could not operate its road. That simply confers the right to adopt a new motive power, and so far it is a regulating Act. It confers no substantial franchise to conduct or operate a road. It specifies how the chartered obligations of the Company may be performed, and its chartered rights exercised. The powers and franchises of street railways existing prior to 1875 may be regulated without violating the constitutional provision referred to; and this may be done by enlarging as well as restricting them. The manner in which an existing franchise to operate a railroad may be exercised is matter of regulation, and is generally within the absolute control of the Legislature. It is not needful nor wise now, even if possible, to determine, or say in a general way, how far the Legislature may add to or enlarge the powers and franchises of an existing street railroad company without violating the constitutional provision referred to. It is sufficient to say that it cannot give to an existing street railroad company authority to substantially construct or operate a new road or to make the road, in its construction and operation, a different one from what it before was. And this it has not done by the Act of 1889. It is the same railroad, and when operated by means of a cable it will not materially increase its interference with the street for all street purposes. It is true that the Act of 1889 confers a new or additional franchise upon an existing railroad company, and authorizes it to impose upon the street a greater or different burden. But there is nothing in the Constitution which prohibits this. The Legislature could, without violating the Constitution, authorize an independent company, or private individuals, to place in any street of the city a cable for the traction of cars or other vehicles lawfully owned and maintained by others; by so doing it would not in any proper sense authorize the construction or operation of any railway. If it could authorize any independent company, or private individuals, to do this, it could authorize the railroad company itself to do it.

These views find some sanction in the cases of *Re New York Elec. R. Co.*, 70 N. Y. 327, and the *Re Gilbert Elec. R. Co.*, Id. 861, and they are not in conflict with anything de-

cided in *Astor v. Arcade R. Co.*, 118 N. Y. 93, 2 L. R. A. 789.

We are therefore of opinion that the orders of the General and Special Terms should be re-

versed, and the application for the mandamus granted, with costs in all the courts.

All concur, except *Ruger, C. J.*, not voting, and *Andrews, J.*, absent.

IOWA SUPREME COURT.

Re William John GILL'S ESTATE.

(79 Iowa, 296.)

1. A "nonresident alien," whose widow, under Code, § 2442, "shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser," means any alien not residing in the State.
2. Mortgagees are purchasers within the meaning of the Code, § 2442, protecting purchasers from nonresident aliens against claims for dower.

(February 3, 1890.)

APPEAL by the widow of William John Gill, deceased, from a decree of the District Court for Polk County ordering a sale of the property of said decedent, and subordinating her claim to dower in the proceeds to that of certain mortgagees of the property. *Affirmed.*

Statement by *Given, J.*:

On petition of the administrator for an order to sell real estate to pay debts. There is no controversy as to the facts, and those necessary to an understanding of the questions presented are as follows: William John Gill, an alien, and subject of Great Britain, resided in Iowa up to, and for some years prior to, 1880, after which he resided in other of the United States, to the time of his death, in 1887, at which time he was a resident in the State of New Jersey. He left Elizabeth Gill, his widow, but no children, surviving him. Mrs. Gill was also an alien, and subject of Great Britain, and never resided in the United States. During his residence in Iowa, Mr. Gill purchased and took title of certain lots in the City of Des Moines, and afterwards, desiring to mortgage said lots to secure a loan of money, he applied to the Circuit Court of Polk County for an order, under §§ 2216, 2219, Code, appointing a guardian to release the interest of his wife in said lots, alleging as reason therefor that she was insane. No notice was given to Elizabeth Gill, nor to anyone on her behalf, of said proceeding; but an attorney of the court was appointed by the court to defend her interests. On final hearing, an order was granted appointing said William John Gill as such guardian for said purpose; and thereafter, for himself, and upon the authority of said order, he executed a mortgage to Liederer & Straus, to secure \$2,000, which mortgage is now the property of the trustees of Stephen Sibley's estate, and a second mortgage to J. B. Stewart, to secure \$1,000. In each of said mortgages he, as such guardian, released as to the interest of appellant in said lots. The appellant having filed her answer and cross-bill, claiming one third of said property as her distributive share, the

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administrator replied, alleging the facts to be in substance as above stated. To this reply appellant demurred upon the grounds that the facts stated constitute no defense to her cross-bill; that the proceedings of the circuit court were void for want of notice and because, if no notice was required by the Statute, the Statute was unconstitutional. This demurrer was overruled; and appellant electing to stand thereon, and the trustees of the Sibley estate and said J. B. Stewart having appeared and pleaded, the cause was submitted on the pleadings, and on an admission of the copy of the record entry of said proceeding in the circuit court. An order was made for the sale of the property, and decreeing appellant's rights and interests therein to be junior to said mortgages, and that she is only entitled to receive one third of the surplus realized from the sale after satisfying said mortgages. From this order and decree said Elizabeth Gill appeals.

Messrs. Bousquet & Earle for appellant.

Messrs. Mitchell & Dudley, Berryhill & Henry and St. John, Stephenson & Whisenand for appellees.

Given, J., delivered the opinion of the court:

1. It will be seen by the foregoing statement that both Mr. and Mrs. Gill were aliens; that Mrs. Gill never resided in the United States; that Mr. Gill had not resided in this State since 1880, and at the time of his death, in 1887, he was a resident of the State of New Jersey.

Code, § 2442, is as follows: "The widow of a nonresident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent." The first question presented is whether the deceased was a nonresident, within the meaning of this section, appellant's contention being that "nonresident," as here used, means nonresident of the United States, while appellees contend that it means a nonresident of this State. No question is made but that it is within the power of the State to declare and regulate the property rights of aliens with respect to property within the State. Our legislation on this subject, like that of many other States, has enlarged the property rights of aliens quite beyond that given them under the common law. The policy of this State, as shown in its Constitution and laws, has been to encourage foreigners to become residents of the State, and to aid in its development, and share in its prosperity.

Section 22, art. 1, Bill of Rights, provides that "foreigners who are, or may hereafter become, residents of this State, shall enjoy

the same rights in respect to the possession, enjoyment and descent of property as native-born citizens." See also chapter 1, tit. 13, Code, §§ 1908, 1909, repealed thereby. Section 2440, Code, provides, without qualification as to residence or citizenship, the share of the estate of the deceased husband or wife that shall go to the survivor. Were it not for section 2442, appellant's rights in the estate of her husband would be unaffected by his residence or citizenship. The evident purpose of section 2442 is to encourage the purchase of lands within the State from nonresident alien owners, and to protect purchasers of such real estate against claims for dower or distributive share therein. Among the reasons for such a provision is the difficulty of knowing the relations of such nonresidents. Without such a provision, titles derived from nonresident aliens, in which the husband or wife does not join, would be left in uncertainty for an indefinite period of time. Appellant cites said § 1908, Code, wherein it was provided that "aliens, whether they reside in the United States or any foreign country, may acquire, hold and enjoy property," etc., and contends that thereby aliens are divided into two classes,—those residing within, and those residing without, the United States. This is not a classification of aliens, but a declaration that all aliens may acquire, hold and enjoy property, etc.; and, to render it certain that all aliens are meant, and avoid any questions that might arise because of the restrictions of the common law, it is declared, "whether they reside in the United States or in any foreign country." If this were a classification of aliens, it is certainly not with reference to the section of the Code under consideration. In view of the language and purpose of section 2442, we are of the opinion that a "nonresident alien," as therein expressed, means an alien not residing in this State, and that William John Gill, deceased, was such a nonresident alien.

3. Appellant's next contention is that, though Mr. Gill was a nonresident alien, yet that his mortgagees are not purchasers from him; that the term "purchasers," in section 2442, is used in the sense of "buyer or one who has acquired title;" and that these mortgagees acquired no interest or title in the real estate mortgaged, and hence are not purchasers. The law recognizes but two ways of acquiring property,—by descent, and by purchase. These mortgagees surely acquired property by their mortgages, and acquired it by purchase. While it may be said that they did not acquire title to the real estate, they certainly acquired an interest in it that they did not theretofore have. It is conceded that under the Recording Acts they are deemed purchasers. The same reasons for protecting purchasers of unconditional titles from nonresident aliens against claims for dower apply with equal force to mortgagees from such. Our conclusion is that mortgagees of nonresident aliens are purchasers, within the meaning of section 2442, and that these mortgagees are therefore entitled to priority over the claim of the appellant.

8. The views already expressed render it unnecessary that we notice the questions made as to the legality of the proceeding had in the circuit court, or the claim of the mortgagees that the debt secured by their mortgages was for money loaned to pay on the purchase price of the property. It only remains to determine whether appellant is entitled to one third of the entire property, subject to the mortgages, or only to one third of what is left after the mortgages are satisfied. Regarding these mortgagees as purchasers, the deceased died possessed only of what is left of the property after satisfying the mortgages; and it is only in one third of what he possessed that she is entitled to share.

We think the decree of the District Court is right, and should be affirmed.

MICHIGAN SUPREME COURT.

William W. HANNAN, *Appt.*,
v.

WILLIAMSBURGH CITY FIRE INSURANCE CO. of Brooklyn, N. Y.

(....Mich....)

A carriage house and stable are covered by insurance on "one two-story frame dwelling and additions thereto, with shingle roof, used as a dwelling . . . including the foundation, gas and water pipes," etc., where they are under the same shingle roof that covers the dwelling, and are partitioned off only by a single row of studding, while the second story is divided by a different arrangement of partitions, and over the carriage house is a bedroom, occupied by a hired man, which is supplied with gas and other conveniences, and furnished like other parts of the house.

(June 27, 1890.)

ERROR to the Circuit Court for Wayne County to review a judgment denying a part of plaintiff's claim in an action brought to recover the amount of a loss by fire alleged to have been covered by a policy of insurance.
Reversed.

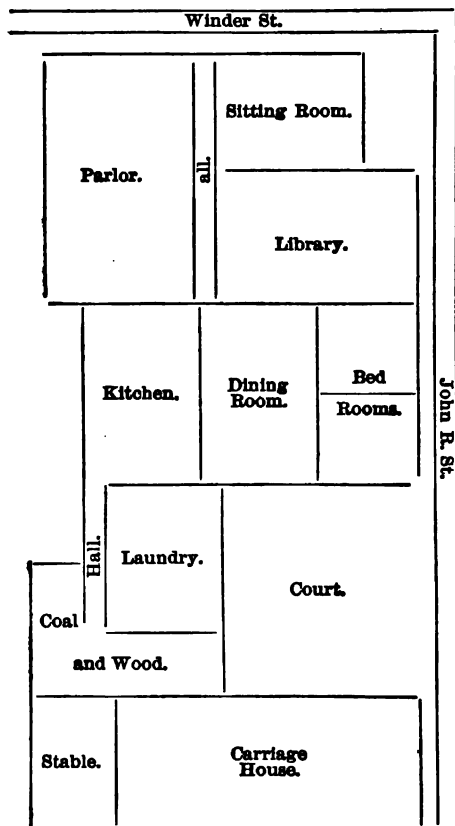
The facts sufficiently appear in the opinion. *Mr. A. C. Blodgett* for plaintiff, appellant. *Mr. Thomas Bates*, with *Mr. DeForest Paine*, for defendant, appellee.

Cahill, J., delivered the opinion of the court:

This action is brought upon a contract of insurance, in which the property is described as follows: "One two-story frame building and additions thereto, with shingle roof, occupied by assured as a dwelling, situate on the south side of and known as No. 72 Winder St., Detroit, Michigan, including the foundations, gas and water pipes and fixtures, and all per-

manent fixtures for heating and lighting as a part of the building."

On the 20th of April, 1889, a fire occurred on the plaintiff's premises, by which loss occurred to the plaintiff amounting to \$1,769.64. Of this amount \$878 was appraised for damages to the building north of a certain line shown on the diagram, and \$896.64 for damages to the building south of the same line. No question is raised by the defendant as to the right of the plaintiff to recover the first amount, but it was claimed that the last amount could not be recovered, because that sum covered damages to the rear part of the building, which was used as a barn, and that the policy did not cover it. This is the sole question in the case. A diagram of the first floor of the building is appended.



The plaintiff, being called as a witness, described the building as follows: "As you enter, there is a hall running from the front door back to the dining-room. On the right side as you enter there is a drawing-room. On the left side is the sitting-room, and the sitting-room is connected with the library room by arches. This does not exactly show it there. Here is the fire-place, and there is an arch on each side of the fire-place. Going through the hall you come directly into the dining-room, and to the right of the dining-room is our kitchen. In the rear of the kitchen is a back hall,

¶ L. R. A.

which leads both to the laundry and to our wood-shed, and an exit out to this court, where the clothes are dried, and then to John R. Street. There is also an entrance from this court into the stable and carriage-house, and there was an old entrance through the coal and wood-shed into the stable there, but afterwards we closed that up, and used the outside entrance entirely."

The proofs also showed that the partition between the room marked "coal and wood" and the room marked "carriage-house" was a single row of studding. It was not lathed or plastered on either side, but was boarded with plain boards, not siding. It was framed in with the rest of the building. The partition between the part of the building marked "kitchen" and "dining-room" and the part marked "laundry" was also single, though this was lathed and plastered. It is not possible to take away the room that was called the "carriage-house" without taking away the partition between it and the room called "coal and wood room." There were bedrooms above the main part of the building. The portion above the laundry was a store-room. The girl's room was above the kitchen. The hired man's sleeping-room was above the portion marked "carriage-house." The man's room was furnished the same as any bedroom in any portion of the house. It had gas, a speaking tube, and everything just as the rest of the house. The gas-pipes connected with the rest of the house. The hired man was also a house-servant. He did general work about the house, and waited upon the ladies of the house. He took his meals at the house. The manner of occupancy at the time of taking the insurance and at the time of the fire was the same. On the first floor of the portion marked "carriage-house" plaintiff kept two horses and two or three carriages, and a buggy or phaeton, and a cart. He had formerly kept a cow. There was a private alley at the rear of the building, in which was a box into which the sweepings from the carriage-house were thrown. The partition that was between the portion marked "coal and wood" and the portion marked "carriage-house" did not extend above the first floor, so that there was no partition in the second story between these portions; it was one room.

I agree with counsel for defendant and with the court below that there is nothing ambiguous about this policy. It is very clear to me that the intention was to insure this building with its additions. I find no warrant in the policy for excluding any part of the additions from its terms. It was all under one "shingle roof." The part used as a stable was as much a part of the "building and its additions" as the wood-house or the laundry. If it had been used for either of these purposes, no one would have questioned its being a part of the building insured. Does the use to which a room is put determine whether it is a part of a building or not? Its use for a purpose not covered by the policy might avoid it altogether, but no such force is claimed for it here. If such a claim had been made, then it would certainly have been competent for the plaintiff to put

in the parol evidence that was offered and rejected to show that the actual facts about the occupation of the building were known to the company when the policy was issued. *Aurora F. & M. Ins. Co. v. Kranich*, 86 Mich. 289; *Michigan State Ins. Co. v. Lewis*, 80 Mich. 4.

I am not prepared to say that the words, "occupied as a dwelling-house," when used in a policy of insurance, necessarily exclude the idea that some part of the building may be used as a stable. If the family live in the building, it is not deprived of its character as a dwelling because the domestic animals are also housed there.

Nor does this view conflict with the doctrine in *English v. Franklin F. Ins. Co.*, 55

Mich. 273, cited by defendant's counsel. In that case the barn which it was sought to bring within the term "dwelling-house and additions" was a separate building, detached about forty feet from the dwelling, and there was in the policy that which made it clear to the learned judge who wrote the opinion that the barn was not intended to be included in the general term "dwelling-house."

The judgment must be reversed, and, as no question is made as to the amount of the recovery if the entire building is to be included, a judgment will be entered here for \$884.83, with interest from the time when the money became due under the policy, and costs of both courts.

The other Justices concurred.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI.

Elizabeth WOOLDRIDGE

v.

Jonas A. STERN.

(43 Fed. Rep. 811)

A promise to provide for the support and education of a minor fourteen or fifteen years old until he becomes twenty-one years of age is not a contract "not to be performed within a year" within the meaning of the Statute of Frauds requiring such contracts to be in writing, as it may be performed within a year if the child should die within that time.

(May 8, 1890.)

MOTION by defendant for a new trial of an action brought to recover upon a contract to support a minor until he reached the age of twenty-one years, in which a verdict had been rendered in favor of plaintiff. *Overruled.*

The facts are fully stated in the opinion.

Messrs. Samuel Boyd and Samuel Davis, for defendant, in support of the motion:

The contract, the foundation of the plaintiff's action, was a contract not to be performed within one year, and was not in writing, and was consequently void under the Statute of Frauds.

The distinction between the case at bar and cases of contract to support a person during life is that in the latter class of cases the contract is fully performed on the happening of the death of the first; while in the former the contract is not fully performed but defeated.

See *Deaton v. Tennessee O. & R. Co.* 12 Heisk. 650; *Shute v. Dorr*, 5 Wend. 204; *Baker v. Lauterbach*, 10 Cent. Rep. 103, 68 Md. 64; *Freeman v. Foss*, 145 Mass. 361; *Mallett v. Lewis*, 61 Miss. 105; *Hinckley v. Southgate*, 11 Vt. 428; *Drake v. Seaman*, 97 N. Y. 280; *Rogers v. Brightman*, 10 Wis. 56; *Farrington v. Donohoe*, 1 Ir. R. C. L. 675; *Washington, A. & G. Packet Co. v. Bickles*, 72 U. S. 5 Wall. 580, 18

L. ed. 550; *Meyer v. Roberts*, 46 Ark. 80; *Bernier v. Cabot Mfg. Co.* 71 Me. 506; *Blanding v. Sargent*, 83 N. H. 246; *Coules v. Warner*, 22 Minn. 449.

A contract which by its general terms is not to be performed within a year is not to be taken out of the Statute because it may be defeated on a given event.

Dobson v. Collis, 1 Hurlst. & N. 81; *Roberts v. Tucker*, 8 Exch. 632.

Mr. Gilbert J. Clark, for plaintiff, *contra*:

A verbal contract to support a person for a number of years certain (more than one) is not within the Statute of Frauds, for the reason that the death of the person to be supported, or of the person to whom the promise moves, is a contingency contemplated by the parties making the contract, which upon the happening of the same puts an end to,—performs,—the contract in accordance with the intention of the parties.

Hill v. Hooper, 1 Gray, 181; *Doyle v. Dixon*, 97 Mass. 208; *White v. Murland*, 71 Ill. 266; *Crowhurst v. Laverack*, 8 Exch. 213; *Jilson v. Gilbert*, 26 Wis. 637; *McLees v. Hall*, 10 Wend. 428; *McKinney v. McCloskey*, 8 Daly, 368; *Peters v. Westborough*, 19 Pick. 864; *Ellicott v. Turner*, 4 Md. 476; *Wilhelm v. Hardaman*, 13 Md. 140; *Stowers v. Hollie*, 83 Ky. 544; *Frost v. Tarr*, 58 Ind. 890.

Read, on the Statute of Frauds, § 204, says: "There is much authority in America for holding that the Statute does not apply to a contract to support a person even though it be for a term of years named, the contingency of death *infra annum* making an exception to the rule of the Statute."

Wiggins v. Keizer, 6 Ind. 252; *Bell v. Hewitt*, 24 Ind. 290; *Howard v. Burgen*, 4 Dana, 187; *Bull v. McCrea*, 8 B. Mon. 428; *Hutchinson v. Hutchinson*, 46 Me. 154; *Ellicott v. Turner*, 4 Md. 476; *Peters v. Westborough*, 19 Pick. 865; *Dresser v. Dresser*, 85 Barb. 578; *Heath v. Heath*, 81 Wis. 223. See also Benjamin, Sales,

Mora—Statute of Frauds; promises not to be performed within a year.

The statute only extends to agreements which cannot be performed within a year, and a verbal agreement to provide for a person during his life

is valid, inasmuch as he may die within a year. *Thorp v. Stewart*, 44 Hun, 633. See notes to *Seddon v. Rosenbaum* (Va.) 8 L. R. A. 337; *Lowman v. Sheets* (Ind.) 7 L. R. A. 784; *Pond v. Sheean* (Ill.) 8 L. R. A. 414.

Ben. ed. § 526, note c; 3 Parsons, Cont. 7th ed. 88, note g; 2 Kent, Com. 510, citing approvingly *Peters v. Westborough*, *supra*; 8 Bl. Com. Cooley's ed. 158; Comyn, Cont. 8d Am. ed. 252; Addison, Cont. *170; *Peters v. Compton*, Skin. 353, cited in 1 Smith, Lead. Cas. 8th ed. 619, 620; Bishop, Cont. § 1274, and cases there cited; Chitty, Cont. 11th ed. 101; Wood, Stat. Fr. § 275; *Fenton v. Emblers*, 3 Burr. 1278.

Mr. C. M. Ingraham, also for plaintiff, *contra*:

When it appears that the happening of any contingency expressed in the contract or reasonably inferred from its terms, and from the circumstances under which it is created, will result in the accomplishment of all instead of defeating all or any part of what the parties could reasonably have had in contemplation at the time of the creation of the contract,—then if the contingency be such that it might in the ordinary course of events happen within one year from the date of the contract, the fact that the performance of the contract was left indefinite, or was even in the contemplation of the parties to extend beyond that period of time, or was expressly fixed beyond the year, will not make it one not to be performed within one year from the making, and it is not void under the Statute.

Peters v. Compton, Skin. 353, cited in Browne, Stat. Fr. §§ 273-286, and 1 Smith, Lead. Cas. 614; *Doyle v. Dixon*, 97 Mass. 208; *Boydell v. Drummond*, 11 East, 142; *Hill v. Hooper*, 1 Gray, 181; *Lyon v. King*, 11 Met. 411; *Blanding v. Sargent*, 33 N. H. 239; *Sherman v. Champlain Trans. Co.* 31 Vt. 162; *Rogers v. Brightman*, 10 Wis. 56; *Siggins v. Heard*, 31 Miss. 426; *Burney v. Ball*, 24 Ga. 605; *Peters v. Westborough*, 19 Pick. 864; *Ellicott v. Turner*, 4 Md. 476; *Howard v. Bergen*, 4 Dana, 187; *Hutchinson v. Hutchinson*, 46 Me. 154; *Wiggins v. Keiser*, 6 Ind. 252; *Foster v. McO'Brien*, 18 Mo. 88; *Suggitt v. Cason*, 26 Mo. 221; *McKinney v. McCloskey*, 8 Daly, 368; *Somerby v. Buntin*, 118 Mass. 286; *Hill v. Jamieson*, 16 Ind. 127; *Stowers v. Hollis*, 83 Ky. 544; *Deaton v. Tennessee C. & R. Co.* 12 Heisk. 650.

Phillips, J., delivered the opinion of the court:

This is an action predicated on a parol agreement for the support and maintenance of a bastard child, and grows out of substantially the following state of facts: The child was born to plaintiff in 1872 or 1873, when the plaintiff was about sixteen or seventeen years old. The evidence tended to show that defendant was the father of said child. The mother seems to have had the care and burden of the support of the child from its birth up to the year 1887. After repeated efforts to have the defendant fulfill his alleged promises to assist the plaintiff in its maintenance, and failing therein, the plaintiff visited the defendant at his place of business in Slater, Mo., and insisted that he must either take charge and custody of the child, or provide for its support and education. The plaintiff's evidence—which the jury, by their verdict, must have credited—was to the effect that

the defendant, at the time of this visit, had recently married another person, and that in order to keep the fact of the paternity of this child, and the scandal thereof, from his wife, he then and there promised plaintiff that if she would leave the State, and remain with the child in the State of Colorado, he would pay her what was right, not only for her past trouble with and support of the child, but that he would from time to time send her money to support and educate the child until it was twenty-one years of age; that thereupon she accordingly took the child to Denver, Colo., where she remained with it, supported and educated it, up to the time of the institution of this suit, in 1889; that the defendant wholly failed to keep his said promise and agreement, for the breach of which this action is brought. At the conclusion of plaintiff's evidence, the defendant demurred thereto on the ground that such a contract was contrary to public policy and good morals, and that the same was within the Statute of Frauds, as being a parol contract not to be performed within one year. The demurrer was overruled. The jury returned a verdict for plaintiff for \$1,050; and the defendant moves for a new trial, urging the same grounds therefor as presented in the demurrer to the evidence.

The first ground of error is practically abandoned by counsel for defendant. The only real question to be determined is as to the applicability of the Statute of Frauds to this agreement. So much of the agreement as refers to the future clearly indicates that its continuance might extend over a period of years. The contention of plaintiff's counsel is that it was none the less an agreement which might be performed within a year, as its longer continuance depended necessarily upon the contingency of plaintiff's life, as also that of the child. There is a general *consensus* among text-writers and courts that the term "not to be performed" does not include an agreement not likely to be performed within the year, nor one scarcely expected to be performed within that time; but rather does it purport such agreements which, by a reasonably clear or fair interpretation of all the parts, viewed by the then existing circumstances, do not admit of performance according to the language and intention within so short a period. Out of this root has grown the recognized rule that, notwithstanding it may have been within the contemplation of the parties that more than one year might be occupied in its performance, yet if it might, consistently with its terms, be fully performed within that time, the Statute does not apply. Such are agreements to pay a given sum of money on the day of the promisor's marriage, to leave money by last will, or to pay during or at the end of a life, or to board one during life, and the like. This rests upon the presumption that it was within the contemplation of the parties to the agreement that the person whose life is concerned may not improbably die within the year; and, on principle, this presumption is extended to other contingencies which are liable to happen or occur within the year, and put an end to the undertaking. Had the

agreement in question simply provided that the plaintiff, for a reasonable compensation, should take and keep the child in the State of Colorado for an indefinite length of time, the authorities are generally agreed that such an agreement would be within the rule of exemption from the operation of the Statute. *Murphy v. O'Sullivan*, 11 Ir. Jur. N. S. 111; *Souch v. Strawbridge*, 2 C. B. 810; *Browne*, Stat. Fr. 4th ed. §§ 274, 276a.

But where a limit is fixed to the duration of the agreement, such as the attainment of majority by a minor, the applicability of the Statute cannot be said to be so well settled. *Browne*, in his treatise on the Statute of Frauds (section 282a), seems inclined to the opinion that such a contract is within the Statute, while *Smith's Leading Cases* (8th ed. vol. 1, p. 619), on the strength of the authorities, regards such contracts as unaffected by the Statute. See *Wood*, Stat. Fr. § 275.

The case of *Peters v. Westborough*, 19 Pick. 364, is perhaps the strongest American case in support of the proposition that a parol agreement to pay for the support and maintenance of a minor, then eleven years old, until the age of eighteen, is not within the Statute. The decision is planted broadly on the ground that such a contract is predicated of the contingency of the life of the child, which is presumed in such case to have been within the contemplation of the parties.

So that, if the child should die within the year, the agreement would not be avoided; but would be fully performed. The doctrine of this case is reaffirmed in *Lyon v. King*, 11 Met. 411.

These decisions are predicated of the language of *Denison, J.* [in *Fenton v. Embler*, 3 Burr. 1279]: "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon contingency."

So in *Ridley v. Ridley*, 34 L. J. Ch. 462, it is said the Statute "is to be confined to cases where the agreement is not to be performed, and cannot be carried into execution, within the year." The doctrine of *Peters v. Westborough* is not touched by the holding in *Hill v. Hooper*, 1 Gray, 181. The agreement in that case was that the plaintiff's son, between fifteen and sixteen years of age, should enter the service of the defendants, and work for them until he arrived at the age of twenty-one years, in consideration that during the time they would pay to plaintiff for such service, quarter-yearly, certain sums, and in addition, semi-annually, certain sums as clothes money, until the boy arrived at the age of eighteen years, then a certain sum semi-annually until he arrived at the age of twenty and then a certain other sum semi-annually until he arrived at the age of twenty-one years. It is at once apparent, from the statement of facts, that the contract could not possibly be performed within the year. The undertaking of the promisor to make the specified payments was based upon the services to be performed by the minor through a series of years. As such

a contract was an entirety, it could not be halved, nor in less degree subdivided; and in such case it cannot be said that the contingency of life was in the contemplation of the parties.

This distinction is very aptly illustrated in the case of *McKinney v. McCloskey*, 8 Daly, 368, affirmed by the court of appeals, 78 N. Y. 594. The agreement was to support, educate, etc., a boy, seven years old, until he was twenty-one years of age, who died during his minority. The opinion directs attention to the important distinction between such a case and one like *Shute v. Dorr*, 5 Wend. 204, which was an agreement to pay the sum of \$100 for services of a minor until of the age of twenty-one. That was clearly within the Statute, because it was to pay a fixed sum for the five years' service. It was indivisible, and could not be performed within one year. So the court, in the opinion, observes: "There is a material difference between an agreement to pay one certain sum for the whole of a person's services during a fixed period of time, and to pay for the support of a person until he reaches a certain age. In the one case, if the party who is to serve dies before the expiration of the time, the promisor loses the benefit of what he contracted for, as he has received only a part of it. In the other, the death, before the end of the term, of the party to be supported, instead of being a loss to the promisor, is a pecuniary benefit," etc.

The doctrine of the last-named case obtains in *Indiana*, *Maryland* and *Kentucky*, and, in effect, in *New Hampshire*, *Maine* and *Illinois*. *Wiggins v. Keiser*, 6 Ind. 252; *Hill v. Jamieson*, 16 Ind. 127; *Frost v. Tarr*, 53 Ind. 890; *Ellicott v. Turner*, 4 Md. 476; *Honard v. Burgen*, 4 Dana, 137; *Stowers v. Hollis*, 83 Ky. 544; *Blanding v. Sargent*, 33 N. H. 246; *Hutchinson v. Hutchinson*, 46 Me. 154; *White v. Murland*, 71 Ill. 266-268.

The case of *Deaton v. Tennessee C. & R. Co.*, 12 Heisk. 650, when analyzed, does not conflict with the doctrine of the above authorities. In that case plaintiff's husband was killed by one of defendant's trains. In consideration that she would not sue the company for damages, the company agreed to support and maintain the widow and her three children—all minors—during the life of the widow, and, if she should die before the youngest child became of age, the children should be supported and maintained until that time arrived. The chief justice, who wrote the opinion, expressly recognized the doctrine of *Peters v. Westborough*, for he says: "When the promise is to continue to do something until the contingency occur, as, for instance, to pay during the promisee's life, or to support a child who is eleven years old until she is eighteen, in these cases the promise is not affected by the Statute, because the party whose life is involved may die within the year."

The opinion then proceeds to point out the peculiarities of the agreement in question,—that the promise was to support the children, at all events, until the youngest child had become of age: "It was not to support and maintain the youngest child only until

it should arrive at age, but to support the widow until that time, if she should live to that period; and, if she should die before that period, the support of the children was to continue until the youngest should come of age. Hence if the mother and the youngest child should both die within the year, the contract would continue in force until the period when the youngest child would have arrived at age, if it had lived. In other words, the contract was that the monthly amount of the husband's wages should continue, at all events, until the time when the youngest child should become of age, and might continue longer if the widow should live beyond that time. The contract, therefore, could not be performed within the year, except upon the death of the widow and all three of the children within that period."

The idea evidently within the mind of the court was that the occurrence of so many events of death was so extraordinary and improbable that it could not constitute a contingency within the terms of the contract, and that "in such case the performance of the contract is defeated, not completed, upon the occurrence of the contingency." In my humble judgment, much of the confusion in considering the applicability of the Statute

to these agreements arises from failing to keep in mind the important distinction between a contingency of such a nature as fulfills the obligation, and one that defeats or prevents it from being performed. In other words, it is the distinction between a matter of avoidance, or a defeasance and fulfillment. The one depending upon the defeasance or matter of avoidance is within the Statute. The other is not. So it is said in 1 Smith, Lead. Cas. 631: "But there is a manifest distinction between avoidance and fulfillment."

After referring to certain cases, it concludes: "There is, however, no real contradiction between these cases, the *ratio decidendi* in *Souch v. Strawbridge* [*supra*] being, not that the contract to support the defendant's child was defeasible, but that it depended on the continuance of her life, and might be fulfilled in less than a year if she died."

The case of *Washington, A. & G. Picket Co. v. Sickles*, 72 U. S. 5 Wall. 580 [18 L. ed. 550], as shown by the opinion (p. 595), was based upon the idea of a defeasance; and, thus viewed, there is no conflict in principle between the holding there and the *overruling* of the motion herein, which is ordered.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Winfield S. MAOKAY

OHIO RIVER R. CO., *Plff. in Err.*

(....W. Va....)

*1. A railroad conductor may demand

*Head notes by BRANNON, J.

NOTE.—*Ejection of passenger from car.*

A by-law of a railway company providing that every passenger shall show his ticket when required, and on failure to do so shall be required to pay fare, does not authorize his expulsion from the train for refusal to pay fare or produce his ticket, at least where he had purchased a ticket and lost it accidentally. Whether a by-law expressly authorizing his expulsion in such a case would be reasonable.—*quære*. Butler v. Manchester, S. & L. R. Co. (Eng. Ct. App.) 28 Am. L. Reg. 81.

Where a passenger purchases a ticket for one continuous trip, the contract is indivisible; and it is his duty to ascertain the train upon which he could take passage according to its terms; but if he takes the wrong train and the conductor suffers him to proceed thereon, get off at an intermediate station and wait for his proper train, his expulsion from the latter train is wrongful. Kellett v. Chicago & A. R. Co. 4 West. Rep. 823, 23 Mo. App. 866.

If a person upon entering a train showed the brakeman her ticket, which was in fact to ride on another road, but the brakeman assisted her upon the train, the conductor was not justified in putting her off the train at a stopping-place, because she had no money to pay her fare, unless such place was a reasonably safe and convenient point from which she could most expeditiously reach a train on the road on which she wished to travel; and it is not material that the conductor did not know that she showed her ticket to the brakeman. Patry v. Chicago, St. P. M. & O. R. Co. (Wia.) June 21, 1890. 9 L. R. A.

a ticket as evidence of a passenger's right of passage, or on failure to produce it may demand payment of fare; and on failure to pay it may lawfully eject the passenger from the train, using no more force than necessary.

2. If a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that

If a passenger has sold or disposed of his ticket, or is unable to exhibit it within a reasonable time after being requested to do so by the conductor, and refuses to pay the usual fare for the balance of the trip, he is not entitled to recover anything, if he is required, without abuse, insult or unnecessary force or violence, to leave the train. *Ibid.*; Louisville & N. R. Co. v. Maybin, 66 Miss. 83.

If a person holding a ticket on one road, upon entering a train upon another road, does not show her ticket to the brakeman, but goes upon the train by reason of her own mistake, and neglects or refuses to pay her fare when the conductor demands it, the latter is justified in putting her off the train at a usual stopping-place or near a dwelling-house. Patry v. Chicago, St. P. M. & O. R. Co. *supra*.

A person is not entitled to damages for ejection from a street car without unnecessary force or violence, where the ticket presented by him is a transfer ticket intended for use on another line and he himself was mainly in fault in regard to the mistake in such ticket. Carpenter v. Washington & G. R. Co. 121 U. S. 474, 30 L. ed. 1013.

Exemplary damages are not recoverable where a passenger is ejected from a train by mistake or any misrepresentation of his rights, by the conductor. Philadelphia Traction Co. v. Orban, 11 Cent. Rep. 681, 119 Pa. 87.

Rules and regulations respecting passengers and their ejection for nonpayment of fare. See note to McGowen v. Morgan's L. & T. R. & S. Co. (La.) 5 L. R. A. 817.

trip, but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be ground of action against the company as for a tort, but the action may and must be based on the breach of the contract to convey the passenger.

(Lucas, J., *dissent*.)

(June 24, 1890.)

ERROR to the Circuit Court for Ohio County to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged wrongful ejection of plaintiff from defendant's train. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. V. B. Archer and Robert White* for plaintiff in error.

Mr. J. O. Pendleton for defendant in error.

Brannon, J., delivered the opinion of the court:

This was an action of trespass on the case, in the Circuit Court of this County, brought by Winfield S. Mackay against the Ohio River Railroad Company, resulting in a verdict and judgment for the plaintiff for \$539.17, to which judgment this writ of error was granted on the petition of said Company. An inspection of the declaration will raise the question whether it states a cause of action *ex contractu* or *ex delicto*; whether it is in assumpsit on a contract for transportation, or for tort for the ejection of the plaintiff from a car. It avers that the defendant Company undertook and promised, for certain hire and reward paid to it, to safely and securely convey the plaintiff in its cars from the Town of Ravenswood to Wheeling, and back again to Ravenswood, and that the plaintiff, confiding in such promise and undertaking of defendant, did take a seat as a passenger in the defendant's car, and was conveyed to Wheeling, and that afterwards, still confiding in such promise and undertaking of the defendant, he took a seat as a passenger in one of its cars to be conveyed back from Wheeling to Ravenswood; but the defendant, not regarding its promise and undertaking, but contriving to injure the plaintiff, did not convey him from Wheeling to Ravenswood, but neglected and refused so to do.

Thus far the declaration seems to be based on the contract of conveyance made by the defendant, as a carrier, with the plaintiff. But it then immediately avers that, instead of so conveying the plaintiff, the defendant, by its servants, violently and with great force caused the plaintiff, against his will and protest, to be ejected from said car, and to be pushed and hurled from it upon the ground, and to be prevented from going to Ravenswood on that day, by means whereof he was compelled to walk a long distance to a hotel, was greatly humiliated in his feelings and hurt in his pride, by being exposed to other passengers on the car, and was compelled to remain in Wheeling, from his business and home, and to pay hotel bills, and

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spend three or four dollars for telegrams sent to his wife, to allay her uneasiness on account of his failure to reach home when expected, and to spend money to purchase a ticket to reach home, and to borrow money for that purpose; and that his wife was ill, and her alarm from his failure to reach home when expected injured her, and protracted her illness, causing him to pay large medical bills; and that his business was damaged by his detention from home, and he sustained numerous other injuries, to his damage \$10,000. The most of this matter relates to the tort of ejecting the plaintiff from the cars, and looks to that as the cause or gravamen of the action. The declaration thus contains matter based on the contract, and matter based on the tort; and it is somewhat difficult to say whether it aims to state the breach of the contract to convey, or the tort in ejecting him from the car, as the gravamen of the action. But it cannot be treated as double in nature. It must be classed either as an action *ex contractu* or *ex delicto*.

The writ summons the defendant to answer an action of trespass on the case, and the declaration denominates the action as trespass on the case; and I conclude to regard the statement of the contract of conveyance as a passenger as matter of inducement explanatory of the reason of the plaintiff's presence on the car, and the ejection of the plaintiff from the car with force and arms as the gravamen of the action, and shall treat the action as trespass on the case. This classification of the action is necessary in passing on the motion to exclude the plaintiff's evidence; for, if we regard the declaration as in assumpsit, the evidence would go to sustain the action, and the motion to exclude it would consequently be overruled, but, if we regard it as in case, the evidence is not sufficient to sustain the action, and the motion to exclude it should have been sustained.

The plaintiff's evidence shows that he purchased from the defendant's agent at Ravenswood what was regarded a round-trip ticket from Ravenswood to Wheeling and return, and paid \$7.85 for it, and under it went to Wheeling, and, when he started to return to Ravenswood, found that his ticket was stamped on each end from "Ravenswood to Wheeling," instead of being stamped, as it should have been, on one end for passage from Ravenswood to Wheeling, and on the other from Wheeling to Ravenswood; that he did not notice the mistake when he purchased the ticket, and first noticed it when he boarded the train at Wheeling to return to Ravenswood. The conductor on the train to Wheeling tore off one end or coupon of the ticket, and when, on his return, the plaintiff presented his ticket to the conductor, he refused to receive it because it called for a passage from Ravenswood to Wheeling, not from Wheeling to Ravenswood, and said to plaintiff: "This ticket is no good. You will have to pay your fare, or get off,"—and the plaintiff replied, "I'll be damned if I do." The conductor pulled the bell-rope to stop the train; and, as the train was stopping, plaintiff asked the conductor what was the matter with the ticket, and he said it was not good.

The plaintiff informed him that he had come up on it the day before with Conductor Patrick; and the conductor, Rice, then said, "He gave you the wrong end," and said, further, "You will have to pay your fare." Plaintiff then said to him that he had no money, and that, if the conductor had given him the wrong end of the ticket, it was a mistake, and it did not cost any more to take him back than to bring him up, to which Conductor Rice replied, "It don't make a damn bit of difference," and that plaintiff must pay fare or get off. When the train stopped, the plaintiff said: "If I get off here, somebody will have to pay for it. I want to get home on this train." Plaintiff says he then got off the train down upon the street in the City of Wheeling. He further says: "Of course the passengers could not hear what was said between the conductor and myself, and they did not know what I was put off for."

There is no act of trespass shown by this evidence. There is not the slightest evidence of force or violence used by any of the defendant's employes upon the plaintiff. He was not, as alleged in the declaration, violently and with great force ejected and pushed and hurled from the car, but walked from it himself, without the slightest battery or assault upon his person. He does not himself say so, and other evidences make it quite clear that no force or violence was used. The evidence does show a breach of the Company's contract to convey the plaintiff as a passenger, or an agreement to sell a different ticket, but not a trespass for which an action based on a tort can be maintained. It is simply the case of a refusal and failure to carry out its contract of conveyance, for which an action of trespass on the case, in assumption based on that contract, might be maintained. The mere manner of his expulsion would not sustain the action as one based on tort. The plaintiff's evidence is that the conductor "talked short" to him, and he to the conductor, and, when he was presenting his views as to the validity of the ticket, the conductor said, "It don't make a damn bit of difference,"—that he had to get off or pay fare.

In the late case in the Supreme Court of North Carolina (*Ross v. Wilmington & W. R. Co.* 106 N. C. 168), an action for putting plaintiff and her husband off a train, it appeared that, their ticket not being stamped as required, the conductor told the husband they must pay fare or get off, and afterwards, at the next station, said, in a brusque, decided manner: "This is H., if you are going to get off," and, they saying they had no intention of getting off unless ordered, he said, "Then I order you off," and they got off, and returned and paid fare, and it was held that the company was not liable for damages, though plaintiff was lying on pillows, and apparently an invalid. But, had force been used, if no more than was necessary to remove the plaintiff from the car, or if it be said that actual force is not necessary to sustain the action, but that threatened expulsion and departure of the passenger from the car by reason of it shall stand in lieu of it, I

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do not think the action can be maintained.

In *Frederick v. Marquette, H. & O. R. Co.*, 87 Mich. 842, it is said that the uniform and universal practice is for railroad companies to issue tickets with the places designated from and to which the passenger is to be carried, and that these tickets are unhesitatingly accepted by the conductor as evidence of the contract between the company and passenger, and that the conductor has seldom any other means of ascertaining or learning, within time to be of any avail, the terms of the contract, unless he relies on the statement of the passenger, contradicted, perhaps, by the ticket, and that there will be cases where a ticket is lost, or where by mistake the wrong ticket was delivered to the passenger, and he will be obliged to pay his fare a second time to pursue his journey, and, if he is unable to do so, great delay and injury may result. Such delay and injury would be the natural result of the loss of the ticket or breach of the contract, but would, in part, at least, be in consequence of the pecuniary circumstances of the party. That such cases are exceptional, and however unfortunate the party who is so situated, yet no rule has ever been devised that would not at times injuriously affect those it was designed to accommodate. The judge then asks: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically, there are but two ways,—one, the evidence afforded by the ticket; the other, the statement of the passenger, contradicted by the ticket. Which should govern? . . . There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger and the right of the latter to travel, the ticket produced must be conclusive evidence; and he must produce it, when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract; but he would have to adopt a declaration differing essentially from the one resorted to in this case."

In that case the passenger had paid to a point beyond that called for by the ticket, and, refusing to pay fare, was ejected, and was denied a recovery in an action on the case. The principle enunciated in this case in Michigan, that, as between the passenger and the conductor, the ticket is the conclusive evidence of the passenger's rights, is sustained in several well-considered cases. *Townsend v. New York Cent. & H. R. R. Co.* 56 N. Y. 295; opinion by Chief Justice Cooley in *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118; *Chicago, B. & Q. R. Co. v. Griffin*, 63 Ill. 499; *McClure v. Philadelphia, W. & B. R. Co.* 84 Md. 532; *Shelton v. Lake Shore*

cf. M. S. R. Co. 29 Ohio St. 214; *Downs v. New York & N. H. R. Co.* 36 Conn. 237; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234; *Bradshaw v. South Boston R. Co.* 135 Mass. 407.

In the Ohio case of *Shelton v. Lake Shore & M. S. R. Co.*, *supra*, it was held that the fact that a ticket had been purchased, which was afterwards wrongfully taken up by a conductor on one train, will not relieve a passenger from the duty of buying a ticket or paying fare on another train of the defendant, and that in such case the right of action would be for wrongfully taking up the ticket, and not for removal from the train for failure to pay fare.

In the Illinois case above cited (*Chicago, B. & Q. R. Co. v. Griffin*) it was held that if a passenger pay fare to a certain station, and the agent inadvertently give him a ticket to an intermediate station, the demand of a second fare will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying a second time, his action will be as complete as if he resist the demand, and suffer himself to be ejected; and his ejection will add nothing to his cause of action. It is his duty to pay the second fare; and, if the company fail to make reparation, he can maintain his appropriate action. This case recognizes the contract as the proper ground of action. *Hall v. Memphis & O. R. Co.* 9 Fed. Rep. 585.

In *Yorton v. Milwaukee, L. S. & W. R. Co.*, *supra*, the passenger, desiring to stop over, and having the right to a stop-over ticket, was given instead a trip check, through the conductor's fault; and it was held that a second conductor may demand additional fare, and may, on refusal to pay, eject him from the train, using no unnecessary force, and that such ejection will be no ground for recovery against the company, though it will be liable for the fault of the first conductor.

In *Townsend v. New York Cent. & H. R. Co.*, *supra*, it was held that a regulation of a railroad company requiring passengers

to present evidence to the conductor of a right to a seat or pay fare is reasonable, and for non-compliance a passenger may be put off, and the wrongful taking of the passenger's ticket by a conductor of a previous train, on which the passenger had performed part of his journey, does not exonerate him from compliance with the regulation, and that for the wrongful act of the former conductor the company is liable. It does not justify the passenger in violating the company's lawful regulation on another train.

In *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455, it was held that a passenger who had a ticket in his pocket, and had exhibited it once to the conductor, and refused to exhibit it again when called on, was properly ejected for refusing to exhibit his ticket.

Here the plaintiff had a ticket not good for the trip he was making, and declined to pay fare. He cannot maintain an action for ejection, or a threatened ejection, from the train, but must look to the breach of contract, or the act of receiving money for the round trip and giving a wrong ticket. If the passenger have a ticket good for the passage, and the conductor should refuse to recognize it, and expel the passenger, the act would be a tort; and an action as for a tort could be maintained.

Judge Cooley said in *Hufford v. Grand Rapids & I. R. Co.*, *supra*, that all the judges of the Michigan Supreme Court agreed that if the ticket was apparently good the passenger need not leave the car. But here the ticket was very apparently not good. Therefore the motion of the defendant to reject plaintiff's evidence as not sustaining his action should have been sustained, not overruled. As the evidence should have been excluded, it becomes unnecessary to pass on the instructions.

The judgment is reversed, the verdict of the jury set aside, and the case is remanded for a new trial in accordance with principles herein indicated.

Snyder, P., and English, J., concur; Lucas, J., dissents.

NEW YORK COURT OF APPEALS.

Margaret HEARTT, *Resp't.*,
v.

Adolph KRUGER, *Appt.*

(....N. Y.)

1. Describing the boundary line between two lots, in a mortgage by a purchaser of both given upon one of them to secure payment of purchase money, as running through the center of a party-wall between the buildings upon them, will not amount to an implied grant of a perpetual easement for the maintenance of the party-wall as such in favor of one claiming title through a foreclosure sale under such mortgage.

2. The accidental destruction by fire of a party-wall, as to the maintenance of which there has been no grant of a perpetual right, will

destroy all right in either party to claim an easement in the property of the other for the further support of a party-wall notwithstanding some portion of the foundation of the old wall remains standing.

(June 3, 1890.)

APPEAL by defendant from a judgment of the General Term of the Superior Court for the City of New York entered upon a verdict which had been directed by the Trial Term to be rendered in favor of plaintiff in an action of ejectment, subject to the opinion of the General Term. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. John Hardy, for appellant:

The right to a party-wall continues so long as the wall stands, even though all the build-

ing except the party-wall has been burned down.

Brondage v. Warner, 2 Hill, 145.

Where from dilapidation the party-wall would have to be rebuilt, either party has the right to take down and rebuild it.

Campbell v. Mesier, 4 Johns. Ch. 834, 1 N. Y. Ch. L. ed. 858, 6 Johns. Ch. 21, 2 N. Y. Ch. L. ed. 41; *Partridge v. Gilbert*, 15 N. Y. 608.

The defendant had a right to assume that the party-wall remained standing after the fire by the consent of the parties. He found the wall on his land on taking possession, and he found that the deeds of conveyance under which he acquired title to this land made the west wall, which was still standing, a party-wall, and he was at liberty to use as his own an erection on the land he had bought and for which he had paid the owner the price in good faith and without notice of any adverse claim.

Sherred v. Cisco, 4 Sandf. 459.

The height of the wall can make no difference, as either party had the right to increase its height.

Brooks v. Curtis, 50 N. Y. 639.

The plaintiff could not have maintained the action if the wall had not been carried up, and the wall when carried up is no more an occupation of plaintiff's land than the original foundation wall was.

Hendricks v. Stark, 87 N. Y. 106; *Brooks v. Curtis*, 50 N. Y. 644.

Mr. James J. Thomson, for respondent:

On the severance of the tenements the wall separating and supporting the houses 503 and 505 West Fifty-fourth Street, and which afterwards became vested in appellant and respondent respectively, became a party-wall, and the reciprocal easement and servitude in the said lots attached on such severance.

Lampman v. Milks, 21 N. Y. 505; *Rogers v. Binsheimer*, 50 N. Y. 648.

The easement and servitude of party-wall were continuous and apparent, and the defendant, whether a prior or subsequent or contemporaneous purchaser, had actual notice.

Rogers v. Binsheimer, *supra*.

No agreement can be implied from the erection of the party-wall to re-erect the wall after it shall have served its use as a party-wall, or to grant the perpetual easement to and impose the perpetual servitude of the party-wall on the lots of the parties on which it shall be erected.

New York Life Ins. & T. Co. v. Milnor, 1 Barb. Ch. 362, 5 N. Y. Ch. L. ed. 417; *Sherred v. Cisco*, 4 Sandf. 459; *Antomarchi v. Russell*, 68 Ala. 358.

The obligation cannot be founded on an implied covenant, for no covenant can be implied in any conveyance.

Rev. Stat. pt. 2, chap. 1, art. 4, §140; 3 Rev. Stat. 7th ed. § 140, p. 2195.

Gray, J., delivered the opinion of the court:

The plaintiff and defendant are owners of adjoining lots of land in the City of New York; and their litigation, in the shape of an action of ejectment, is over the question of whether or not their tenements are subject to a perpetual party-wall easement, dominant as to the defend-

ant's, and servient as to the plaintiff's, properties. This question, as it is presented by the case before us, does not seem to have arisen before in our courts, though there are several reported cases which, I think, suggest the principle of decision. Some are referred to in the well-considered opinion of *Judge Ingraham* (5 N. Y. Supp. 192) speaking for the general term below. I think, indeed, we might leave the decision of this case with his opinion, were it not for the importance which, perhaps, the question involved possesses for real-estate owners in cities. That consideration fairly warrants some expression of the views which lead us to uphold the judgments of the courts below.

In 1874 these lots were owned by one Burchell. He erected upon them two buildings, five stories in height, with a party-wall dividing them of twelve inches in width. He conveyed both premises to one Falk, and took back from his grantee a mortgage on the lot now owned by this defendant, which described the westerly line of the lot as "running southerly and parallel with Tenth Avenue, and partly through the center of a party-wall fifty feet and five inches to the northerly side of 54th Street." With this conveyance of both lots, and the contemporaneous mortgaging of one of them, commenced the severance of the tenements; and, whatever rights of easements have existed with respect to the division-wall, which partly supported both houses, they took their rise and form in those transactions. Through the conveyance upon a foreclosure sale of the mortgaged premises and other means conveyances, the defendant acquired his title. In 1897 the buildings on both lots were wholly burned down, and only the foundation or cellar wall remained, upon which had been erected the party-wall; and it was while the premises were in that condition that this defendant became their owner. He then built upon them, erecting upon the old foundation wall a party-wall two stories high, and of the same thickness as the former one. This erection of the new wall partly upon the adjoining lot was without any other right in the defendant than was to be found in the conditions of his title. There is some pretense of an estoppel upon the plaintiff by reason of interviews with her husband upon the subject of rebuilding, but there is no foundation for that defense, or for the defense of acquiescence; and we need not stop to consider that feature.

The question thus arises as to whether, after the destruction of the buildings by fire, any right remained in the defendant, as appurtenant to his property, under which he could claim the continuance of an easement in the plaintiff's property for the support of another party-wall. Where will we find the legal foundation for such a claim? There had certainly been no agreement, and there was no express grant of any easement in the land by the common owner, Falk; and I do not see how any grant arose by implication from his mortgaging the lot now owned by the defendant. The only language in the mortgage capable of such an implication was in the description of the westerly boundary, which I have quoted above. That, however, was merely language of description, and, while sufficient

to create a servitude in the adjoining lot for the purpose of the existing party-wall, was insufficient to predicate any grant of a perpetual easement upon. It was merely the statement of the fact that the dividing line of the two lots ran through the center of what was a party-wall, so that the claim of the defendant to a continued easement in the plaintiff's land must depend wholly upon this reasoning, namely, that a party-wall had formerly existed there, and that, because the foundation wall remained, that fact sufficed to preserve unimpaired the right to a reconstruction of a party-wall. The defendant insists that the wall did not cease to be a party-wall after the fire, and he cites, in support of his position, *Brondage v. Warner*, 2 Hill, 145. His argument amounts to this, in effect: that, if any fragment of the wall was left, or if only the foundation or cellar-wall upon which it stood remained, in the legal vision the party-wall still stood, with its accompanying burden or benefit to the adjoining properties. But that I consider a doctrine untenable, and clashing with the doctrine of property rights in land. *Brondage v. Warner*, *supra*, affords no support for it; for there the defendant's right to use and occupy the wall in question lay in grant. The deed under which the defendant in ejectment claimed the right to continue to use the wall granted the right to build upon and occupy it. That had been done. The fire which had destroyed the plaintiff's store left the wall standing, which was occupied by the defendant. It still answered the purpose for which its use had been deeded, and therefore the court held that the right to continue to use it had not been affected. The facts of this case are quite other. When the title to these two lots was severed by their conveyance to separate persons, the purchaser of each lot is presumed to have contracted in reference to the condition of the property at the time; and the openly existing arrangement of a party-wall could not be changed so long as it stood and answered its purpose. It was made a party-wall upon the severance of the title, by the description of the boundary line, but the whole extent of the qualification, which resulted as to each lot owner's title, was the easement which the other acquired in the wall dividing and supporting their respective buildings. Each was bound to preserve the existing order of things in that respect, and neither had any right to change the relative condition of his building to the injury of the adjoining one. The party-wall of the two buildings was an open and visible condition of the ownership of the property; and, in legal contemplation, its use as such, while the building stood, was an element which entered into the contract of the purchaser, and which charged the land with a servitude. This principle of obligation is asserted in several cases, of which I only cite *Lampman v. Mills*, 81 N. Y. 507; *Curtiss v. Agawit*, 47 N. Y. 79, and *Rogers v. Sinsheimer*, 50 N. Y. 644. But upon the destruction of the buildings the tenements reverted to their original or primary conditions of ownership. Their tenure was no longer qualified by the relative rights and obligations which previously existed.

In the early case of *Sherred v. Chico*, 4 Sandf. 485, the facts were quite similar to those in this 9 L. R. A.

record. Adjoining buildings were destroyed by fire, and nothing was left of a party-wall but the stone foundation. The plaintiff rebuilt on his lot; and, when the defendant also rebuilt, he made use of the wall for his buildings, which plaintiff had erected on the old foundation. Thereupon, plaintiff sued to recover of defendant his contribution towards the expense of the erection, and failed in his suit. In his opinion, Judge Sandford held that the agreement under which the party-wall had been built related to that wall only; and he said "that, when two owners of adjoining city lots unite in building two stores with a party-wall, we have no right to infer from that act an agreement binding upon them, and their heirs and assignees, to the end of time, to erect another like party-wall at their mutual expense when that one is casually destroyed, and so on, as often as the new one shares the same fate." The principle of that decision, I think, was a correct one, and it may be well applied here. The implied agreement that the party-wall existing at the time of the conveyances of the two lots by their common owner should continue in its use and occupation as such cannot be extended so as to relate to a changed condition of things, caused by the casual destruction of the wall and buildings.

In *Partridge v. Gilbert*, 15 N. Y. 601, Judge Denio, in his opinion upon the case, approves of Judge Sandford's opinion in the case cited. He held that, upon the occurrence of a state of affairs rendering the party-wall useless in its then condition, "the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other." The facts of that case were not, of course, similar, for the action related to the right of the tenant of a building to recover damages for injuries to goods, etc., occasioned during the rebuilding by the defendant of a division-wall. The case turned upon the necessity for the removal of the old, and the rebuilding of a new, wall. But the opinions are instructive upon the subject before us, however unnecessary, in that respect, to the decision of that particular case. Very appropriately to this case, Judge Denio remarked, also, in his opinion, that "in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and an entirely different character, would be required; and it might happen, too, that the views of one of the proprietors as to the value and extent of the new buildings would essentially differ from those of the other, and the division-wall which would suit one of them would be inapplicable to the objects of the other."

The rule which, with the cessation of the necessity for the existence of a right, abrogates the right itself, is supported by the reason of the thing, as well as by legal principles. The mutual easements existed by force of the situation at the time of the severance of the ownership of the two lots, and with the change in that situation produced by the casual destruction of the buildings, the reason for their existence ceased. Thenceforth they were inapplicable, and the lands were free for the lawful uses of their owners. The easement was measured in its extent and duration by the existence of the

necessity for it. When the necessity ceased, as it did by the destruction of the buildings and wall, the rights resulting from it ceased also. *Ogden v. Jennings*, 62 N. Y. 581.

In *Holmes v. Goring*, 2 Bing. 76, that principle was laid down in the case of a right of

way. Without further discussion of principle or authorities, I think *the judgment appealed from was clearly right, and therefore should be affirmed, with costs.*

All concur, except *Ruger, Ch. J., and O'Brien, J.,* not voting.

ILLINOIS SUPREME COURT.

AMERICAN EXPRESS CO., *Appt.*,

v.

PEOPLE of the State OF ILLINOIS.

(....Ill.....)

The transportation of game which has been killed within the limits of a State, and which has been sold or which is intended for sale within the same State, may lawfully be prohibited by the State Legislature. The killing of game vests no such absolute title to it in the killer that a prohibition to sell it deprives him of his property without due process of law.

(June 12, 1890.)

APPEAL by defendant from a judgment of the County Court of Effingham County in favor of plaintiffs in an action brought to recover the statutory penalties for the unlawful transportation of game. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Wood Brothers and Rinehart & Wright, for appellant:

At common law an individual had no property right in game until it was under his control.

Cooley, Torts, 485; 2 Kent, Com. 12th ed. 350.

When under his control the game if living was his qualified property. If it escaped or was abandoned his property in it ceased.

2 Kent, Com. 349.

If it was dead his property in it was absolute.

2 Bl. Com. (Sharswood's ed.) 398, 408, 419.

The property right in game reduced to possession and killed for food carried with it the necessary incident of alienation.

2 Kent, Com. 327; 2 Bl. Com. (Sharswood's ed.) 388.

It was the duty of common carriers to transport this species of property (3 Addison, Cont. § 978), and a refusal to do so, without some just ground, would render them liable.

2 Kent, Com. 599.

The right of property of citizens in dead game was above and before Constitutions.

Cooley, Const. Lim. 37, 175.

To prevent its sale, or transportation for sale, within the State would be an interference with private right, amounting to a destruction of the right of property without due process of law.

People v. O'Neil, 71 Mich. 325; *State v. Saunders*, 19 Kan. 127.

The carrying of dead game is neither a nuisance in fact, nor has it been so declared by law.

See 4 Bl. Com. (Sharswood's ed.) 162; Cooley, Const. Lim. 706.

The absolute prohibition of the carriage of a

healthy article of food, that is the private property of the individual, is an arbitrary act of the legislative power of the State, by which a vested property right is destroyed.

Cole v. Hall, 108 Ill. 82; *Com. v. Hall*, 128 Mass. 410; *Allen v. Young*, 76 Me. 80; *People v. O'Neil*, 71 Mich. 325.

Mr. R. C. Harrah, for the People:

The policy of the common law was to regulate and control the hunting and killing of game, for its better preservation, and such regulation and control belong to the police power of the government.

Cooley, Bl. bk. 4, p. 174.

Almost every State in the Union has exercised the power to pass laws for the preservation of game.

Tiedeman, Pol. Power, § 122, chap. 10, p. 440; *Allen v. Wyckoff*, 2 Cent. Rep. 213, 48 N. J. L. 98; *Phelps v. Racey*, 60 N. Y. 10; *Magner v. People*, 97 Ill. 333; *Parker v. People*, 111 Ill. 588.

Section 2 of the Statute of 1889, prohibiting the sale at all times of the birds named in said section, is a regulation that tends to the protection or such birds, and is a proper enactment to carry out the intention of the Legislature as expressed in the title of the Act of 1879 "for the protection of wild fowl and birds."

To prevent the abandonment by indigent persons of their proper callings during the periods when game can lawfully be killed for the purpose of deriving a revenue from the slaughtered game and make it an offense against the public policy and economy of the State, this law was also properly enacted.

See Cooley's Bl. bk. 4, p. 174.

The present Constitution of this State (§ 22, art. 4) recognizes the power of the Legislature to enact laws for the protection of game or fish.

See *Parker v. People*, 111 Ill. 531.

As to the law of other States, see—

Bellevs v. Elemendorf, 7 Lans. 462; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 524; *State v. Farrell*, 23 Mo. App. 176.

Craig, J., delivered the opinion of the court:

This was an action to recover the penalties prescribed for the unlawful transportation of quail in section 2 of "An Act to Amend Sections 1, 2 and 6 of an Act Entitled 'An Act to Revise and Consolidate the Several Acts Relating to the Protection of Game, and for the Protection of Deer, Wild Fowl and Birds.'" Laws 1889, p. 162, Rev. Stat. 1889, chap. 61, §§ 1, 2, 6.

The facts agreed upon by the parties on the trial of the cause were in substance as follows: That the defendant, the American Express Company, is a corporation, and carrier of

goods for hire; that, between October 1 and October 23, 1889, it received for transportation from Redding, Gibbs and others at Mason, in Effingham County, divers quail which had been killed by shooting after October 1, 1889, in this State, and on October 23, 1889, the Express Company did transport such quail to Chicago, and deliver them to Hernae and Lynch Bros., commission merchants. The Express Company at the time of such receipt for transportation by its agent, Sisson, at Mason, had knowledge that the quail had been sold, and were to be sold, and offered for sale, by said commission merchants.

Section 1 of the Act provides "that it shall be unlawful for any person or persons to hunt, pursue, kill, trap, net or ensnare, or otherwise destroy, . . . any ruffed grouse, quail, pheasant or partridge between the first day of December and the first day of October of each succeeding year, or any year." Section 2 provides: "It shall be unlawful for any person to buy, sell or have in possession any of the animals, wild fowl or birds mentioned in section 1 of this Act, at any time when the trapping, netting or ensnaring of such animals, wild fowl or birds shall be unlawful, which shall have been entrapped, netted or ensnared contrary to the provisions of this Act; and it shall further be unlawful for any person or persons at any time to sell or expose for sale, or to have in his or their possession for the purpose of selling, any quail, pinnated grouse or prairie chicken, ruffed grouse or pheasant, gray, red, fox or black squirrel, or wild turkey, that shall have been caught, snared, trapped or killed within the limits of this State; and it shall further be unlawful for any person, corporation or carrier to receive for transportation, to transport, carry or convey, any of the aforesaid quail, pinnated grouse or prairie chicken, ruffed grouse or pheasant, squirrel or wild turkey, that shall have been caught, snared, trapped or killed within the limits of this State, knowing the same to have been sold, or to transport, carry or convey the same to any place where it is to be sold or offered for sale, or to any place outside of this State, for any purpose."

It is plain, under the facts as agreed upon, the Express Company received the quail for transportation, and transported the same, knowing the quail were sold or transported for the purpose of sale, in violation of the terms of the Statute; and, if the Statute is valid, the Company was liable for the amount of the penalty prescribed by its terms and provisions. But it is insisted by the Express Company that the Statute is invalid, and upon this ground the judgment rendered in the county court was erroneous. It will be observed that the first section of the Act makes it unlawful to hunt or kill quail between the 1st day of December and the 1st day of October of each year, but the section is silent as to October and November. It would follow, therefore, that a person might hunt or kill quail during the months of October and November; not, however, for sale, but under the restrictions found in section 2 of the Act.

The first clause of section 2 makes it unlawful for any person to buy, sell or have in possession any of the birds named in section 1 of § L. R. A.

the Act, at any time when the trapping, etc., of such animals shall be unlawful. The second clause makes it unlawful for any person to sell or expose for sale, or have in possession for the purpose of sale, any quail that shall have been killed within the limits of the State. Under this clause, while a person might lawfully kill quail during the months of October and November for his own use, he would have no right whatever to do so for the purpose of placing such quail on the market as an article of commerce. Then follows the clause making it unlawful for any person, corporation or carrier to transport quail where the same have been killed in this State for sale, regardless of the time such quail may have been killed. A bare reference to the terms of sections 1 and 2 of the Act is sufficient to show that the purpose the Legislature had in view in passing the Act was to protect the game in the State. The hunting and killing of game was regulated for its preservation by the common law, and the control was predicated under the police power of the government. Bl. Com. bk. 4, p. 174.

Statutes in almost every State in the Union may be found enacted for the preservation of game. The text-writers, in treating of the power to legislate on this subject, place it under the police power inherent in each State. Tiedeman, Lim. Pol. Powers, § 122f, chap. 10, p. 440, says: "It is a very common police regulation, to be found in every State, to prohibit the hunting and killing of birds and other wild animals in certain seasons of the year, the object of the regulation being the preservation of these animals from complete extermination, by providing for them a period of rest and safety, in which they may procreate and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be questioned."

In *Phelps v. Racey*, 60 N. Y. 10, the power of the State to legislate for the preservation of game was called in question, and in deciding the case the court said: "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food." "The means best adapted to this end are for the Legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body. See also *Allen v. Wyckoff*, 48 N. J. L. 98, 2 Cent. Rep. 218.

In *Magner v. People*, 97 Ill. 333, the validity of the Game Law of 1879, to which the Act in dispute is amendatory, was before this court, and it was then said: "The ownership being in the people of the State,—the repository of the sovereign authority,—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as in the opinion of its members will best subserve the public welfare."

It is, however, argued that where quail have been killed the dead animals become property,

and the taker becomes the absolute owner of such property, and an Act to prevent a sale, or transportation for sale, within the State, would be an interference with private right amounting to a destruction of the right of property without due process of law. The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the *Magner Case, supra*, it was held, as has been seen, that no one had a property in animals and fowls denominated "game." The ownership was in the people of the State. This being so, it necessarily follows that the Legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the Legislature might confer. The Legislature has never conferred an absolute property in quail upon the person who might kill the same. The killing of quail during the months of October and November was permitted, not for sale, not to go upon the market as an article of commerce, but for the mere use of the person who killed the birds. The person killing quail under this Statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might

maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell, or the right to ship for the purpose of sale; and, when such person undertakes to ship for sale, he is undertaking to assert a right not conferred by law. The Act, therefore, does not destroy a right of property, because no such right exists. It will be observed that section 2 of the Act does not prohibit absolutely the transportation of quail which have been killed in the State, but only transportation by persons, corporations and carriers knowing the same to have been sold, or knowing they were to be sold or offered for sale. If the Legislature of the State thought that a statute preventing a citizen from killing quail for sale in the market, and imposing a penalty on a common carrier for shipping or transporting for sale, would result in protecting the game in the State, we perceive no valid reason why a statute of that character might not be enacted. The nature and character of the legislation was a matter resting solely with the Legislature; and so long as no constitutional right of the citizen has been infringed upon, the Statute must be sustained.

The judgment of the County Court will be affirmed.

MINNESOTA SUPREME COURT.

MANCHESTER LOCOMOTIVE WORKS,

Appl.,
v.

W. H. TRUESDALE *et al.*, *Repts.*

(....Minn.....)

*1. The petitioner sold to a railroad company a locomotive upon the condition

*Head notes by DICKINSON, J.

that it should be paid for on delivery. It was delivered, but was not paid for. The vendor, without asserting its right to repossess itself of the locomotive, sued to recover the price, and by garnishment and judgment secured partial satisfaction. *Held*, that the delivery, in the first instance conditional, became absolute by the conduct of the vendor, so that the latter had no reserved lien upon the locomotive.

2 More than six months after the sale the road was placed in the hands of a

NOTE.—*Mortgage may include future-acquired property.*

At common law a valid mortgage could not be made to cover after-acquired property (*Ross v. Wilson*, 7 Bush, 29; *Emerson v. European & N. A. R. Co.*, 67 Me. 337; *Griffith v. Douglass*, 73 Me. 532; *Pierce v. Emery*, 33 N. H. 484; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Farrar v. Smith*, 64 Me. 74; *Looker v. Peckwell*, 68 N. J. L. 253); but it is otherwise in equity (*Stover v. Eylesheimer*, 3 Keyes, 620; *Oliphint v. Eckerly*, 36 Ark. 69; *Little Rock & Ft. S. R. Co. v. Page*, 36 Ark. 304; *McCauley v. Woodin*, 65 N. Y. 459; *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. 234; *Wright v. Bircher*, 73 Mo. 179; *Mitchell v. Winslow*, 3 Story, 630; *Langton v. Horton*, 1 Hare, 549); for the reason that what is in form a conveyance operates in equity by way of present contract merely to take effect and attach as soon as the property comes into being. *Christy v. Dana*, 34 Cal. 548; *Rice v. Kelso*, 57 Iowa, 115; *Emerson v. European & N. A. R. Co. supra*; *Boone, Corp.*, § 12.

The same principles of construction apply to a mortgage upon future acquisitions of property by a corporation that would apply to a like instrument executed by an individual. *Mississippi Val. Co. v. Chicago*, etc. R. Co. 58 Miss. 393.

Railroad mortgages.

The power of a railway company to execute a mortgage of its franchises or of corporate property essential to its operation must be expressly con-

ferred by its charter. *Frazier v. East Tennessee, V. & G. R. Co.*, 88 Tenn. 133.

A charter granted to a railroad company authorizing it to issue bonds and mortgage its property for the purpose of completing its road or putting it into full operation does not authorize the issuance of bonds and execution of a mortgage for any other purpose than that of completing and equipping the original line; and a mortgage executed more than twenty-five years after such completion and equipment, and not purporting to be for such purpose or to secure renewal bonds, will not be presumed to have been executed for the purpose named. *Ibid.*

A law subjecting the road and chartered rights of all railroad companies to sale for their debts inures to the benefit of prior as well as subsequent mortgages. *Galveston, H. & H. R. R. Co. v. Cowdrey*, 73 U. S. 11 Wall. 459, 20 L. ed. 199.

A mortgage as against the company and its privies, though given before the road is built, attaches thereto as fast as it is built, and to all property covered by its terms as fast as it comes into existence as property of the company. *Ibid.*

What property included in mortgage.

A mortgage of all the property of a railroad, including its rights, franchises, etc., contemplates property owned both at the time of the mortgage and that to be subsequently acquired. *Howe v. Freeman*, 14 Gray, 566; *Pennock v. Coo*, 54 U. S. 23

receiver at the suit of the holders of mortgage bonds to foreclose their mortgages, given long before the sale, and covering all the property of the railroad company, present and prospective, including its earnings. Nearly a year after the appointment of the receiver the vendor applied to the court for an order requiring the payment of the balance of its debt out of the earnings of the receivership. Held, that the debt was more properly to be classed with the general debts of the corporation than with those incurred for current expenses proximately connected with the operation of the road by the receiver, and hence that the court properly refused to allow this claim as one equitably entitled to preference over the claims of the bondholders secured by mortgage (antedating the sale of the locomotive) upon the earnings of the road.

(July 18, 1890.)

APPEAL by petition from an order of the District Court for Hennepin County denying its application for an order directing its claim for the purchase price of a locomotive furnished by it for the operation of a railroad to be paid out of current earnings of the road. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Flannery & Cooke for appellant.

Messrs. E. M. Wilson, Howard S. Abbott, F. D. Larrabee, J. M. Shaw, J. D. Springer, Albert E. Clark, H. C. Truesdale, M. B. Koon, George B. Young, Woods & Kingman and Keith, Evans, Thompson & Fairchild for respondents.

Dickinson, J., delivered the opinion of the court:

This is an appeal by the above-named petitioner, the Manchester Locomotive Works, from an order of the District Court denying its application for an order directing the receiver of the Minneapolis & St. Louis Railway Company to pay a balance remaining unpaid of the purchase price of a locomotive sold by the Locomotive Works to the railway company on the 22d day of December, 1887. Although the price (\$6,800) was to be paid on the delivery of the locomotive, it was not so paid, and in May, 1888, the petitioner commenced an action in the district court against the railway company for the recovery of the debt, and in that action garnished certain money belonging to the corporation in the hands of other persons. In that action the Locomotive Works recovered judgment in November, 1888, against the railway company, and secured satisfaction of a part of the same through the garnishee proceedings. While that action was pending, and on the 28th of June, 1888, a little more than six months after the sale and delivery of the locomotive, the respondent Truesdale was appointed receiver of the railway company, the corporation being insolvent, in an action in the district court to foreclose certain trust deeds or mortgages which had been given by the railway company long before the sale of the locomotive, to secure its bonded indebtedness of more than \$9,000,000. These mortgages in terms covered all the property of the railway company, including all locomotives then held or

How. 117, 16 L. ed. 436; Coe v. McBrown, 28 Ind. 252; Pierce v. Emery, 32 N. H. 484; Quincy v. Chicago, R. & Q. R. Co. 94 Ill. 537.

It covers a road purchased where it was one which might have been built under its charter. *Branch v. Jesup, 106 U. S. 468, 27 L. ed. 279.*

But the franchise of being a corporation is not one which passes by a mortgage of the property and franchises, except by positive provisions of law. *Memphis & L. R. R. Co. v. Berry, 112 U. S. 402, 28 L. ed. 387.*

Yet the franchise of a railroad corporation, of the right to occupy streets and public grounds with railroad tracks, may be included in a mortgage of the railroad, in Louisiana. *New Orleans, S. Ft. & L. R. Co. v. Delamore, 114 U. S. 501, 29 L. ed. 244.*

A railroad mortgage conveying the road, franchises and endowments does not cover or convey a contract with the United States for carrying the mails. *St. Paul & D. R. Co. v. United States, 112 U. S. 733, 28 L. ed. 861.*

Immunity from taxation is not such a franchise of a railroad corporation as will pass by a sale under a mortgage on the property and franchise of the company. *Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 830; East Tennessee, V. & G. R. Co. v. Hamilton County, 102 U. S. 273, 26 L. ed. 152; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922; Memphis & L. R. Co. v. Berry, 112 U. S. 402, 28 L. ed. 387; Chesapeake & O. R. Co. v. Miller, 114 U. S. 173, 29 L. ed. 121.*

Mortgage covering after-acquired property.

Where no rule of law is infringed, and the rights of third parties are not prejudiced, courts will in proper cases give effect to mortgages of subsequently acquired property. *Beall v. White, 94 U. S. 382, 24 L. ed. 173.*

9 L. R. A.

Mortgages of railroad property and deeds of trust of the same, which in terms cover after-acquired property, are valid and estop the company and all persons claiming under them, and in privity with them, from asserting that they do not cover all the property and rights which they profess to cover. *Thompson v. White Water Valley R. Co. 132 U. S. 68, 33 L. ed. 256.*

A railroad mortgage covering all subsequently acquired property includes a railroad and appurtenances afterwards leased by the mortgagors (*Barnard v. Norwich & W. R. Co. 14 Nat. Bankr. Reg. 469*), and all property used upon a leased line (*Buck v. Seymour, 46 Conn. 158*); but it can only attach to such interest as the mortgagor acquires. *Williamson v. New Jersey S. R. Co. 23 N. J. Eq. 277, 29 N. J. Eq. 311; United States v. New Orleans R. Co. 79 U. S. 12 Wall. 363, 20 L. ed. 434.*

Where a mortgage executed by a railroad company mortgages "all its present and future-to-be-acquired property, that is to say," and then enumerates its road, right of way and other property, county bonds belonging to the company, not enumerated in the mortgage, are not embraced in a sale and do not pass by it. *Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637.*

The rights, privileges and franchises mortgaged were only such as had direct connection with the management and operation of the road. *Ibid.*

So property not necessary for its use is not contemplated in the mortgage (*Boston & N. Y. A. L. R. Co. v. Coffin, 50 Conn. 150, 12 Am. & Eng. R. R. Cas. 375*); nor would lands acquired under a subsequent authority. *Meyer v. Johnston, 53 Ala. 237; Calhoun v. Memphis & P. R. Co. 2 Flipp. 442.* See, however, *Hamlin v. European & N. A. R. Co. 73 Me. 33.*

Where a railroad company executed a mortgage upon its road "constructed and to be constructed," etc., its real estate then owned and thereafter to be acquired, etc., the mortgage embraced all property

which should thereafter be acquired, and the tolls, issues and profits of the road. This locomotive is a part of the equipment of the railroad, and was delivered to the receiver as such. The funds garnished by the Locomotive Works consisted of moneys earned by the railway company subsequent to the giving of the mortgages. Since the purchase of the locomotive, and prior to the appointment of the receiver, the railway company used more than \$60,000 of its earnings in payment of interest on its mortgage bonds, and more than \$25,000 in construction and permanent improvements. The earnings of the road since the receiver took possession, and now in his hands, are more than sufficient to pay the claim of this petitioner, and all others due for supplies, equipment and labor furnished or done for the railway company. Our Statute (chap. 84, Gen. Stat. 1878, §§ 72, 73) authorizes mortgages by railroad companies covering after-acquired property, both real and personal, and there would seem to be no doubt that in the absence

of any conflicting and superior equity the mortgagees are entitled to have the net earnings of the road in the hands of the receiver, after the payment of the current operating expenses, applied on their mortgage debt. The claim of the petitioner was a simple, unsecured debt of the railroad company, upon which judgment has been now recovered. The petitioner, as a creditor, had no lien upon the property, franchises or earnings of the railroad corporation, and whatever lien it has now by virtue of its judgment is subject to the prior lien of the mortgagees. The sale of the locomotive does not appear to have been made with a reservation of title in the vendor after delivery, and until the purchase price should be paid. The contract being that payment should be made at the time of the delivery, the petitioner might have taken back the property when, upon the delivery, the railroad company neglected or refused to make payment; the delivery in such case being subject to the condition of payment being made, and not absolute.

therein described, whether then owned or yet to be acquired for the purposes of the railroad. *Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 284, 14 How. Pr. 581.

But after-acquired lands which cannot be regarded as accretions to the road itself will not pass under a general mortgage of a railroad as parcel thereof. *Calhoun v. Memphis & P. R. Co.* 3 Flipp. 442.

So lands subsequently acquired and not essential to the operation of the road do not pass by implication under such a mortgage. *Ibid.*

A branch road not in contemplation at the time is covered by the mortgage. *Coe v. Delaware, L. & W. R. Co.* 84 N. J. Eq. 203.

An additional railway subsequently purchased becomes subject to the mortgage, but not to the prejudice of prior mortgagees of the purchased road. *Branch v. Atlantic & G. R. Co.* 8 Woods, 481.

A mortgage by a railroad company on all future-acquired property is subject to any liens under which it comes into the company's possession. *New Orleans & O. R. Co. v. Mellen* ("United States v. New Orleans R. R.") 79 U. S. 12 Wall. 362, 20 L. ed. 424.

Authority to mortgage; what property included.

The power given to a railroad company to borrow money includes authority to mortgage subsequently acquired property, embracing every species necessary to the operation of the road. *Ludlow v. Hurd*, 1 Disney (Ohio) 563; *Pierce v. Emery*, 23 N. H. 485; *Pierce v. Milwaukee & St. P. R. Co.* 24 Wis. 551; *Pennock v. Coe*, 64 U. S. 23 How. 117, 16 L. ed. 438; *Jessup v. Bridge*, 11 Iowa, 572; *Dunham v. Isett*, 18 Iowa, 284; *Coopers v. Wolf*, 15 Ohio St. 523.

A mortgage by a railroad covering after-acquired property, and naming engines, cars and machinery, covers engines, cars and machinery added after the mortgage was given and in existence at the time of the foreclosure. *Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333; *Philadelphia W. B. R. Co. v. Woelpper*, 64 Pa. 366.

But where cars were sold and delivered to a railroad company on time, and the title of the cars was to remain in the vendor until they were paid for, the contract was valid; and the cars are not subject to a prior mortgage given on the present and future-acquired property of the company, and the seller may reclaim them. *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Fosdick v. Southwestern Car Co.* 99 U. S. 250, 25 L. ed. 344; *Huiskoper v. Hinckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 344. 9 L. R. A.

A mortgage by a railroad company upon its present and future-acquired property, including cars, cannot hold cars subsequently leased to the company with the privilege of purchasing them. This is so although, under the Railroad Mortgage Laws of Iowa, the rolling-stock and personal property of the company are deemed a part of the road for the purposes of a mortgage. *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59.

Where one furnishes iron to be laid into a railroad, and allows it to go into and become part of the road, it is covered by such mortgage and he has no lien which can displace it. *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 450, 20 L. ed. 199; *New Orleans & O. R. Co. v. Mellen* ("United States v. New Orleans R. R.") 79 U. S. 12 Wall. 362, 20 L. ed. 424.

A mortgage of a railroad to be built, together with its superstructure, appurtenances, fixtures and rolling-stock, covered these several items of property as they came into existence as property of the mortgagor. *Galveston, H. & H. R. Co. v. Cowdrey*, *supra*.

Rails put down upon a railroad, and permanent fixtures which are essential to its successful operation, become a part of the property of the company covered by a mortgage, as much as though they had existed when the mortgage was executed. *Thompson v. White Water Valley R. Co.* 128 U. S. 68, 33 L. ed. 254.

They become part of the security in equity against persons buying them with knowledge of the facts, or without parting with value for them. *Weetjen v. St. Paul & P. R. Co.* 4 Hun, 529.

Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors as against any contract between the furnisher of the property and the railroad company. *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254, 17 L. ed. 584; *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 450, 20 L. ed. 199; *United States v. New Orleans R. Co.* 79 U. S. 12 Wall. 362, 20 L. ed. 424; *Dillon v. Barnard*, 88 U. S. 21 Wall. 430, 23 L. ed. 673; *Porter v. Pittsburg B. R. Co.* 122 U. S. 267, 30 L. ed. 1210.

It includes and embraces wood provided for the use of the road from time to time. *Coe v. Mo-Brown*, 23 Ind. 253.

Earnings and profits.

The parties may agree in the mortgage that future earnings and profits shall be held in equity by

so as to transfer the title, unless the vendor should waive that condition, and make the delivery absolute. *Fishback v. Van Dusen*, 38 Minn. 111.

But the vendor must not allow the property to remain in the possession and use of the vendee as a purchaser, and proceed as it did to enforce payment of the debt by the ordinary legal remedies, without being deemed to have elected to treat the delivery as absolute, and itself as a creditor of the vendee as to the contract price. The title then passed absolutely to the railroad company, and the property became at once subject to the lien of the already existing mortgages. *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459 [20 L. ed. 199].

Of course the vendor was entitled to payment, and might, as it did, pursue the proper legal remedies to secure payment. But in this proceeding it seeks to have the express lien of the mortgage, as respects the earnings of the

receivership, postponed to what is asserted to be a prior equity arising from the fact that the property sold became a part of the equipment of the road, and ought to have been paid for out of the earnings of the road; and from the fact that such earnings have been, to the amount of \$80,000, paid to satisfy interest on the mortgage bonds, while this debt remained unpaid.

The doctrine of *Fordick v. Schall*, 99 U. S. 235 [25 L. ed. 839], and of other decisions of like tenor, is relied upon in support of this application. In connection with what may be deemed the leading case of *Fordick v. Schall*, the following cases may be referred to as bearing upon the subject under consideration: *Douglass v. Cline*, 12 Bush, 608; *Williamson v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 624; *Addison v. Lewis*, 75 Va. 701; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144; *Hale v. Frost*, 99 U. S. 392 [25 L. ed. 419]; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258 [25 L. ed. 344];

the mortgagees. In such case such income is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it. *Pullan v. Cincinnati & C. A. L. R. Co.* 5 Biss. 287.

A railway mortgage upon the present and future-acquired property of a railway company and its incomes and profits is a prior lien upon the net earnings of a road, only after the payment of all the operating expenses, while the road is in the possession of the company. *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419; *Addison v. Lewis*, 75 Va. 701; *Tompkins v. Little Rock & Ft. S. R. Co.* 15 Fed. Rep. 6. See note to *Spies v. Chicago & E. L. R. Co.* (N.Y.) 6 L. R. A. 566.

The mortgagees are entitled to the whole property, and all its income until payment has been made in fact (*Gooding v. Shea*, 103 Mass. 360); but the income while the property was in possession of the mortgagors was subject to garnishment for their debts. *De Graff v. Thompson*, 24 Minn. 452.

Priority over other liens.

A railroad mortgage covering subsequently acquired property takes precedence of a subsequent mortgage on such after-acquired property. *Morrill v. Noyes*, 56 Me. 453.

Such a mortgage takes precedence of the claim of persons advancing money to pay duties on imported iron purchased by the railroad company. *Pierce v. Emery*, 82 N. H. 435. Compare, however, *Haven v. Emery*, 38 N. H. 66.

So it takes precedence of moneys advanced for payment of interest for the company, and for taxes assessed against the company. *Coe v. Columbus, P. & L. R. Co.* 10 Ohio St. 372.

Such a mortgage will hold the after-acquired property as against judgment creditors. *Pennock v. Coe*, 64 U. S. 23 How. 117, 16 L. ed. 436.

But such a mortgage should not be allowed to overrule a lien given for the purchase price of such property. *United States v. New Orleans & O. R. Co.* 79 U. S. 12 Wall. 232, 20 L. ed. 424. Compare *Pierce v. Milwaukee & St. P. R. Co.* 24 Wis. 551.

If a railroad company give a mortgage for the purchase money of property, such mortgage, whether registered or not, has precedence over the general mortgage covering future-acquired property, except when the property is annexed to a subject already covered by the general mortgage, and becomes a part thereof, as rails laid down. *New Orleans & O. R. Co. v. Mellen* ("United States 9 L. R. A.

v. New Orleans R. R.") 79 U. S. 13 Wall. 322, 20 L. ed. 434.

The fact that part of a road was entirely built by money raised on a subsequent mortgage does not give it priority over prior mortgages which lawfully cover the whole road. *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199.

A contractor expending money and labor in building a railroad, under an agreement with the company that he shall have the possession of the road until he is fully paid, does not thereby acquire a priority over an elder valid mortgage. *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 264, 17 L. ed. 584.

Claims for right of way acquired after execution of the mortgage are subject to the prior rights of the mortgagees. *Baylis v. Lafayette, M. & B. R. Co.* 8 Biss. 193.

Receiver's certificates of indebtedness.

The court cannot authorize the issue of receiver's certificates of indebtedness having priority over the existing mortgages, for the payment of employees of the railroad whose claims had matured prior to his appointment, or for deficiency for supplies. *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 264, 17 L. ed. 584; *Denniston v. Chicago, A. & St. L. R. Co.* 4 Biss. 414; *Duncan v. Mobile & O. R. Co.* 3 Woods, 542; *Jerome v. McCarter*, 64 U. S. 734, 24 L. ed. 187; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 835; *Brown v. New York & E. R. Co.* 19 How. Fr. 84; *Vatable v. New York, L. E. & W. R. Co.* 96 N. Y. 49; *Atkins v. Petersburg R. Co.* 3 Hughes, 307; *Union Trust Co. v. Souther*, 107 U. S. 592, 27 L. ed. 438; *Farmers & M. Nat. Bank v. Philadelphia & R. R. Co.* 7 Fed. Rep. 379; *High, Rec.* § 1-11; *Bispham, Eq.* § 576; *Jones, Railroads*, §§ 458, 533; *Meyer v. Johnston*, 53 Ala. 237; *Coe v. New Jersey Midland R. Co.* 31 N. J. Eq. 105; *Turner v. Peoria & S. R. Co.* 35 Ill. 134; *Coe v. Columbus Piqua R. Co.* 10 Ohio St. 372; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 358; *L. S. Trust Co. v. New York, W. S. & B. R. Co.* 25 Fed. Rep. 853.

Where the receivers were appointed at the instance of the mortgagees and for their benefit, the mortgagees are entitled to the earnings from the time of their appointment, their title relating back to such time. *Howell v. Ripley*, 10 Paige, 43, 4 N. Y. Ch. L. ed. 373; *Astor v. Turner*, 11 Paige, 438, 5 N. Y. Ch. L. ed. 189; *Lofsky v. Maujer*, 3 Sandf. Ch. 63, 7 N. Y. Ch. L. ed. 73; *Syracuse City Bank v. Tullman*, 31 Barb. 201; *Moore v. Donegal*, 11 Ir. Eq. 364; *Boyd v. Burke*, 8 Ir. Eq. 680.

Miltnerberger v. Logansport, C. & S. R. Co. 106 U. S. 286 [27 L. ed. 117]; *Burnham v. Bowen*, 111 U. S. 776 [28 L. ed. 596]; *Wood v. Guarantees, T. & S. D. Co.* 128 U. S. 416 [32 L. ed. 472]; *Porter v. Pittsburgh, B. S. Co.* 120 U. S. 649 [30 L. ed. 830]; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 315; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 806, and other cases cited. But see, also, *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 103 N. Y. 245, 4 Cent. Rep. 364; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1.

Accepting what seems to be the now more generally declared doctrine in such cases, as illustrated in *Fordick v. Schall*, it would not be easy to define a rule of general application which could be said to be in accordance with all the decisions which may be deemed to recognize the right of the court to require payment, out of the earnings of a receivership, of prior debts of the corporation, in preference to the precedent mortgage lien. Nor shall we here undertake to lay down any rule defining the precise extent and limitations of that doctrine. It will be sufficient for our present purposes to say that no inflexible rule has been laid down; that the matter is one in which necessarily the result must depend upon the peculiar circumstances of each case, and must be determined by the sound judicial discretion of the court, for upon this ground of discretion the doctrine largely rests; and that whatever may be the precise extent or limitations of the doctrine, the court was justified by the circumstances of this case in refusing the order sought. In this connection it is to be observed that the decisions which have established the right of the court to require the earnings of such a receivership to be applied in payment of debts incurred prior to the appointment of the receiver, in preference of the claims of the mortgagees at whose suit the receiver had been appointed, restrict that right to somewhat narrow limits. It may be said to be confined to what may be deemed operating expenses of the railroad, including, to some extent, or under some circumstances, necessary equipment and repairs, but excluding debts for original construction, and the demands of the general creditors of the corporation. It is to be observed, too, that the length of time which may have elapsed after the incurring of the debt sought to be thus preferred, and before the appointment of the receiver, has been regarded as of importance, and in some jurisdictions a period of time has been adopted by judicial decisions back of which, in general, the courts have refused to go in making such preferential allowances. See *Thomas v. Peoria & R. I. R. Co.* and *Turner v. Indianapolis, B. & W. R. Co.* *supra*.

It was said by Harlan, J., in the former of these cases, that "it would not do to charge the income of mortgaged railroad property managed by a receiver, or the property itself, with every debt incurred in all its previous history, for labor, supplies or equipment." We refer to such limitations of time as showing that the courts have felt that such allowances should be narrowly restricted.

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In *Miltnerberger v. Logansport, C. & S. R. Co.*, *supra*, it was said that the discretion to direct payment, out of the earnings of the receivership, of pre-existing debts, should be exercised with very great care; the payment of such debts standing *prima facie* on a different basis from that of claims arising under the receivership. The opinion in this case may be noted as making prominent the considerations of necessity, having regard to the public interests as well as the interests of the mortgagees, for allowing the payment of claims intimately related to the possession and operation of the road by the receiver; reasons not applicable to debts of long standing, even though they were incurred for labor or equipment.

In view of all the authorities, we are of the opinion that if, either from lapse of time or from other circumstances, the debt for equipment or labor sought to be preferred by order of the court, and to be paid out of the earnings of the receivership, is more properly to be classed with the general debts of the corporation than with those incurred for current expenses proximately connected with the possession and operation of the road by the receiver, it is at least a proper exercise of the discretion of the court to disallow the application. The application of that test to the circumstances of this case justifies the order appealed from. The petitioner's debt constituted no lien or charge upon any of the property of the corporation, while the funds sought to be appropriated were legally and equitably charged for the payment of the mortgage bonds and interest. The legal rights of the vendor of this locomotive were the same as those of any creditor. It resorted to the ordinary legal remedies to enforce payment of the debt; and after the appointment of the receiver the prosecution of its legal remedies was continued and satisfaction of the greater part of its demand was thus secured. The sale was completed, absolutely and without condition, more than six months before the appointment of the receiver. It was about eleven months after that appointment, and seventeen months after the debt was incurred, before this application was made. The debt was no more closely related to the operation of the road by the receiver than any debt that might have been incurred for the ordinary permanent equipment of the road at any time past, where the property, with other property of the road covered by the lien of the mortgage, had passed into the hands of the receiver. There was no greater necessity or reason, from considerations affecting either the public interest, the interest of the mortgagees or the rights of the creditor, for preferring this debt to the specific lien of the mortgagees, than there would be in thus preferring any debt incurred at any past time for the permanent equipment of the road; and yet it is certain, under the authorities, that all debts of that kind are not to be allowed to thus displace the mortgage security. Our conclusion is that the court was justified in treating this debt as a general debt of the corporation, and not entitled to preference.

Order affirmed.

TEXAS SUPREME COURT.

Charles ALFF *et al.*, *Appts.*,

v.

William RADAM.

(....Tex....)

1. The words "microbe killer" being English words in common use cannot be appropriated in their original meaning as a trade-mark.
2. A white label with a red border containing the words "microbe killer" and the picture of a man striking a human skeleton with a bludgeon is not fraudulently imitated by a yellow label with a black border containing merely the words "microbe destroyer."

(June 3, 1890.)

A PPEAL by defendants from a judgment of the District Court for Travis County in

NOTE.—Trade-mark defined.

A trade-mark is a particular sign or symbol, which, by exclusive use, becomes recognized as the distinguishing mark of the owner's goods, and for the protection of which the aid of equity may be properly invoked. High, *Int.* 1063.

Object of the trade-mark.

The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993; *Taylor v. Carpenter*, 11 Paige, 292, 5 N. Y. Ch. L. ed. 140; *Goodyear India Rubber G. Mfg. Co. v. Goodyear Rubber Co.* 129 U. S. 598, 33 L. ed. 535; *Falkinburg v. Lucy*, 35 Cal. 75; *Corwin v. Daly*, 7 Bosw. 222; *Newman v. Alvord*, 49 Barb. 590; *Stokes v. Landraff*, 17 Barb. 608; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Clark v. Clark*, 25 Barb. 77; *Brooklyn White Lead Co. v. Masury*, *Id.* 417; *Wolfe v. Goulard*, 18 How. Pr. 64; *Coffeen v. Brunton*, 4 McLean, 516; *Howe v. Howe Mach. Co.* 50 Barb. 241.

No dealer has the right to be protected in the exclusive use simply of the name by which to designate the commodity which does not express its original ownership or place of manufacture or sale, but merely its quality, kind, texture, composition, utility, destined use or class of consumers or some other attribute which it has in common with other similar commodities. *Corwin v. Daly*, 7 Bosw. 220; *Amoskeag Mfg. Co. v. Trainer*, *supra*; *Shaver v. Shaver*, 54 Iowa, 208; *Burnett v. Phalon*, 9 Bosw. 199; *Taylor v. Carpenter*, 11 Paige, 292, 5 N. Y. Ch. L. ed. 140.

No property can be acquired in any word, mark or device which denotes merely the nature, kind or quality of an article. *Laughman v. Piper*, 5 L. R. A. 599, 128 Pa. 1.

It is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by anyone as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right. *Connell v. Reed*, 128 Mass. 477; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 20 L. ed. 581; *Gilman v. Hunnewell*, 122 Mass. 139, 148.

It is the object of the law relating to trade-marks to prevent one man from unfairly stealing another man's business and good will. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 33 Fed. Rep. 94.

Similarity in trade-marks, likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law. *Ibid.*

Trade-marks under U. S. Statutes. See *note* to *Laughman v. Piper* (Pa.) 5 L. R. A. 599, 9 L. R. A.

favor of plaintiff in an action brought to enjoin the alleged infringement of a trade-mark and for damages. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Walton, Hill & Walton*, for appellants:

The words "microbe killer" are English words that have a definite, every-day meaning, and do not purport ownership, manufacture or place of manufacture, and are therefore not susceptible of being erected into a trade-mark.

Partridge v. Menck, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572, 47 Am. Dec. 283, 284, and *notes* thereto, particularly sub. 1, p. 287, sub. 7, p. 292, sub. 10, 12, p. 295, and the three last paragraphs on pp. 297, 298 and 299; *Rumford Chemical Works v. Muth*, 1 L. R. A. 44, and *notes*, 35 Fed. Rep. 524; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Amoskeag Mfg. Co. v.*

Of what may consist.

Subject to qualifications, a trade-mark may consist of a name, symbol, figure, letter, form or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, or to distinguish the same from those manufactured or sold by another. *Taylor v. Carpenter*, 2 Sandf. Ch. 608, 7 N. Y. Ch. L. ed. 720; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 50, 25 L. ed. 993; *McLean v. Fleming*, 96 U. S. 254, 24 L. ed. 832.

A trade-mark cannot be had in the form or color of a package or box. *Ball v. Seigel*, 3 West. Rep. 42, 115 Ill. 187.

No one can obtain a trade-mark in the form, appearance or finish of his goods so that another cannot make his goods like them. *Ibid.*

A trade-mark cannot be obtained for the form of sticks of chewing gum, or for the use of a particular form and decoration of the boxes to contain the gum, or for the manner in which the gum may be placed in the boxes. The trade-mark must be restricted to some well-defined and specific name or device that may and does designate and distinguish the chewing gum from that of other manufacturers of a like article and for like purposes. *Adams v. Heisel*, 31 Fed. Rep. 279.

What may be appropriated. See *notes* to *Rumford Chemical Works v. Muth* (Md.) 1 L. R. A. 44; *Cigar Makers Protective Union v. Conhalm* (Minn.) 3 L. R. A. 125.

What cannot be appropriated.

The name "Acid Phosphate," applied to a medicinal preparation, describing with reasonable exactness the character and qualities of the preparation, cannot be exclusively appropriated as a trade-mark, as it is descriptive. *Rumford Chemical Works v. Muth*, 1 L. R. A. 44, 35 Fed. Rep. 524.

The use of a descriptive name as a trade-mark will not be enjoined at the suit of another party using the same name, where defendant properly distinguished his preparation from complainant's and sold it as his own. *Ibid.*

One has no right to appropriate as a trade-mark a sign, or a symbol, or a name which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose. *Corbin v. Gould*, 138 U. S. 308, 33 L. ed. 611.

What cannot be appropriated. See *note* to *Gato v. El Modelo Cigar Mfg. Co.* (Fla.) 6 L. R. A. 823.

Geographical names.

A merely geographical name cannot in general be used as a trade-mark, especially when the article

Trainer, 101 U. S. 54, 55, 25 L. ed. 904; *Filley v. Fasset*, 44 Mo. 168, 100 Am. Dec. 279, and authorities and notes; *Hostetter v. Fries*, 17 Fed. Rep. 621, 623; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 823, 20 L. ed. 588.

There was no evidence showing any similarity between the label of defendant and the alleged trade-mark of plaintiff, that could deceive the public, and the verdict in plaintiff's favor was unwarranted.

Davidson v. Edgar, 5 Tex. 495, 496; *Ross v. Collier*, 25 Tex. Sup. 256; *Moore v. Anderson*, 30 Tex. 228.

Mr. John Dowell, for appellee:

The words "microbe killer" can be taken as a trade-mark and applied to medicine.

Davis v. Kendall, 2 R. I. 566; Cox, Trade-Mark Cas. Nos. 103, 281, holding "Pain Killer" good (the word "Killer" here passed on

being one of the words of appellee); *Smith v. Sizbury*, Price & Stuart, Am. Trade-Mark Cas. 557, holding "Magnetic Balm" good; *Fulton v. Sellers*, 4 Brewst. 43, Cox, Trade-Mark Cas. 279, holding "Blood Searcher" good; *Funk v. Dreyfus*, 84 La. Ann. 80, 44 Am. Rep. 513, holding "Backer's Stomach Bitters" good; *Reinhardt v. Spalding*, 49 L. J. Ch. 28, W. R. holding "Family Salve" good; *Perry v. Truefitt*, 6 Beav. 66, holding "Medicated Mexican Balm" good; *Coffeen v. Brunton*, 4 McLean, 516, holding "Chinese Liniment" good; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233, holding Ferro Phosphorated "Elixir of Caoly-sia Bark" good; *Ex parte Heyemen*, Price & Stuart, Am. Trade-Mark Cas. 361, holding "Invigorator" good; *Shepard v. Stuart*, Id. 193, holding "Excelsior" good; *Heier v. Abrahams*, Id. 438, holding "Fride" good; Id. 904, holding

to which it is applied is the product of the place named. *Laughman v. Piper*, 5 L. R. A. 599, 128 Pa. 1; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 20 L. ed. 581.

In the absence of fraud, complainant cannot enjoin defendant from the use of a geographical name. *Evans v. Von Laer*, 32 Fed. Rep. 153.

The name of a place from which two parties import a certain article cannot be exclusively claimed by one of them as a trade-mark for his goods. *Ibid*. "Montserrat" being the name of an island from which lime juice is imported by several distinct business firms, the exclusive use of the word "Montserrat" as a trade-mark will not be enforced. *Ibid*.

A manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district so designated. *A. F. Pike Mfg. Co. v. Cleveland Stone Co.* 35 Fed. Rep. 896.

"Sonman," not being the name of a private estate, but that of a large boundary of land containing a number of separate private estates owned by a number of different persons all engaged in the same business of mining and shipping coal, cannot be adopted as a trade-name to the exclusion of others. *Laughman v. Piper*, *supra*.

Trade-name; use of in business.

Although a man may use his own name in his business, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Holloway v. Holloway*, 13 Beav. 209; *Meneely v. Meneely*, 62 N. Y. 427; *Gilman v. Hunnewell*, 123 Mass. 139; *Rogers v. Rogers*, 1 New Eng. Rep. 411, 53 Conn. 121; *Carmichel v. Latimer*, 11 R. I. 405.

Hence a person may be enjoined from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name, when he has parted with the right thus to apply it. *Gillis v. Hall*, 2 Brewst. 342; *Kidd v. Johnson*, 100 U. S. 619, 25 L. ed. 770.

The right which every person has to use his own name in the prosecution of his business can be limited or controlled only when such name has become the trade-mark or business sign of another, and is being used to deceive the public or defraud the person who made it valuable. *Caswell v. Hazard*, 31 N. Y. S. R. 676.

A manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose is intended. *Carmichel v. Latimer*, 11 R. I. 405; *Partridge v. Menck*, 2 Sandf. Ch. 622, 7 N. Y. Ch. L. ed. 727.

A man may acquire the right of a trade-mark in 9 L. R. A.

his own name or in the name of any person, but he cannot acquire the right of a trade-mark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place. *Gato v. El Modelo Cigar Mfg. Co. (Fla.)* 6 L. R. A. 823.

The right to use the name "John Turton & Sons" will not be denied to a firm consisting of John Turton and sons, when he takes them into partnership, after having long carried on the business under the name of "John Turton & Co.," although there is another firm engaged in similar business under the name of Thomas Turton & Sons, where there is no attempt to deceive the public by imitating the latter's labels or otherwise. *Turton v. Turton* (Eng. Ct. App.) 7 R. R. & Corp. L. J. 64.

But a second appropriator may not use his own name in connection with like marks or words as those used by the first appropriator, or with such as so closely resemble as that the association will probably mislead. *William Rogers Mfg. Co. v. Simpson*, 4 New Eng. Rep. 75, 64 Conn. 627; *Frazier v. Frazer Lubricator Co.* 9 West. Rep. 793, 121 Ill. 147.

Where the parties both deal in the same article, one should not be allowed to sell his product in bottles having the name of the other party blown in them. *Evans v. Von Laer*, 32 Fed. Rep. 153; *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 368.

A temporary suspension of the use of one's name in branding whiskey, on the sale of a distillery, with permission to the purchaser to use it for the time being, does not deprive him of the right to again use it. *Mattingly v. Stone*, 12 Ky. L. Rep. 76.

The right to use a person's name merely in a business enterprise is not taken away from him in bankruptcy. *Ibid*.

Names descriptive of a class of goods cannot be adopted as trade-marks, and the addition of the word "company" to the name does not create any exclusive right to its use. *Goodyear India Rubber G. Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 33 L. ed. 535.

Use of name. See note to *Rumford Chemical Works v. Muth* (Md.) 1 L. R. A. 44.

Name of place in trade-mark.

When a man manufactures his goods at a particular place, he may use the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods; and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place. *Gato v. El Modelo Cigar Mfg. Co. (Fla.)* 6 L. R. A. 823.

A tenant cannot apply to a building a particular name intended to be descriptive of the place, without the consent of the owner, as distinguished from the name adopted as a trade-mark, and then at his

"Champion" good; *Id.* 474, holding "Satin Polish" good; *Browne, Trade-Marks*, §§ 216, 264, 274, 275.

The two words together were first used by appellee, and though each one separate may have been used before, yet he is the only one who applied them together,—designated their joint use; and such is new, novel and valid.

Newman v. Alford, Cox, *Trade-Mark Cas.* 262; *Burnett v. Phalon*, *Id.* 277.

Words selected arbitrarily, not expressive of the quality or character of the article, and not previously appropriated by any other person to designate a similar commodity, may be used as a trade-mark for such article.

Price & Stewart, *Am. Trade-Mark Cas.* 1, 6, 79, 88, 103, 485, 559, 672, 674.

In determining whether or not there is imitation the court will look to the whole package

as offered for sale,—the jug, label, color of medicine and the whole general appearance,—and the court in this case erred in looking solely to the label and deciding there was no imitation.

Id. 1, 2, 4, 12, 67, 70, 161, 175, 1096, 1096.

If the common words "pain killer" were passed upon by two supreme courts, viz.: *Davis v. Kendall*, 2 R. I. 566, Canada West, Chan—Mowat, *V. O. Cod. Dig.* 236, and held to be a fancy name indicative of the inventor's article, then why not microbe killer?

Labels may be quite different, yet, if the general appearance of the whole thing when put up is the same, so that the public are deceived thereby, using ordinary care, then the imitation is complete.

The Electro Silicon v. Levy, *Price & Stewart*, *Am. Trade-Mark Cas.* 370; *Smith v. Saxbury*, *Id.* 558, 559; *Gillott v. Esterbrook*, 48 N. Y.

pleasure change its original signification, and apply the identical name to another and distinct locality. *Armstrong v. Kleinhans*, 62 Ky. 308.

A trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment, although it consists only of the name of the seller. *Dant v. Head*, 12 Ky. L. Rep. 153.

The name of the business could be severed from the place where it was transacted, and while thus separated could be treated as an object of property, so as to prevent third persons from attaching it to their business and thus depriving the owners of a legitimate profit which they might reap elsewhere under the same name. *Glen & H. Mfg. Co. v. Hall*, 51 N. Y. 223, 19 Am. Rep. 263; *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Howard v. Henriques*, 3 Sandf. 725; *Marsh v. Billings*, 7 Cush. 322; *Christy v. Murphy*, 12 How. Pr. 77; *Hudson v. Osborne*, 39 L. J. N. S. Ch. 79.

Where a trade-mark asserts for the article it designates some particular place of origin, it is inseparable from the place, and passes as an incident with the sale of the place. *Hill v. Lockwood*, 22 Fed. Rep. 399.

Property right in trade-mark; when attaches.

Until the thing is actually on the market, marked by the particular mark of the person intending to acquire a title, no property right in the mark arises. *Lawson v. Bank of London*, 18 C. B. 84; *Maxwell v. Hogg*, L. R. 2 Ch. 307; *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 538; by *Lord Langdale* in *Perry v. Truefitt*, 6 Beav. 66; by *Lord Cranworth* in *Farina v. Silverlock*, 6 De G. M. & G. 218; by *St. William Page Wood* in *Ainsworth v. Wainsley*, L. R. 1 Eq. Cas. 524; by *Lord Justice Cairns* in *Maxwell v. Hogg*, L. R. 2 Ch. 314; and by *Vice-Chancellor Bacon* in *Hirst v. Denham*, L. R. 14 Eq. Cas. 549; *McAndrew v. Bassett*, 4 De G. J. & S. 38; *Kerr*, *Inj.* 475; *Joyce*, *Inj.* § 176, p. 23.

Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device not in actual use to designate articles of the same kind or class. *Amoskeag Mfg. Co. v. Trainer*, 101 U.S. 57, 25 L. ed. 905.

In order that a party may claim property in a trade-mark it must be a symbol or design which of itself characterizes and distinguishes the particular goods to which it is attached. *Munro v. Smith*, 55 Hun. 419.

One adopting a device or symbol to mark goods acquires a property therein of which he cannot be deprived. *Pratt's App.* 10 Cent. Rep. 506, 117 Pa. 401.

The trade-name of any natural product or other article of manufacture upon which a trade-mark cannot conveniently be affixed, though not strictly a trade-mark, is a species of property, and will, as § 1 R. A.

a general rule, be protected in a like manner. *Laughman v. Piper*, 5 L. R. A. 599, 128 Pa. 1; *United States v. Steffens* ("Trade-Mark Cases,") 100 U. S. 82, 25 L. ed. 550.

The 8th clause of § 8 of article 1 of the Constitution, authorizing Congress "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries," gave no authority to Congress to enact the Acts of July 8, 1870, and of August 14, 1876, concerning trade-marks, and those Acts are not valid and constitutional. *United States v. Steffens* ("Trade-Mark Cases,") *supra*.

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than a sudden invention. It is often the result of accident rather than design, and under the Act of Congress which sought to establish it by registration, neither originality, invention, discovery, science or art was in any way essential to the right attempted to be conferred by that Act. *Ibid*.

The United States Act of 1876, imposing penalties for infringement of trade-marks, fell with the decision of the Supreme Court of the United States that the Act of 1879, to which it referred, was unconstitutional. *Ibid*.

Such Act of 1876 was not vivified or given operative force by the Act of 1881 in reference to trade-marks. *United States v. Koch*, 5 L. R. A. 130, 40 Fed. Rep. 250.

Registration does not create a trade-mark, and is only prima facie evidence that the person procuring it has a valid trade-mark. *United States v. Braun*, 39 Fed. Rep. 775.

Registering the word "pudding" as a trade-mark for an uncooked pudding cannot prevent other makers from calling similar goods by their well-known English name of pudding. *Clotworthy v. Schepp*, 42 Fed. Rep. 62.

Rose and vanilla having been for many years well-known flavoring extracts, a person registering these words as a trade-mark for a food product cannot prevent other persons from flavoring food products with rose or vanilla or both, and describing them as so flavored. *Ibid*.

The Acts of Congress fortify the common-law right to a trade-mark by conferring a statutory title upon the owner, but "property in trade-marks does not derive its existence from an Act of Congress." *La Croix v. May*, 15 Fed. Rep. 237.

Property in words.

Property in a word, for all purposes, cannot exist; but property in that word, as applied by way of a

874; *Newman v. Alford*, 51 N. Y. 189; *Hier v. Abrahams*, 82 N. Y. 519; *Ex parte Heiman*, Price & Steuart, Am. Trade-Mark Cas. 862, 868; *O'Rourke v. Central City Soap Co.* Id. 1043; *Burton v. Stratton*, Id. 678; *Filley v. Fussett*, 44 Mo. 168, Cox, Trade-Mark Cas. 669; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 597; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 822, 20 L. ed. 583; *Falkenburg v. Lucy*, 35 Cal. 52; *Browne, Trade-Marks*, § 216; *Durham Smoking Tobacco Case*, 3 Hughes, 157; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Ford v. Foster*, L. R. 7 Ch. App. 611; *McAndrew v. Bassett*, 10 Jur. N. S. 550, 12 Week. Rep. 777; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Seizo v. Proezende*, L. R. 1 Ch. App. 192; *Braham v. Bustard*, 1 Hem. & M. 447.

stamp upon a particular vendible, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94.

Where an unknown word was coined and adopted by the manufacturers as a trade-mark, the subsequent use of it by the public as a common appellation of the substance manufactured cannot take away the manufacturer's right to its exclusive use. *Ibid.*

An unlawful imitation of a corporate name by another corporation is to be dealt with precisely as if the names were the names of private firms or partnerships. *Ibid.*

The name "Chatterbox," when used upon books of a juvenile character, points "distinctively to the origin or ownership of the books to which it is applied; and its use as a trade-mark will be protected. *Etes v. Leslie*, 29 Fed. Rep. 91; *Etes v. Worthington*, 24 Blatchf. 371, 31 Fed. Rep. 164.

The words "cough-cherries" are not merely descriptive of a brand of confections medicated for alleviating coughs and colds, but are sufficiently arbitrary and fanciful to be claimed as a trade-mark. *Stoughton v. Woodard*, 39 Fed. Rep. 902.

The word "lightning" duly registered is a valid trade-mark as applied to hay knives which have become extensively known to the trade as the "Lightning Hay Knife." It is not merely descriptive of the quality or characteristics of the article. *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34.

Where plaintiff's trade-mark was the word "Moxie," and it used a champagne bottle wrapped in a peculiar paper with the words "Moxie Nerve Food" printed thereon in large letters, defendant was enjoined from putting on the market bottles of the style used by complainant, so wrapped, containing a beverage similar thereto. *Moxie Nerve Food Co. v. Baumach*, 32 Fed. Rep. 235.

The word "valvoline," compounded by parties and appropriated as a trade-mark for lubricating oil, is a valid trade-mark; and a defense to infringement, that the word is a descriptive word, meaning literally valve oil, cannot be sustained. *Leonard v. White's Golden Lubricator Co.* 38 Fed. Rep. 922.

The word "health-preserving," preceding the word "corset," only describes a quality, and cannot be employed as a trade-mark. *Ball v. Seigel*, 3 West. Rep. 41, 116 Ill. 137.

Words and names in common use.

Words or names in common use may be adopted by various persons in the same business, employment or manufacture, in competition of trade or business, and be encouraged by all the attributes of courts and communities; but such use must be independent and free from the charge of deceitful 9 L. R. A.

Acker, P. J., filed the following opinion

William Radam brought this suit against Chas. Alf & Co., a firm composed of Charles Alf and Joe K. Heim, and against the members of the firm individually, to recover damages for alleged infringement of a trade-mark, and for injunction restraining the defendants from using the alleged infringing trade-mark. The trial by jury resulted in a verdict for plaintiff for one cent damages, and judgment was rendered perpetuating the injunction, from which this appeal is prosecuted. The alleged trade-mark of plaintiff consisted of the words "microbe killer" used in conjunction with a device, symbol or illustration representing a man in the attitude of striking a human skeleton

simulation. *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 462; *Croft v. Day*, 7 Beav. 84; *Hogg v. Kirby*, 8 Ves. Jr. 215; *Knott v. Morgan*, 2 Keen, 219; *Crawshaw v. Thompson*, 4 Man. & Gr. 357; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 418; *Lemoine v. Gauton*, 2 E. D. Smith, 843; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Coats v. Holbrook*, 2 Sandf. Ch. 568, 7 N. Y. Ch. L. ed. 718; *Williams v. Johnson*, 2 Bosw. 1.

The words "indurated fibre" cannot be claimed as a valid trade-mark for ware made of wood pulp by a hardening process in which it is baked at a high degree of temperature. The words are not arbitrary or fanciful, but denote, in a measure at least, the quality, ingredients and characteristics of the article produced. *Indurated Fibre Co. v. Amoskeag Indurated F. W. Co.* 37 Fed. Rep. 696.

The words "Iron Bitters," being indicative of the composition of the article so called, cannot be claimed as a trade-mark. *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360.

The word "Kaiser" could not be lawfully registered as a trade-mark for mineral water, when various mineral springs named "Kaiser Springs" had long been known and used. *Luyties v. Hollender*, 24 Blatchf. 253, 30 Fed. Rep. 632.

A company has not an exclusive right to the use of the words "Lackawanna Coal" as a distinctive name or trade-mark for the coal mined by it. *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 311, 20 L. ed. 561.

The word "satinine," applied to starch and other preparations for laundry purposes and perfumery, is a descriptive word, and therefore not registrable as "an invented word," or "a word having no reference to the character or quality of the goods," under the English Patents, Designs and Trade-marks Act of 1888, § 10. *Re Meyerstein's Trade-mark*, L. R. 43 Ch. Div. 604.

A word such as "Tycoon," which has been for many years in general and common use as a term descriptive of a class of teas introduced into the American market, belongs to the public as the common property of the trade, and therefore is not subject to appropriation by any person as a trade-mark. *Corbin v. Gould*, 123 U. S. 308, 33 L. ed. 611.

The adoption by plaintiff of the words "La Normandi" as a trade-mark, in his business of manufacturing and selling cigars of a certain kind, cannot take away the right previously acquired by the public in the use of the words "La Normandi" as indicating a particular kind of cigars. *Stachelberg v. Ponce*, 128 U. S. 636, 32 L. ed. 569.

Assignment of trade-name and trade-mark.

One who has carried on a business under a trade-name, and sold a particular article in such a manner, by the use of his name as a trade-mark or a trade-name, as to cause the business or the article to become known or established in favor under such name, may sell or assign such trade-name or

with a bludgeon. The words and illustration are printed on a white paper label eight and one half by five and one half inches in dimensions, with a red border around it, the illustration being printed in red ink, while the name and directions for using are printed in black ink. The alleged trade-mark of the defendants consisted of the words "microbe destroyer," printed on a yellow paper label four and one half by four and three fourths inches in dimensions, with a black border around it, but no device or symbol. Appellants contend that the words "microbe killer" are words of definite meaning, in common use, descriptive of the quality, ingredients or characteristics of the remedy put up and sold under that name, "and therefore

not susceptible of being erected into a trade-mark."

What constitutes a trade-mark is a question of law for the court. Whether a trade-mark has been so constituted, and, if so constituted, whether there has been an infringement of it, are ordinarily questions of fact for the jury. In the case of *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 54 [25 L. ed. 994], it is said: "The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose either to the manufacturer or to the public. It would

trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way. *Horton Mfg. Co. v. Horton Mfg. Co.* 18 Fed. Rep. 816; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Probasco v. Bouyon*, 1 Mo. App. 241; *Oakes v. Tonsmierre*, 4 Woods, 555; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 22 Fed. Rep. 94; *Ainsworth v. Walsley*, L. R. 1 Eq. 524; *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194; *Frazer v. Frazer Lubricator Co.* 9 West. Rep. 768, 121 Ill. 147, 18 Ill. App. 432; *Frank v. Sleeper*, 150 Mass. 583; *Hoxie v. Chaney*, 8 New Eng. Rep. 709, 143 Mass. 582.

When a trade-mark is affixed to articles manufactured at a particular establishment, and that establishment is transferred to others, the right to the use of the trade-mark may be lawfully transferred with it. *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769.

The trade-mark and good will of the firm may be included within the meaning of a bill of sale made on dissolution of the firm; and the seller may be enjoined from using the trade-mark. *Hoxie v. Chaney*, *supra*.

On a sale of a partnership business to one of the partners, the entire good will and right to use trade-marks used in the partnership business passes without express mention. *Merry v. Hoopes*, 119 N. Y. 415.

When a right to use a trade-mark is transferred to others, either by act of the original manufacturer or by operation of law, the fact of its transfer should be stated in connection with its use. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 37 L. ed. 705.

Where a party sells out an established business, and with it his own name to be used in connection with such business, he cannot afterwards resume it in carrying on the same business. *Frazer v. Frazer Lubricator Co.* 9 West. Rep. 768, 121 Ill. 147.

An assignee of a trade-mark has no special privilege of deceiving the public, even for his own benefit. *Congress & Empire Springs Co. v. High Rock Congress Spring Co.* 57 Barb. 532.

The discoverer of a valuable and popular article of trade, manufactured and sold by himself, has a property right to the use of the name; and such right is the subject of sale and transfer, and equity will not permit him to defeat the right and title thus disposed of in the hands of the assignee or his grantees. *Frazer v. Frazer Lubricator Co.* *supra*.

The proprietor of a medicine, who bought his interest from one of the sons of the original proprietor, whose name is given to the medicine, and from whom, by successive transfers of the business, the title is derived, has a sufficient title to sustain his right to a trade-mark in the name, although his own name is entirely different. *Jennings v. Johnson*, 37 Fed. Rep. 864.

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Right to exclusive use of trade-mark.

The plaintiff acquires the right to the exclusive enjoyment of the trade-mark, not alone by devising it, but by its prior use and application. *Godillot v. Harris*, 81 N. Y. 287; *Walton v. Crowley*, 8 Blatchf. 440; *Taylor v. Carpenter*, 2 Sandf. Ch. 614, 7 N. Y. Ch. L. ed. 738; *Congress & Empire Springs Co. v. High Rock Congress Springs Co.* 45 N. Y. 281.

Everyone is at liberty to affix to the product of his own manufacture any symbol or device not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others (*Laughman v. Piper*, 5 L. R. A. 599, 128 Pa. 1); and no other person has a right to adopt his label or trade-mark, or one so like his as to lead the public to suppose that the article to which it is affixed is the manufacturer's. *Gato v. El Modelo Cigar Mfg. Co. (Fla.)* 6 L. R. A. 823.

But no title arises until the thing is actually on the market marked with the peculiar mark. *Schneider v. Williams*, 44 N. J. Eq. 381.

While a manufacturer would not have the exclusive right to appropriate the figures 1, 2, 3 and 4 or the letters A, B, C and D, to distinguish the first, second, third and fourth qualities of his goods, yet he may have the right to the exclusive use of the same figures in combination—as "3214,"—to distinguish his goods from those of others, where the public has come to know them by these numerals. *American Solid L. B. Co. v. Anthony*, 2 New Eng. Rep. 630, 15 R. L. 338.

Protection of right to sole use of trade-mark.

The owner of any original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that he may appropriate as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to appropriate a sign or mark which indicates the name or quality of the goods, and which others may employ with equal truth for the same purpose. *Dunbar v. Glenn*, 43 Wis. 126; *Congress & Empire Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 281; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 20 L. ed. 581.

The court of chancery may interfere, by injunction, to prevent the pirating of trade-marks. *Partidge v. Menok*, 2 Barb. Ch. 102, 5 N. Y. Ch. L. ed. 572, 5 N. Y. Leg. Obs. 85, 4 How. Pr. 296.

The court protects the title of the author or inventor of any names, marks, letters or other symbols which any manufacturer, trader or other person has devised or appropriated or been accustomed to use in his trade or business, and restrains by injunction any unauthorized use thereof to his prejudice. *Bloss v. Bloomer*, 23 Barb. 606; *Taylor v. Carpenter*, 11 Paige, 297, 5 N. Y. Ch. L. ed. 142, 2 Sandf. Ch. 610, 7 N. Y. Ch. L. ed. 724; *American Grocer Pub. Asso. v. Grocer Pub. Co.* 25 Hun, 401;

afford no protection to either against the sale of a spurious, in place of the genuine, article. This object of the trade-mark, and the consequent limitations upon its use, are stated with great clearness in the case of *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 811 [20 L. ed. 581]. There the court said, speaking through *Mr. Justice Strong*, that 'no one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or its characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.' And a citation is made from the opinion of the Superior Court of the City of New York in the case of the present complainant against *Spear*, reported in 2 Sandf. 599, that 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the

article . . . to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose.'

Words in common use are common property of the people, and no exclusive right to the use of such words can be acquired by adopting them as a trade-mark, unless they be used in an arbitrary or fanciful sense, and not in their ordinary signification. *Browne, Trade-Marks*, §161; *Filley v. Fussett*, 44 Mo. 168, 100 Am. Dec. 279.

On the trial the plaintiff testified that the words "microbe killer" mean "fungus destroyer," that the word "microbe" was intended to signify "fungus;" that, in using the name "Microbe Killer," he intended to convey the meaning that it kills these things; and that the name "Microbe Killer" means "destroyer of microbes." That the words are English words, in common use, of known signification and fixed meaning, we think

Potter v. McPherson, 21 Hun. 564; *Bloss v. Bloomer*, 23 Barb. 609.

The right to protection depends upon the priority of the selection or appropriation. *Gillott v. Westbrook*, 47 Barb. 468; *Stokes v. Landgraaf*, 17 Barb. 609.

A newspaper establishment is a species of property, and the rights which appertain to it so far as they are private and exclusive are entitled to the protection of the laws. *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 462; *Snowden v. Noah*, *Hopk. Ch.* 347, 351, 2 N. Y. Ch. L. ed. 446, 447; *Bell v. Locke*, 8 Paige, 75, 4 N. Y. Ch. L. ed. 350; *Robertson v. Berry*, 50 Md. 591.

The jurisdiction of a court of equity rests entirely on the ground that a property right is violated. *Schneider v. Williams*, 44 N. J. Eq. 391.

Courts of equity are frequently called upon to interpose and prevent a person from using the name of another in a business or concern, for the fraudulent purpose of imposing on the public, and supplanting the other in the good will of his business. *Howe v. Searing*, 19 How. Pr. 23, 6 Bosw. 371, 10 Abb. Pr. 277; *Taylor v. Carpenter*, 2 Sandf. Ch. 603, 7 N. Y. Ch. L. ed. 730.

The possessor of a trade-mark which contains a misrepresentation calculated to impose on the community is entitled to no protection. *Swift v. Dey*, 4 Robt. 612; *Fetridge v. Wells*, 4 Abb. Pr. 144.

Protection of right to its use as property. See *note to Rumford Chemical Works v. Muth* (Md.) 1 L. R. A. 44.

Imitation of trade-mark an infringement.

Defendants have no right by similitude to derive advantage from the plaintiff's title. *Burnett v. Phalon*, 9 Bosw. 199.

A party cannot be permitted to use a spurious and unlawful imitation of plaintiffs' trade-mark. *Burnett v. Phalon*, 8 Keyes, 593, 1 Abb. App. Dec. 270, 3 Trans. App. 169; *Williams v. Johnson*, 2 Bosw. 6; *Stokes v. Landgraaf*, 17 Barb. 609; *Wolfe v. Goulard*, 18 How. Pr. 64; *Clark v. Clark*, 26 Barb. 76; *Brooklyn White Lead Co. v. Masury*, Id. 416; *Coats v. Holbrook*, 2 Sandf. Ch. 578, 7 N. Y. Ch. L. ed. 713; *Merrimack Mfg. Co. v. Garner*, 4 E. D. Smith, 391.

This principle is firmly established. *Burnett v. 9 L. R. A.*

Phalon, 1 Abb. App. Dec. 270, 5 Abb. N. S. 217; *Taylor v. Carpenter*, 2 Sandf. Ch. 603, 611, 7 N. Y. Ch. L. ed. 721, 725; *Partridge v. Menck*, 2 Sandf. Ch. 622, 7 N. Y. Ch. L. ed. 729, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572; *Williams v. Johnson*, 2 Bosw. 1; *Wolfe v. Goulard*, 18 How. Pr. 64; *Clark v. Clark*, 26 Barb. 76; *Brooklyn White Lead Co. v. Masury*, Id. 416.

No trader can adopt a trade-mark so resembling that of another trader that ordinary purchasers, buying with ordinary caution, are likely to be misled. *McLean v. Fleming*, 98 U. S. 245, 24 L. ed. 838; *Brueckmann's App. (Pa.)* May 5, 1890.

If the imitation of a trade-mark is intentionally so close as to deceive an ordinary purchaser, the infringer is liable notwithstanding that an attentive inspection would disclose differences in many respects between the two articles. *Sperry v. Percival Milling Co.* 81 Cal. 252; *Curtis v. Bryan*, 2 Daly, 315, 36 How. Pr. 86; *Burnett v. Phalon*, 9 Bosw. 199; *Millington v. Fox*, 3 Myl. & Cr. 838.

The use of the words "Golden Chain" is not an infringement upon the trade-mark "Golden Crown;" but as it appeared that the tobacco of defendants was gotten up in imitation of plaintiffs', so as to mislead an ordinary purchaser, an injunction was granted. *Parlett v. Guggenheimer*, 8 Cent. Rep. 796, 67 Md. 542.

So the use of the word "cellonite" instead of the word "celluloid." *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 33 Fed. Rep. 94.

The use of the word "warranted," in place of "Warren," with a cut similar to that used as a trade-mark in connection with the words "Warren Hose Supporters," constitutes an infringement of the trade-mark. *Frost v. Rindkopf*, 42 Fed. Rep. 408.

Exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. *McLean v. Fleming*, 98 U. S. 245, 24 L. ed. 828.

Where the alleged imitation by the defendants of the plaintiffs' trade-mark consisted, among other things, in the directions for the use of the article, which directions were identical with those printed on the plaintiffs' label, this was not an infringement of plaintiffs' trade-mark. *Hurricane Patent Lantern Co. v. Miller*, 56 How. Pr. 236.

there can be no doubt; and that they were employed by the plaintiff in their ordinary, and not in any arbitrary or fanciful, sense, is shown beyond question by the testimony of the plaintiff himself. Under the authorities *supra*, we think it quite clear that the words "microbe killer," as used by the plaintiff, did not constitute a trade-mark.

Notwithstanding plaintiff has no real or legal trade-mark, if the defendants had intentionally simulated the peculiar device or symbol employed by plaintiff on his labels, and such simulation was calculated to deceive ordinarily prudent persons, and did deceive such persons, the plaintiff would be entitled to protection against the consequences of such deception, not because of his device or symbol being a trade-mark, in the legal sense of that term, but because of the fraud and deception practiced by the defendant upon the plaintiff and the public. In this case, however, the labels used by the plaintiff and defendants, respectively, are so entirely dissimilar that we do not think it possible for any person of ordinary prudence and caution to have been deceived by defendants' label, and thereby induced to buy their remedy when the purchaser desired and intended to buy the plaintiff's remedy.

To justify an injunction in a case of violation of a trade-mark, it should appear that the resemblance is sufficiently close to raise a probability of mistake on the part of the public, or to show a design in defendant to deceive and mislead. *Sanders v. Jacob*, 2 West. Rep. 409, 20 Mo. App. 96.

The use of a trade-name, so like that of another person in the same business as to raise a strong probability of misleading and deceiving the public, or to show a design to so mislead and deceive, will be restrained. *Ibid*.

Laches of the plaintiff will not avail as a defense in a proceeding to restrain the use of a trade-name, where the name was adopted with a fraudulent intent. *Ibid*.

Infringement of right. See note to *Rumford Chemical Works v. Muth* (Md.) 1 L. R. A. 48.

When court will not interfere.

The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties. *Ball v. Seigel*, 8 West. Rep. 41, 116 Ill. 137; *Popham v. Cole*, 66 N. Y. 78, 23 Am. Rep. 22; *Partridge v. Menck*, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572; *Stokes v. Landgraf*, 17 Barb. 608; *Tallcot v. Moore*, 6 Hun, 108; *Snowden v. Noah*, Hopk. Ch. 347, 2 N. Y. Ch. L. ed. 448.

So where the alleged imitation by the defendants of the plaintiffs' trade-mark consisted, among other things, in directions for the use of the article, which directions were identical with those printed on the plaintiffs' label. *Hurricane Patent Leather Co. v. Miller*, 56 How. Pr. 256.

Equity will not lend any active aid to sustain a claim to a trade-mark which contains a misrepresentation to the public. *Hoxie v. Chaney*, 3 New Eng. Rep. 714, 143 Mass. 662; *Swift v. Dey*, 4 Robt. 412. See *Partridge v. Wells*, 4 Abb. Pr. 144, 13 How. Pr. 286.

So where the terms and phrases the plaintiff endeavored to appropriate were not true, but on the other hand were unfounded and deceptive, and in no way related to the origin or manufacture of the articles to which they were applied. *Newman* 9 L. R. A.

Other assignments of error are immaterial and will not be discussed, as what we have said disposes of the case. We are of opinion that the judgment of the court below should be reversed, and judgment rendered here that appellee take nothing by his suit, and that he pay all costs of this and of the court below.

Stayton, Ch. J.:

Report of the commission of appeals examined, their opinion adopted and judgment reversed, and rendered in accordance with said report.

Subsequently appellants moved to reform the judgment so as to permit of the prosecution of their cross action, and appellee moved for a rehearing, and on June 28, 1890, *Stayton, Ch. J.*, delivered the opinion of the court:

Judgment having been rendered in accordance with the opinion of the commission of appeals, both parties, in effect, ask that the judgment be so reformed as to remand the cause for further proceedings. Appellants desire this to enable them to prosecute their cross-bill for damages; and appellee suggests that he may be able to offer further evidence on another trial tending to show that his

v. Alvord, 49 Barb. 590; *Pidding v. How*, 8 Sim. 477.

A court of equity will not protect a person in the exclusive use of a word which expresses a falsehood; as, if the article bears the word "patented," when in fact it is not patented, or exhibits an untruth as to the place of manufacture or composition of the article. *Burton v. Stratton*, 12 Fed. Rep. 698; *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 581; *Flavel v. Harrison*, 10 Hare, 467; *Palmer v. Harris*, 60 Pa. 158.

The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between trade-marks used by different persons. *Popham v. Cole*, 66 N. Y. 60, 23 Am. Rep. 22; *Partridge v. Menck*, 2 Sandf. Ch. 622, 7 N. Y. Ch. L. ed. 729, affirmed, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572; *Stokes v. Landgraf*, 17 Barb. 608; *Snowden v. Noah*, Hopk. Ch. 347, 2 N. Y. Ch. L. ed. 448.

In the following cases the remedy was refused: *Bell v. Looka*, 8 Paige, 75, 4 N. Y. Ch. L. ed. 260; *Stephens v. De Couto*, 7 Robt. 343; *Tallcot v. Moore*, 6 Hun, 108; *American Grocer Pub. Assn. v. Grocer Pub. Co.* 51 How. Pr. 402; *Carmichel v. Latimer*, 11 R. I. 405.

Equity will not interfere in case of a use of a trade-mark to recover damages except in aid of a legal right; and if the fact of plaintiff's property in the trade-mark or of defendant's interference with it appears at all doubtful, plaintiff is left to establish his case first by an action at law. *Merrimack Mfg. Co. v. Gardner*, 3 Abb. Pr. 324; *Motley v. Downman*, 3 Myl. & Cr. 1; *Croft v. Day*, 7 Beav. 84; *Spottiswoode v. Clarke*, 2 Phill. Ch. 154.

A court of equity will not restrain a defendant from the use of a label on the ground that it infringes the plaintiff's trade-mark, unless the form of the printed words, the words themselves and the figures, lines and devices are so similar that a person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other. *Gilman v. Hunnewell*, 122 Mass. 151.

Trade-marks calculated to deceive, not protected. See note to *Rumford Chemical Works v. Muth*, (Md.) 1 L. R. A. 48.

right has been infringed, even if it be true that the words "microbe killer" may not constitute a trade-mark. Without in any respect qualifying the former opinion as to the law of the case, the former judgment will be

set aside, and a judgment here entered reversing the judgment of the court below, and remanding the cause for further proceedings. It is so ordered.

MINNESOTA SUPREME COURT.

BARDWELL *et al.*, Resp'ts.,

v.

ANDERSON *et al.*, and Collins, Appt.

(....Minn.....)

*1. In actions in personam of a strictly judicial character, and proceeding according to the course of the common law, service of the summons, by publication in a newspaper, upon resident defendants, who are personally within the State, and can be found therein, is not "due process of law."

2. Therefore Gen. Stat. 1878, chap. 81, § 28, assuming to provide for such service in actions to foreclose mortgages, is unconstitutional and void.

(July 17, 1890.)

A PPEAL by defendant, Collins, from an order of the District Court for Hennepin County refusing to set aside a judgment entered against him by default, and alleged to be invalid because there had been no valid service of summons upon him. *Reversed.*

The case is fully stated in the opinion.

Mr. Daniel Fish for appellant.

Mr. Harlan P. Roberts for respondents.

Mitchell, J., delivered the opinion of the court:

The questions raised by this appeal involve the construction and validity of the provisions of § 28, title 2, chap. 81, Gen. Stat. 1878, relating to the service of the summons in actions for the foreclosure of real-estate mortgages, which by § 8, chap. 90, of the same Statutes, are made also applicable to actions to enforce mechanics' liens. This action was one to enforce a mechanic's lien, the complaint alleging that the defendant Collins claimed a lien or interest in the property on which the lien was sought to be enforced, but that it was subsequent and inferior to plaintiffs' lien, and that no personal claim was made against him. It nowhere appears whether Collins was or was not a resident of the State. It must therefore be presumed that he was a resident, and could have been found within the jurisdiction of the court. The only service of the summons upon him was by publication, and no affidavit for publication was ever filed with the clerk of the court, as provided by § 64, chap. 66, *Id.* Judgment was entered against him on default, which he moved to have set aside on the ground that the court had never acquired jurisdiction of his person, because there had been no valid service of the summons. From an order denying this motion, he appeals.

*Head notes by MITCHELL, J.

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The legislation in this State regarding substituted service by publication of the summons in civil actions has been somewhat incongruous and complicated, the history of which in detail might be interesting, but not profitable for present purposes. Suffice it to say that, from the earliest days of the Territory down at least to 1866, such substituted service in actions strictly judicial in their nature, and proceeding according to the course of the common law, was only allowed where the defendant could not be found within the State, personal service being, in accordance with the uniform rule and practice from time immemorial, required in all cases where the defendant could be found, and service made upon him, within the jurisdiction of the court. And prior to 1869 an order of court granted upon an affidavit showing a state of facts authorizing service by publication was necessary; but by chapter 78, Laws 1869, publication was permitted merely upon filing the affidavit with the clerk of the court, an order of the court being no longer required. The filing of the affidavit is, however, a condition precedent to a valid service by publication upon a nonresident defendant. *Barberv. Morris*, 37 Minn. 194.

The first appearance of anything like § 28, title 2, chap. 81, Gen. Stat. 1878, was in the Revision of 1866, where it will be found as section 25 of the same title and chapter. This was amended by chapter 74, Laws 1868, so as to read as it is now, except that the word "personal," qualifying the word "judgment," was omitted. This rendered it meaningless and inoperative, unless, by a very liberal and hardly allowable construction, the word "personal" could be read into it. It remained in this form until March 7, 1878, when, by chapter 6 of the Laws of that year, the word "personal" was restored, so that it read as now found in Gen. Stat. 1878. In the mean time, title 1 of chapter 81, to which it refers, had been repealed by chapter 131, Laws 1877, and foreclosure by advertisement entirely abolished. This mode of foreclosure was, however, restored by an Act (chap. 53, Laws 1878) also passed March 7, but to take effect April 1, 1878, and which is now title 1, chap. 81, Gen. Stat. 1878. It is also worthy of note that on February 28, 1878 (only eight days before the last amendment of § 25, title 2, chap. 81, Gen. Stat. 1866), the Legislature added a sixth subdivision to § 49, chap. 66, Gen. Stat. 1866, enumerating the cases where a summons might be served by publication on nonresident defendants, which is as follows: "When the action is to foreclose a mortgage, or to enforce a lien of any kind, on real estate in the county where the action is brought." Laws 1878, chap. 9.

So much for the history of the legislation bearing upon the questions before us.

The provisions of Gen. Stat. 1878, chap. 81, title 2, with which we have now to do are as follows: "Sec. 27. Actions for the foreclosure of mortgages shall be governed by the same rules and provisions of statute as civil actions, except as herein otherwise expressly prescribed. Sec. 28. Service by publication of the summons in the manner provided in section 5 of title 1 of this chapter, for publication of the notice of sale therein specified, may be made upon all parties to the action against whom no personal judgment is sought; and in such case judgment may be taken, without giving security as to those parties, at the expiration of twenty days after the completion of the period of publication. But such parties, or any of them, shall be permitted to appear and defend, upon good cause shown, at any time before final decree."

The questions presented are two: *First*, Was section 28 intended to provide that, in actions to foreclose mortgages, the summons might be served by publication on resident defendants who could be found in the State? And, as a subsidiary question, whether the provisions of § 64, chap. 66, Gen. Stat. 1878, providing for the filing of an affidavit with the clerk of the court, are applicable to such cases. *Second*, If the Statute thus provides for service by publication on resident defendants, does such service constitute "due process of law?" We infer from the memorandum of the district judge that the subsidiary branch of the first question was the main, if not the only, point urged before him; and the second question is so faintly raised by the defendant in this court that we would hardly deem it incumbent on us to consider it, if the interests of no one but himself would be affected by an erroneous assumption of the validity of such a statute.

We think it clear that the expression "personal judgment" is here used in the sense of a money judgment for the mortgage debt; and, while the legislation on the subject, as we have narrated it, has been rather incongruous in some respects, and while we have been unable to discover where the commissioners who prepared the Revision of 1886 found any precedent for so radical a departure from the uniform course of judicial procedure from time immemorial, and while we are unable to conceive what considerations induced them to adopt it, yet its plain and unequivocal language compels us to the conclusion that this Statute was intended to provide that service of the summons by publication might be made on all defendants in foreclosure suits whom it was not sought to hold personally liable for the mortgage debt, although residents of the State, and personal service might be made on them within its jurisdiction. And, if this be so, it would seem to follow that the provisions of § 64, chap. 66, as to filing an affidavit, could not apply to such cases; for, by the very terms of that section, it is only applicable to cases where the defendant is a nonresident, and cannot be found within the State. Where

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such are not the facts, the required affidavit cannot be truthfully made.

The only remaining question, therefore, is whether it is competent for the Legislature to authorize such service in such actions upon residents of the State personally present, and capable of being found, and personally served, within its jurisdiction. Is such service "due process of law?" In determining this question, it becomes important, first, to consider the character of an action to foreclose a mortgage. It is not an action *in rem*, but an action *in personam*. It is true it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding *in rem*, but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claim to real estate, and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the property, but against the persons; and the judgment binds only those who are parties to the suit, and those in privity with them. *Whalley v. Eldridge*, 24 Minn. 358.

Next, it is not only an action *in personam*, but is also strictly judicial in its character, proceeding according to the due course of common law, like any other ordinary action cognizable in courts of equity or common law. These facts are important for the reason that what would be due process of law in one kind of proceeding might not be such in another, for reasons that will be alluded to hereafter.

No court has ever attempted to give a complete or exhaustive definition of the term "due process of law," for it is incapable of any such definition. All that can be done is to lay down certain general principles, and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the *Dartmouth College Case*, gave an exposition of the words "law of the land," and "due process of law," which has often been quoted by the courts with approval, viz.: "The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

In judicial proceedings, "due process of law" requires notice, hearing and judgment. It does not mean, of course, the general body of the law, common and statute, as it was at the time the Constitution took effect; for that would deny to the Legislature the power to change or amend the law in any particular. Neither, on the other hand, does "the law of the land," or "due process of law," mean anything which the Legislature may see fit to declare to be such; for there are certain fundamental rights, which our system of jurisprudence has always recognized, which not even the Legislature can disregard in proceedings by which a person is deprived of life, liberty or property; and one of these is notice before judgment in all judicial proceedings. Although the Legislature may at its pleasure provide new remedies or change

old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights which have been always recognized and observed in judicial procedures. Hence, it becomes important, in determining what kind of notice would constitute "due process of law" in any judicial proceeding affecting a man's property, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind, according to that system of jurisprudence of which ours is derivative. In proceedings *in rem*, as in admiralty and the like, where the process of the court goes against the thing which is in the custody of the court, and technically the defendant, and persons are not made parties to the suits but come in rather as intervenors, it is not essential to the jurisdiction that the persons having an interest in the thing to be affected by the judgment should have personal notice of the proceeding, or in fact any other notice than such as is implied in the seizure of the thing itself. There are other proceedings in the nature of proceedings *in rem*, many of them not strictly judicial, and none of them proceedings according to the course of common law, such as the probate of wills, administration on the estate of deceased persons, the exercise of the right of eminent domain, the exercise of the power of taxation, which affect property rights, but in which personal notice to persons interested in the subject or object of the proceedings has never been deemed necessary. Some form of substituted service of notice, as by publication, has always, from considerations of public policy or necessity, been deemed appropriate to such proceedings, and hence, as to them, "due process of law." But we think that, from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that, in actions *in personam* proceeding according to the course of common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term "proceeding according to the course of the common law," as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process; for, although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to, or equivalent to, constructive service, where the defendant could not be found and served personally. But what we do mean to assert is that the right to resort to such constructive or substituted service in personal actions proceeding according to the course of the common law rests

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upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a nonresident, or had absconded or had concealed himself for the purpose of avoiding service. As showing what means were resorted to as amounting or equivalent to constructive service, and how strictly it was limited to cases of necessity by both courts of common law and courts of chancery, reference need only be had to 8 Bl. Com. 288, 444.

As a substitute for the means formerly resorted to in England in such cases, most of the American States have adopted service of the process or summons by publication. But we have found no statute, except the one now under consideration, which has assumed to authorize such a mode of service, and have found no case where its validity has been sustained by the courts, except as to defendants who could not be found within the jurisdiction either because of nonresidence, or because they had absconded or concealed themselves to avoid the service of process. We think this will be found true in every instance, from the earliest decisions on the subject down to the latest utterance of the Supreme Court of the United States in *Arndt v. Griggs*, 134 U. S. 316 [33 L. ed. 918], in which that court took occasion to set at rest some misapprehensions as to the scope of their previous decision in *Hart v. Sansom*, 110 U. S. 151 [28 L. ed. 101].

We think it would be a surprise to the bench and the bar of the country if it should be held that process or summons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice are too apparent to require to be named or even suggested. So radical a departure is this from the uniform and well-established ideas of what constitutes due process of law in such cases that, although this Act has been on the statute-books for twenty-four years, we doubt whether one lawyer in twenty is aware of its existence; and we have yet to hear of any case, except the present, where anyone has ventured to act upon it.

It is, in our judgment, beyond the power of the Legislature to disregard so fundamental and long-established a principle of our jurisprudence. Service by publication, under such circumstances, is not "due process of law," and therefore any statute assuming to authorize it is unconstitutional. It would be of little use to cite authorities upon a subject which has been so much and so often discussed in its many phases, as each case must be determined upon its own facts, and hence the decided cases would ordinarily be in point only by way of analogy. See, however, *Brown v. Board of Levee Comrs.* 50 Miss. 468.

Order reversed.

RHODE ISLAND SUPREME COURT.

George A. FERGUSON

v.

Mary I. NEILSON.

(....R. L....)

A married woman is not liable for the negligence of a servant hired by her although she is living apart from her husband, who is a resident of another State.

(July 5, 1890.)

ACTION to recover damages for injuries caused by the negligence of defendant's servant. On demurrer to replication. *Sustained.*

The facts sufficiently appear in the opinion.

Messrs. Francis B. Peckham and Patrick J. Galvin for plaintiff.

Mr. Samuel R. Honey for defendant.

Stiness, J., delivered the opinion of the court:

The plaintiff brings this action to recover damages for the negligence of the defendant's servant in driving. The defendant, now a widow, pleads coverture at the time of the alleged negligence; to which the plaintiff replies that at said time the defendant was living separate and apart from her husband, who was then a resident of New York, and never a domiciled inhabitant of Newport; that the defendant maintained herself separately in Newport, hiring her own servants and paying them from her own income, including the servant whose negligence is complained of; and that such servant was under her direction and control. To this replication the defendant demurs. The replication does not set out facts to bring the case within Pub. Stat. R. I., chap. 165; and therefore the question is, simply, whether a married woman is liable for the negligence of a servant employed by her, apart from her husband. At common law a married woman was incapable of making a contract, and consequently incapable of holding the relation of master to servant. If she hired domestic servants or others whose service the husband accepted, it was held she did so as her husband's agent and on his behalf. They were his servants, and not hers, and he alone was responsible to and for them. But the plaintiff contends that as a married woman is liable, jointly with her husband, during coverture, and solely after his death, for her own torts, this action can be maintained against the defendant, and that her liability under a contract of hiring is not the test of his right to sue.

That a married woman is liable for her torts, as claimed by the plaintiff, is a general rule, which has been recognized by this court in *Curry v. Allen*, 14 R. I. 843. But whether this rule embraces negligence we need not now decide, since this case, as presented, does not involve the negligence of the defendant, but only that of a servant, while she was a *feme covert*. If she is liable at all, her liability must rest upon the same ground as that of any master or principal for the act

of a servant or agent. The foundation of the rule *respondet superior* is contract, express or implied, by means of which the servant stands in the place of the master, so that his act is regarded as the master's act. If, therefore, there is not, and cannot be, a contract of hiring, there can be no representation of one by the other, and no ground for the application of the rule. There is no substantial difference between holding a married woman liable directly on a contract, or indirectly for breach of a duty imposed upon her by the contract. Although the plaintiff is not a party to a contract with her, yet where he asserts a relation based upon a contract, as the foundation of a consequent breach of duty, his position is essentially the same as one who sets up the same contract, in order to recover directly for its breach. If we should say she is liable for the tort because of the relation, we should say there was a contract which made her liable; for if the driver was her husband's servant, and not hers, of course she is not responsible for him; but if he was her servant, and not the husband's, how could a court, for example, refuse him judgment if he were to sue for wages upon the contract?

The same thing is true of married women which was held in regard to infants in *Jennings v. Rundall*, 8 T. R. 335, that there is no liability for torts dependent upon a contract. *Lord Kenyon* said: "If it were in the power of a plaintiff to convert that which rises out of a contract into a tort, there would be an end of that protection which the law affords to infants." We have been somewhat surprised that neither the diligence of counsel nor our own research has brought to light any cases like the one before us; and yet, the absence of authority, on a case so likely to have occurred before, is perhaps the best authority for the conclusion that a married woman has never been thought to be liable for tort based upon a contract relation. There are cases where a married woman has made false representations in matters of contract, but in these it has been held that an action will lie neither against the husband nor wife.

In *Liverpool Adelphi L. Asso. v. Fairhurst*, 9 Exch. 423, *Pollock, C. B.*, said: "A *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife." See also *Keen v. Hartman*, 48 Pa. 497; *Woodward v. Barnes*, 46 Vt. 333; *Owens v. Snodgrass*, 6 Dana, 229; *Curd v. Dadds*, 6 Bush, 681. If,

then, a married woman is not liable for a positive fraud connected with a contract, much less is there reason to hold her liable for the negligence of a third person, for whose acts she can only be answerable under a contract relation. The incapacity of a wife to enter into a contract on her own behalf arises from the fact of marriage, and does not depend upon the other circumstances under which she may seek to act. In some States the incapacity has been removed or modified by statute, but in this State there has been no change sufficient to cover the claim made in this case. Hence the fact set up by the plaintiff in his replication, that the defendant was living separate from her husband, does not affect the question at issue, since it does not alter her character or condition, nor relieve her from the disability which the law imposes upon married women. *Marshall v. Rutton*, 8 T. R. 545.

While there are cases which have gone far towards treating a married woman, living apart from her husband, as a *feme sole*, yet such decisions, it will be found, have generally been induced by circumstances which do not appear in this case. Where the husband had been banished, or had abjured the realm and was an alien, or was so situated that he might be treated as civilly dead, the courts in England long ago relaxed the rules to meet apparent necessities, and practically treated the wife as a widow. *Marsh v. Hutchinson*, 2 Bos. & P. 226.

In this country courts have followed the same course (*Gregory v. Paul*, 15 Mass. 81), even to the extent, in one case, of holding that where a husband, leaving his family without providing for them, went to another State, it was equivalent to abjuring the realm, and enabled the wife to sue and be sued as a *feme sole*. Other cases have been very liberal with married women in the matter of their capacity to act separate from their husbands when circumstances seemed to require it, but we need not consider them in this case. The same arguments which are urged in behalf of a wife, whose husband lives abroad or in another State, apply with almost equal force to one abandoned by her husband while he remains in the same State; and yet, in the latter case, aside from statutory provisions, no one would claim that the wife could act alone. In trying to mitigate hardships, courts sometimes illustrate the maxim that extreme cases are the quicksands of the law. But, whatever the line of the law may be elsewhere, we think our Statutes relating to married women and their property go as far as it has been intended to go in the way of removing their disabilities in this State. To adopt the plaintiff's claim in this case would be judicial legislation, ingrafting a new provision upon the Statute which is substantially an adoption of the principle of the English rule. The same claim was pressed upon the court in *Mason v. Jordan*, 13 R. I. 193, in the case of a deed, but it was not allowed there, nor do we think we should allow it here in the case of a contract.

The demurrer to the replication must therefore be sustained.

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Fred E. HOVEY.

TOWN OF EAST PROVIDENCE.

(....R. I.....)

A mechanic's lien is not enforceable against a house and lot held by a town for the uses of a public school unless the statute expressly allows it.

(July 5, 1890.)

PETITION for the enforcement of an alleged mechanic's lien against a lot of land belonging to defendant for materials furnished and used in the erection of a building thereon. *Dismissed.*

The case sufficiently appears in the opinion.

Mr. George J. West for petitioner.

Mr. Edward C. Dubois for respondent.

Durfee, Ch. J., delivered the opinion of the court:

This is a petition for the enforcement of a

NOTE.—*Public buildings not subject to Mechanic's Lien Law.*

Prior to N. Y. Laws 1878, chap. 315, there was no law by which any lien could attach upon public buildings, or upon the moneys due from a city to the contractor who did any work thereon. *Bell v. New York*, 7 Cent. Rep. 266, 105 N. Y. 139.

Hence a mechanic's lien was not enforceable against a public schoolhouse. *Brinckerhoff v. Board of Education*, 2 Daly, 443, 6 Abb. N. S. 428, 37 How. Pr. 499; *Williams v. Controllers*, 18 Pa. 276; *Pollon v. New York*, 47 N. Y. 606.

But under the Act of 1878, individuals who furnish materials to a contractor on public works in cities are entitled to a lien on moneys in the city treasury due or to grow due under the contract. *Bell v. New York*, *supra*.

A contract between a person and the trustees of public schools in a ward of the City of New York, to do the mason work on a school building on a lot belonging to the city, is one within the New York Act of 1878. *Ibid.*

Trustees of public schools in the City of New York contracting with an individual to do mason work on a school building on a lot belonging to the city act as the agents of the city, legally appointed. *Ibid.*

A mechanic's lien cannot be enforced against the property of a county; nor can the processes of the Mechanic's Lien Law be used to subject the indebtedness of a county to a contractor to the payment of a debt owing by him to a sub-contractor. *Breneman v. Harvey*, 70 Iowa, 479.

Where a city contracted under a license from the school board for the construction of a cistern built in the ground, on the corner of a school lot in which the city held no assignable interest in the land; and the city omitted to take a bond, as provided by Laws 1883, Act 94, providing for the payment, by a contractor, of claims for material furnished,—*Held*, such case was not within the Lien Law of 1880, and men furnishing material to such contractor could not recover against the city. *Eaton v. Monroe*, 6 West. Rep. 189, 63 Mich. 525.

Under Minn. Gen. Laws 1887, chap. 170, a public schoolhouse is not subject to a mechanic's lien. *Jordan v. Board of Education*, 39 Minn. 294.

A contractor to erect a building for a municipal corporation cannot have a lien thereon for his work or the material furnished, or hold possession until he is paid therefor. *Platteville v. Bell*, 66 Wis. 326.

mechanic's lien against a lot of land belonging to the defendant Town, and all the buildings and improvements thereon, for materials furnished for and used in the erection of a school-house thereon, the materials having been furnished to the contractors. The question is raised whether such a lien is enforceable against a house and lot held by a town for the uses of a public school.

In 2 Jones, Liens, § 1875, the law is stated to be as follows, to wit: "On grounds of public policy, the Mechanic's Lien Laws do not, in the absence of express provisions, apply to public buildings erected by States, counties and towns for public uses. Schoolhouses erected for the use of public schools come within the exemption. Such buildings are exempt from attachment, and from sale upon execution, and for the same reason are exempt from liens which might result in an adverse sale."

The law is laid down in Phil., Liens, § 179, and in 2 Dill., Mun. Corp., § 577, in the same manner, with copious citation of cases, and among them several in which the law as stated has been applied to public school lots and houses. *Abererombie v. Ely*, 60 Mo. 23; *Hastings v. Woods*, 2 Mo. App. 148; *Board of Edu-*

cation v. Neidenberger, 78 Ill. 58; *Quinn v. Allen*, 85 Ill. 89; *Filout v. Indianapolis School Comrs.* 102 Ind. 223; *Brinkerhoff v. Board of Education*, 37 How. Pr. 499; *Williams v. Controllers*, 18 Pa. 275.

It is easy to see what detriment might follow if lands and buildings held for public uses, as for instance for parks, court-houses, jails, town halls or common schools, could be sold to satisfy the debts or defaults of municipal corporations having the legal title. The public uses would be thereby annihilated. Courts have presumed that this could not have been intended, and accordingly have decided, as a matter of public policy, that lands or buildings so held are not subject to mechanic's liens. We see no satisfactory reason why we should not follow these precedents. Our statutes recognize that there is property which is exempt from seizure on execution by public policy. R. I. Pub. Stat. chap. 209, § 4, cl. 14.

Our statutes do not permit executions to run against the property of towns, but provide other modes in which judgments against towns, or against the town treasurers representing them, may be satisfied.

We decide that the petition must be dismissed.

MISSOURI SUPREME COURT.

Rosette BECKE, *Respt.*,

v.

MISSOURI PACIFIC R. CO., *Appt.*

(....Mo.....)

1. The negligence of the driver of a stage coach will not be imputed to his

passenger, who has no control over him or the management of the coach, so as to defeat an action on behalf of the passenger against a third person to recover damages for an injury resulting from the joint negligence of the driver and the third person.

2. Running a passenger train without a head-light, at the rate of twenty-five miles

NOTE.—Negligence of driver not imputed to passenger.

Where a passenger rides, without pay, with another who is driver of a team, exercising entire control over it, and who is in no sense the passenger's agent or servant, the negligence of the driver or his knowledge of the defective condition of the road cannot be imputed to the passenger so as to bar an action by him against a negligent third party. The passenger is answerable for his own negligence only. *Carlisle v. Brisbane*, 4 Cent. Rep. 508, 113 Pa. 544; *Elyton Land Co. v. Mingea* (Ala.) April 19, 1890.

The negligence of the driver of a public carriage is not to be imputed to a passenger who, in the management of the conveyance, exercises no control over the movements of the vehicle, and who is injured by a collision. *Missouri Pac. R. Co. v. Texas Pac. R. Co.* 41 Fed. Rep. 313.

The negligence of a carrier in whose train a passenger is riding is not imputable to him. *Flaherty v. Northern Pac. R. Co.* 1 L. R. A. 680, 39 Minn. 323.

The negligence of the driver of a hose cart cannot be imputed to an employé of the fire department who is injured while engaged in their common employment. *Elyton Land Co. v. Mingea* (Ala.) April 19, 1890.

Doctrine of imputed negligence. See *notes to Ribbet v. Garner* (Iowa) 1 L. R. A. 152; *Dean v. Pennsylvania R. Co.* (Pa.) 6 L. R. A. 143; *Chicago City R. Co. v. Wilcox* (Ill.) 8 L. R. A. 493; *Fletcher v. Fitchburg R. Co.* (Mass.) 3 L. R. A. 743; 9 L. R. A.

Duty of railroad company as to travelers on highway.

The duty of the managers of railroad trains to persons traveling with teams on a highway is a limited one at most, and cannot under any circumstances require more than the exercise of ordinary care. *Bailey v. Hartford & C. V. R. Co.* 56 Conn. 444.

If it be seen that a person is on the track of a street railway in advance of its car, such care must be exercised as will avoid injury, if this can be done; and for failure in this respect the company will be liable for the resulting injury, unless there is contributory negligence on the part of the injured person. *Baltimore, O. & C. R. Co. v. Everts*, 11 West. Rep. 375, 112 Ind. 533.

A railroad company is not liable to one injured by its negligence upon a crossing over which there was no right of way except by invitation or license, unless it has invited or induced such use of the crossing. *Hanks v. Boston & A. R. Co.* 7 New Eng. Rep. 139, 147 Mass. 495.

An invitation to the public to use a railroad crossing as a highway may be established by use permitted by the company, even if the crossing leads to private premises, and not necessarily to any public way beyond. *Ibid.*

A railroad company is not liable for injuries caused to a traveler at a highway crossing in consequence of a breaking in two of the train, which is wholly fortuitous. *Buster v. Humphreys*, 34 Fed. Rep. 507.

an hour, through a populous country and over a highway crossing near the suburbs of a city after dark on a dark night, is negligence as matter of law.

3. Failure to give statutory signals or to have the head-light burning when a passenger train approaches a highway crossing after dark is negligence of the employes of the railway company "whilst running, conducting or managing any locomotive, car or train of cars" within the meaning of § 2121, Rev. Stat. 1879, fixing the damages at \$5,000 in case of death resulting from such negligence.

(June 30, 1890.)

A PPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Affirmed.*

The case is fully stated in the opinion.

Messrs. Thomas J. Portis and Bennett Pike, for appellant:

The negligence of the driver is a bar to plaintiff's recovery in this action.

Chapman v. New Haven R. Co. 19 N. Y. 341 344; *Forks Twp. v. King*, 84 Pa. 230; *Thoregood v. Bryan*, 8 O. B. 115, 129; *Armstrong v. Lancashire & Y. R. Co.* L. R. 10 Exch. 47; *Lockhart v. Lichtenthaler*, 46 Pa. 151; *Stiles v. Geesey*, 71 Pa. 439; *Payne v. Chicago, R. I. & P. R. Co.* 39 Iowa, 523.

It was error for the court to assume in its charge that failure to have the head-light burning was negligence.

Stoher v. St. Louis, I. M. & S. R. Co. 10 West. Rep. 54, 91 Mo. 518; *King v. Missouri Pac. R. Co.* 98 Mo. 235; *Crumpley v. Hannib. & St. J. R. Co.* Id. 34.

Mr. A. R. Taylor for respondent.

Brace, J., delivered the opinion of the court:

In this action plaintiff sues to recover damages for the death of her husband, Charles Becke, who was a passenger in a public stage or hack that was struck by a

A railroad company is under no obligation to keep a special lookout for intruders or trespassers on its track, except at public crossings and within the limits of towns or cities, and is only bound to reasonable diligence after they are, or ought to be, discovered. *Columbus & W. R. Co. v. Wood*, 36 Ala. 184.

A company does not owe a trespasser the duty of having its engineers on the lookout for him, but is bound to take care not to hurt him after he is discovered. *Denman v. St. Paul & D. R. Co.* 28 Minn. 357; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 513.

In an action against a railroad for negligence causing death, it is a matter of no consequence that the bell was not rung, where deceased, a trespasser, was not killed at any crossing, and saw the engine coming. *Rhine v. Chicago & A. R. Co.* 3 West. Rep. 300, 38 Mo. 302.

As to concurrent duties of railroad company and travelers at road crossings, see *note* to *Fletcher v. Fitchburg R. Co.* (Mass.) 3 L. R. A. 743.

While the failure of a railroad company to give warning does not relieve a person about to cross the track from exercising care to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required. *Chicago & E. I. R. Co. v. Hedges*, 3 West. Rep. 397, 105 Ind. 398; *Pennsylvania R. Co. v. Ogler*, 35 Pa. 60; *Indianapolis & V. R. Co. v. McLin*, 32 Ind. 435.

Duty of railroad to warn travelers on approach to highway crossings.

It is the duty of railroads, even in the absence of statutory provisions, to give warning to travelers at railroad crossings. *Bradley v. Boston & M. R. Co.* 2 Cush. 543; *Linfield v. Old Colony R. Corp.* 10 Cush. 509; *Philadelphia & R. R. Co. v. Killips*, 19 Alb. L. J. 263; *Louisville & N. R. Co. v. Com.* 13 Bush, 388.

And in running cars in the night all means and measures of precaution must be used which the highest prudence could suggest. *Johnson v. Hudson River R. Co.* 20 N. Y. 75.

A railroad must give signals at crossings though none are required by statute, and the omission to do so is negligence. *Louisville & N. R. Co. v. Com.*, *Bradley v. Boston & M. R. Co.*, *Linfield v. Old Colony R. Corp.* and *Johnson v. Hudson River R. Co.* *supra*; *Spencer v. Illinois Cent. R. Co.* 29 Iowa, 55; *Arts v. Chicago, R. I. & P. R. Co.* 34 Iowa, 153, 9 L. R. A.

Robinson v. Western P. R. Co. 43 Cal. 409; *Webb v. Portland & K. R. Co.* 37 Me. 134.

And a mere compliance with the statute in sounding bell or whistle does not authorize the omission of other necessary precautions. *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 317; *Robinson v. Western P. R. Co.* and *Webb v. Portland & K. R. Co.* *supra*.

Statutes are not the exclusive measure of the duties of railroads. *Shearm. & Redf. Neg.* § 484; *Bradley v. Boston & M. R. Co.* 2 Cush. 543.

The duty of a railroad company is not, however, limited to the measures imposed by law (*Harts v. Central R. Co.* 42 N. Y. 472); nor has the Legislature declared that a railroad company shall not be liable for injury at a crossing where it rings its bell and sounds its whistle. *Richardson v. New York Cent. R. Co.* 45 N. Y. 350.

Neither the statutes nor the common law requires that warning of the approach of a train to a crossing should be given by both bell and whistle. *Spencer v. Illinois Cent. R. Co.* *supra*.

Statutes of various States construed.

The Alabama statutory provision that a train must blow its whistle or ring its bell at least one fourth of a mile before reaching a public road crossing has no application to its passing under a highway bridge over a railroad. *Louisville & N. R. Co. v. Hall*, 4 L. R. A. 710, 37 Ala. 703.

If the failure to ring a bell or blow a whistle of a train, as required by statute, reasonably contributed to an injury, the company is liable unless there was contributory negligence. *Western R. Co. v. Sistrunk*, 35 Ala. 353.

The Legislature in Connecticut, having assumed the regulation of danger signals to be given by trains approaching a crossing, no other signals than those specifically provided by such regulations are required. *Dyson v. New York & N. E. R. Co.* 57 Conn. 9.

A railroad company is not liable for frightening the horse of a traveler on a highway parallel with the railroad, by blowing a whistle on approaching a crossing, where the statute requires either the blowing of the whistle or the ringing of the bell. *Bailey v. Hartford & C. V. R. Co.* 56 Conn. 444.

It is negligence, as a matter of law, for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance. *Western & A. R. Co. v. Young*, 31 Ga. 397.

train of defendant at a public crossing a short distance from Nevada, Mo., thereby causing the said coach to be overturned, and the said Becke injured so that he died within two days after the collision, from such injuries. The plaintiff had judgment for \$5,000, and the defendant appeals. The only errors urged as grounds for reversal are upon the instructions. They may all be considered upon instructions 1 and 8 given for plaintiff, and instruction A refused for the defendant:

"No. 1. If you find from the evidence that plaintiff was the wife of Charles Becke when he died; and that on January 16, 1886, said Charles Becke was a passenger on a public stage or hack going from Montevallo to Nevada, in Missouri, and had no control over the driver thereof, or of the management of said hack; and that the hack in which said Becke was then such passenger was struck on said day by an engine of defendant at the crossing of the railroad and a traveled public road near Nevada, Mo., and not within

any city; and that in consequence of said collision said Becke received injuries from which he died at Nevada, Mo., on or about January 18, 1886; and if you further find, from the evidence, that said collision directly resulted from or was caused by the omission of defendant's employes in charge of said engine to give any of the signals mentioned in instruction No. 2; and that said Charles Becke, at and prior to said collision, was himself exercising ordinary care to avoid injury and danger,—then your verdict should be for plaintiff, and you should assess her damages at the sum of \$5,000."

"No. 8. If you find, from the evidence, the facts to be as mentioned in instruction No. 1, except as to the omission of signals, and find on that point that one of the signals mentioned therein (and more particularly described in instruction No. 2) was given; but if you then further find, from the evidence, that at the time and place of said collision it was no longer daylight, but was after dark, and that there was no head-light

The statutory diligence required touching the use of the bell or whistle and checking of trains, on approaching public crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it; yet, relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury. *Central R. Co. v. Ralford*, 82 Ga. 400.

The Illinois Statute prescribing signals to be given by railroad companies at highway crossings is applicable to the Illinois Central Railroad Company, despite the fact that the charter of that company lays down different rules for giving signals. *Illinois Cent. R. Co. v. Slater*, 6 L. R. A. 413, 129 Ill. 91.

Where there are several parallel railway tracks crossing a street or highway, a train passing upon one of them is not of itself a warning of the approach of another train on a different track. *Chicago, M. & St. P. R. Co. v. Wilson* (Ill.) May 14, 1890.

Failure to perform a statutory duty to ring a bell or sound an engine whistle is *per se* negligence. *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540; *Indiana, B. & W. R. Co. v. Barnhart*, 13 West. Rep. 431, 115 Ind. 399.

Where the statute provides for certain signals on approaching crossings the neglect to give them is negligence. *Bellefontaine R. Co. v. Hunter*, 83 Ind. 335.

Under the Iowa Statute it is *per se* negligence in employes of a railroad company to run a locomotive over a highway crossing without ringing the bell. *Reed v. Chicago, St. P. M. & O. R. Co.* 74 Iowa, 188.

Under the Statute of Kansas the failure to sound the whistle of a locomotive approaching a crossing, as the Statute requires, is not ordinarily negligence as to a traveler who sees the train eighty rods away, and knows that it is approaching. *Atchison, T. & S. F. R. Co. v. Waltz*, 40 Kan. 483.

It is the duty of a railroad company, where a train crosses a public highway on a trestle, and there is danger of catching a traveler unawares and frightening the horse that he is riding or driving, to give some timely warning of the approach of the train to the crossing (*Rupard v. Chesapeake & O. R. Co.* (Ky.) 7 L. R. A. 516); but it is not negligence as to trespassers crossing or using the track elsewhere. *Shackleford v. Louisville & N. R. Co.* 84 Ky. 43.

It is gross negligence in a railroad company not

to have someone to give notice of the approach of trains at a point near a large city where its road crosses a public thoroughfare, and where street-cars cross its track until late at night. *Central Pass. R. Co. v. Kuhn*, 86 Ky. 573.

The failure to whistle at a private crossing in the open country, guarded by gates, where there was no station, and where no trains ever stopped, and the line of the railroad was nearly straight, is not evidence of negligence on the part of the railroad company. *Alvey, Ch. J.*, dissents. *Philadelphia, W. & B. R. Co. v. Frank*, 9 Cent. Rep. 64, 67 Md. 339.

A railroad company is not exempt from liability for failure to place a flagman at a crossing where common prudence would dictate that it should do so, merely because the railroad commissioners had not ordered one to be placed there. *Freeman v. Duluth, S. S. & A. R. Co.* 3 L. R. A. 504, and note, 74 Mich. 86.

In Missouri the failure to have a flagman at a crossing is negligence *per se*. *Murray v. Missouri Pac. R. Co.* (Mo.) June 2, 1890.

The failure to stop an engine at a place where there is a stopping board is not necessarily negligence, but may be a circumstance to be considered upon the question of contributory negligence. *Hanson v. Minneapolis & St. L. R. Co.* 37 Minn. 355.

Failure by a railroad company to comply with a city ordinance requiring certain signals to be given by its trains will not render it liable for injury where the person injured could have avoided it by the exercise of ordinary care. *Neier v. Missouri Pac. R. Co.* (Mo.) 4 West. Rep. 597.

In determining whether employes in charge of a railroad train were negligent in failing to give the signals required by law in crossing a highway in a village, the facts that the train was running at a high rate of speed, and was an hour and a half behind time, are proper to be considered by the jury. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475.

Running a locomotive without warning across a track which has been jointly used by the public without objection is negligence. *Spittorf v. State*, 10 Cent. Rep. 703, 108 N. Y. 205.

Where a railroad crosses a street in the city almost at grade, and about forty feet beyond such street crosses a private way used by the public as a driveway, to the knowledge both of its owners and of the employes of the railroad, the statutory signal must be given eighty rods from the crossing of the private way. *Cranston v. New York O. & H. R. R. Co.* 32 N. Y. S. R. 532.

lit or burning on said engine, and that in consequence of said omission said collision occurred at said crossing,—then your verdict should be for plaintiff, and you should then assess her damages at the sum of \$5,000, that being the measure of damages fixed by the statute in this case in the event you find for the plaintiff under these instructions and the evidence before you."

"A. The court instructs the jury that if they believe from the evidence that on the 19th day of January, 1896, one Hanley was driving a hack from Montevallo to Nevada, and that he had driven that hack from Nevada to Montevallo and back six days each

week for one third of the time since the 1st of December, 1885, and had known the road ever since the railroad was built for four or five years, and had been over it often during that time, and knew said public road on which he was traveling, crossed the defendant's railroad at a point from a mile to a mile and a quarter southeast of the Town of Nevada in open prairie land, where the railroad train could be seen from half a mile to a mile and a quarter before the train reached said crossing, and that said train could have been seen or heard by said Hanley for a distance of thirty rods or more before he reached the crossing if he had looked in the direction

Proper and reasonable warning must be given of the approach of a railroad train to a place which, although not a public crossing, is used as a crossing in the course of business by a number of persons who are at work near the track. *Owens v. Pennsylvania R. Co.* 41 Fed. Rep. 187.

The rule requiring the ringing of a bell or the sounding of a whistle on an engine when a person is seen on the track does not apply when a mule is seen on the track. *Fisher v. Pennsylvania R. Co.* 126 Pa. 238.

The omission to keep a watchman at the crossing as provided by ordinance is not negligence unless it is the proximate cause of the accident. *Pennsylvania Co. v. Hensil*, 70 Ind. 569.

The provisions of the South Carolina Statute as to liability for injuries by a railroad train at a crossing, do not apply to cattle killed or injured while pasturing near by, but not upon the crossing, and not using it to pass from one side to the other. *Neely v. Charlotte, C. & A. R. Co.* (S. C.) June 19, 1890.

Failure to give proper signals by a bell or whistle while approaching a crossing is not excused by the mere fact that the engineer was engaged in arranging the air-pumps at the time, when there was no sudden and unexpected emergency. *Petrie v. Columbia & G. R. Co.* 29 S. C. 303.

The fact that a person killed by cars at a railroad crossing was so muffled up as not to hear the whistle does not prove that negligence in failing to ring the bell or blow the whistle continuously as required by statute was not material, on the ground that such signals also would have been insufficient to be heard. *Ibid.*

The provisions of the Tennessee Code that "every railroad company shall keep someone on the locomotive always upon the lookout ahead, and, when any person, etc., appears upon the road, whistle, put down brakes, and use every possible means to prevent an accident,"—is nothing more or less than a declaration of the common law, without addition or variation. *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 9.

The precautions to be observed by those running a railroad train approaching a crossing upon which there is a person, animal or other obstruction, are not applicable to a case where a wagon is not on the track before the train reaches the crossing, but is driven against the engine as it crosses the road. *Nashville, C. & St. L. R. Co. v. Seaborn*, 85 Tenn. 391.

The Statute requiring the ringing of a bell or blowing of a whistle on a railroad train eighty rods distant from a crossing, and continuing it until the crossing is passed, is no less obligatory because the train is running upon a side track, the main track being obstructed by a standing train. *Brown v. Griffith*, 71 Tex. 654.

While the Statutory signals to be given at road crossings are intended as a warning to those crossing the track, and the failure to give them as to such persons is negligence *per se*, the failure may

be considered in proving negligence on the part of the company as to other parties lawfully on the railway. *International & G. N. R. Co. v. Gray*, 65 Tex. 32.

The fact that these requirements were not complied with is *prima facie* evidence of negligence, for which, if the injury resulted without negligence on the part of the person injured, the railroad company is liable. *Gulf, C. & S. F. R. Co. v. Bretling* (Tex.) Jan. 10, 1890.

A railroad company may be negligent in failing to require a whistle to be blown or a sign set up at a crossing, although not required by any statute. *Winstanley v. Chicago, M. & St. P. R. Co.* 72 Wis. 375.

It is negligent if it does not have someone to warn and prevent persons from attempting to cross a railroad when a train which has just passed a crossing suddenly backs down upon the crossing. *Duane v. Chicago & N. W. R. Co.* 72 Wis. 523, 7 Am. St. Rep. 879.

High rate of speed.

Without regard to the statute, a railroad company should operate its trains at a moderate rate of speed, and give the usual signals of approach to a crossing, the view of which is obstructed by buildings. *Chicago & A. R. Co. v. Dillon*, 13 West. Rep. 286, 123 Ill. 570.

The giving of the statutory signals at a crossing does not under all circumstances render a railroad company free from negligence if it runs its train at an undue and what might be found to be an improper and highly dangerous rate of speed through a village or city more or less densely populated. *Thompson v. New York Cent. & H. R. R. Co.* 13 Cent. Rep. 240, 110 N. Y. 636.

It is negligence on the part of those in charge of an irregular train to approach a dangerous crossing at a high rate of speed without warning. *McWilliams v. Kein* (Pa.) 22 W. N. C. 372.

The running of special trains off schedule time or at an increased speed is not negligence *per se*. *East Tennessee & W. N. C. R. Co. v. Winters*, 85 Tenn. 240.

Making flying switches on a public highway in constant use, without the car being under the control of a brakeman, is gross negligence. *O'Connor v. Missouri Pac. R. Co.* 13 West. Rep. 587, 94 Mo. 157.

Although a traveler is bound to keep a sharp watch for cars, yet he is not bound to anticipate that defendant would make a flying switch across and over the public highway,—he is not bound to be prepared for an act of negligence on the part of the defendant. *Ibid.* See *Wright v. Boston & A. R. Co.* 2 New Eng. Rep. 725, 142 Mass. 286; *Drain v. St. Louis, I. M. & S. R. Co.* 2 West. Rep. 114, 86 Mo. 574; *Louisville, N. A. & C. R. Co. v. Schmidt*, 3 West. Rep. 648, 108 Ind. 73; *Chicago & E. I. R. Co. v. Hedges*, 3 West. Rep. 892, 105 Ind. 396; *Merz v. Missouri Pac. R. Co.* 4 West. Rep. 522, 88 Mo. 672; *Chicago, St. L. & P. R. Co. v. Welsh*, 6 West. Rep. 540.

of the train, or could have been heard by him if he had listened carefully, or if it was after dark in the evening, from 6.10 to 6.25 o'clock P. M., and said Hanley had stopped and carefully looked and attentively listened, that he could have seen or heard the train, and that said Hanley knew it was about train time, and, notwithstanding, said Hanley drove his team and hack onto the railroad crossing without stopping and carefully looking and attentively listening, and plaintiff's deceased husband was injured in consequence thereof, either by the train, or by reason of the team running away, upsetting

the hack, and dragging deceased, or otherwise, the defendant is not liable for any injury so done, and the jury should find their verdict for defendant, whether the whistle was sounded, the bell was rung or the headlight was lit or not."

1. It is contended by counsel for the defendant that the court committed error in refusing to instruct the jury that the plaintiff could not recover if the driver of the hack in which her husband was a passenger was guilty of negligence which contributed to the injuries which resulted in his death, and that the doctrine laid down in *Thorogood*

118 Ill. 572; *Kelley v. Michigan Cent. R. Co.* 8 West. Rep. 177, 65 Mich. 186; *Rafferty v. Missouri Pac. R. Co.* 18 West. Rep. 255, 91 Mo. 33; *Yancy v. Wabash, St. L. & P. R. Co.* 12 West. Rep. 250, 98 Mo. 423; *Regan v. St. Louis, K. & N. W. R. Co.* 12 West. Rep. 307, 98 Mo. 348; *Baltimore & O. R. Co. v. Kean*, 8 Cent. Rep. 716, 65 Md. 394; *Lehigh & W. B. Coal Co. v. Lear (Pa.)* 8 Cent. Rep. 107; *Woodard v. New York, L. E. & W. R. Co.* 9 Cent. Rep. 293, 106 N. Y. 309.

The unusual speed of a train is not negligence as to one who voluntarily places himself upon the track where he has no right to be; and the company will not be liable unless those in charge of the train, after discovering the danger, could, by reasonable and proper care, have avoided the injury. *Shackelford v. Louisville & N. R. Co.* 84 Ky. 42. See *Freeman v. Duluth, S. S. & A. R. Co.* 3 L. R. A. 594, and note, 74 Mich. 80.

The Georgia Statute does not require that a train started at or upon a public crossing should be checked and kept checked while passing over that crossing. *Harris v. Central R. Co.* 78 Ga. 525.

A railroad company is not excused from the consequences of running a train at great speed through a station or in the streets of a populous city, because the engineer was temporarily disabled from controlling his engine by an accident received from the lever, which, after it was reversed to shut off steam, slipped from its position and struck him a violent blow. *Parsons v. New York C. & H. R. Co.* 3 L. R. A. 653, 118 N. Y. 356.

A person about to cross a track within the limits of a city has a right to assume that trains will not be run at a greater speed than allowed by ordinance. *Correll v. B. C. R. & M. R. R. Co.* 38 Iowa, 120.

Where the horses of a traveler in a city were frightened by a train passing at a rate of speed prohibited by the city ordinance, a suit may be maintained for his benefit for the statutory penalty imposed, although there was no actual collision. *Chicago & E. L. R. Co. v. People*, 9 West. Rep. 740, 120 Ill. 667.

The Mississippi Revised Code, which prohibits the running of railroad trains through incorporated cities and towns at a greater rate of speed than six miles per hour, and makes the railroad company liable for any damage or injury which may be sustained by anyone from such trains while running at a greater rate of speed through any such incorporated city or town, applies to damages and injuries done to real estate as well as to personal property or to the person. *Porterfield v. Bond*, 38 W. Rep. 391.

The Alabama Code, making it the duty of a railroad to check the speed of trains in approaching a public crossing, has no reference whatever to stock running at large and not injured at the crossing. *Nashville, C. & St. L. R. Co. v. Hembree*, 35 Ala. 451.

Where, by excessive speed upon station grounds, animals are stampeded and run down and killed upon the track outside the grounds, the unlawful ? L. R. A.

speed upon the station grounds is the proximate cause of the injury. *Story v. Chicago, M. & St. P. R. Co.* 79 Iowa, 402.

Recovery was sustained where a boy of eleven years of age, driving a wagon over a street crossing, was injured by an engine driven from a depot yard at an unusual rate of speed. *Ketchum v. Texas & P. R. Co.* 38 La. Ann. 777.

A violation of an ordinance regulating the speed of a train, requiring the ringing of a bell at a crossing or the stationing of a man on the car furthest from the engine when backing, is negligence *per se*. *Erwin v. St. Louis, L. M. & S. R. Co.* 96 Mo. 290.

In Missouri the rule is that, aside from statutory or municipal regulation, no rate of speed of railroad trains is negligence *per se*. *Maher v. Atlantic & P. R. Co.* 64 Mo. 287; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50; *Wallace v. St. Louis, I. M. & S. R. Co.* 74 Mo. 594; *Goodwin v. Chicago, R. I. & P. R. Co.* 75 Mo. 73; *Powell v. Missouri Pac. R. Co.* 76 Mo. 80; *Main v. Hannibal & St. J. R. Co.* 18 Mo. App. 383.

Duty of traveler approaching railroad crossing.

A traveler approaching a railroad crossing must stop and look and listen for approaching trains before crossing. *Pennsylvania R. Co. v. Weber*, 76 Pa. 157; *Wilcox v. Rome, W. & O. R. Co.* 39 N. Y. 353; *Havens v. Erie R. Co.* 41 N. Y. 296; *Baxter v. Troy & R. R. Co.* Id. 502; *Gorton v. Erie R. Co.* 45 N. Y. 660; *Allen v. Maine Cent. R. Co.* 32 Me. 111.

The failure of a traveler to stop immediately before crossing a track is negligence *per se*, and a question for the court. *North Pennsylvania R. Co. v. Heileman*, 49 Pa. 60; *Pennsylvania R. Co. v. Beale*, 73 Pa. 504.

The absence of a flagman will not excuse a traveler in relaxing his care and watchfulness. *MoGrath v. New York Cent. & H. R. Co.* 59 N. Y. 463. The failure to look and listen is not *per se* contributory negligence; it depends on circumstances. *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540.

There may be circumstances which will excuse the taking of the usually necessary precaution of looking and listening. *Chicago & E. I. R. Co. v. Hedges*, 3 West. Rep. 397, 105 Ind. 398.

And the omission of these precautions will not prevent recovery if they would not have availed to avoid the consequences of the railroad company's negligence. *Cleveland, C. & Y. R. Co. v. Crawford*, 24 Ohio St. 631.

The rule that one about to cross a railroad track must look as well as listen must be observed, although his view of the track and a coming train has been temporarily obstructed by a train that has just passed. *Fletcher v. Fitchburg R. Co.* 3 L. R. A. 743, 149 Mass. 127.

But if a traveler by looking could not see the train in question, negligence by not looking cannot be imputed to him. *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 306.

The law requires a listening as well as a looking for a coming train by a traveler at a crossing; and

v. *Bryan*, 8 C. B. 115.—that a passenger upon the vehicle of a common carrier who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons is so identified with the former as to be chargeable with their negligence in an action against the latter, and therefor only entitled to recover damages from his carrier,—should govern the case. This doctrine, from the time it was first announced in *Thorogood v. Bryan*, 1849, though afterwards followed by the English courts for a time (*Armstrong v. Lancashire & Y. R. Co.* L. R. 10 Exch. 47), was continually subjected to adverse comment and criticism, until recently, in the case of *The Bernina* (Jan. 24, 1887), L. R. 12 Prob. Div. 58, the whole question was re-examined, and the authorities, English and American, reviewed by the Court of Appeals of England, and the doctrine condemned; and *Thorogood v. Bryan*, and the cases that followed it, cannot any longer be considered authority even in England. Lord Esher, *M. R.*, thus sums up in the *Bernina Case*: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, we cannot see any principle upon which it can be supported, and we think that with the exception of the

weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is essentially unjust, and inconsistent with other recognized propositions of law. As to the propriety of dealing with it at this time in a court of appeal, it is a case which from the time of its publication has been constantly criticised. No one can have gone into . . . an omnibus, railroad or ship on the faith of the decision. We therefore think that, now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan* must be overruled." The doctrine of *Thorogood v. Bryan* has received the sanction of some American courts, notably in *Lockhart v. Lichtenthaler*, 46 Pa. 151, and others might be cited, but it has never been generally recognized or followed in this country,—in fact, the great weight of American authority is against it; and to this conclusion the Supreme Court of the United States arrived in the recent case of *Little v. Hackett*, 116 U. S. 866 [29 L. ed. 655], after a thorough consideration of the subject and a review of the American author-

obscuration of vision is no defense against a failure to listen. *Pennsylvania R. Co. v. Mooney*, 126 Pa. 244.

He has no right to assume that no train is approaching, if his view is obstructed, from the fact that no whistle is sounded; and such fact cannot be considered in determining the question of his negligence. *Cincinnati, I. St. L. & C. R. Co. v. Howard* (Ind.) 8 L. R. A. 563.

The degree of care required by a person who is about to cross a railroad track is such care as could be reasonably expected of an ordinarily prudent person under like circumstances; and this is usually a question of fact for the jury to determine under all the circumstances of the case. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475.

Obstructions to sight or hearing in the direction of an approaching train as a traveler nears a railroad crossing require increased care on his part, the care required being in proportion to the increase of danger that may come from the use of the highway at such place. *Cincinnati, I. St. L. & C. R. Co. v. Howard*, *supra*.

An error of judgment in stepping upon a railroad track in an emergency, if the proof is not clear as to the elements of time and space on which such judgment was based, should not be held negligence as matter of law, but the question should be left to the jury. *Bernhard v. Rensselaer & S. R. Co.* 1 Abb. App. Dec. 131; *Smalls v. Brooklyn & R. B. R. Co.* 88 N. Y. 18; *Weber v. New York Cent. & H. R. R. Co.* 58 N. Y. 455.

A person killed by a train at a crossing is presumed to have observed the requisite precautions; the burden is on the company to show the contrary. *Pennsylvania R. Co. v. Weber*, 76 Pa. 157.

The evidence as to the negligence of a person injured at a street crossing is properly left to the jury. *Hutchinson v. St. Paul, M. & M. R. Co.* 32 Minn. 398; *Corey v. Northern Pac. R. Co.* 32 Minn. 457.

Degree of care required of traveler.

One who approaches a railroad crossing where buildings obscure the track on either side, who leaves his horses with the driver, about twenty feet
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from the track, walks to the track, looks up and down, listens and, as the track is visible for only a few hundred feet, sees and hears nothing, walks quickly back to his team, drives upon the track and is injured by a train, has fulfilled his duty to stop, look and listen; and the court should so instruct the jury. *Lehigh Valley R. Co. v. Brandtmaier*, 5 Cent. Rep. 144, 118 Pa. 610.

A citizen who on a public highway approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. *Donohue v. St. Louis, I. M. & S. R. Co.* 6 West. Rep. 848, 91 Mo. 357; *Kennayde v. Pacific R. Co.* 45 Mo. 255; *Tabor v. Missouri Valley R. Co.* 46 Mo. 853.

A foot traveler crossing a railroad track by a foot-path near a highway, who stops to look and listen for an approaching train, but cannot perceive one or signals of one, and begins to cross, but is struck by a train approaching suddenly and without warning, and who is otherwise in the exercise of due care, is not chargeable with negligence contributing to the collision. *Baltimore & O. R. Co. v. Owings*, 3 Cent. Rep. 847, 65 Md. 502.

If the statutory warning of an approaching train is not given, the traveler is not bound to be on the alert for danger. *Ernst v. Hudson River R. Co.* 85 N. Y. 9; *Benwick v. New York Cent. R. Co.* 36 N. Y. 132.

He has a right to assume that the company will act with appropriate care and give the usual signals. *Tabor v. Missouri Valley R. Co.* 46 Mo. 853.

The degree of care required of a person who is about to cross a railroad track is such care as could be reasonably expected of an ordinarily prudent person under like circumstances; and this is usually a question of fact for the jury to determine under all the circumstances of the case. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475. See note to *Fletcher v. Fitchburg R. Co.* (Mass.) 3 L. R. A. 743.

Reckless assumption of risk.

Where a party recklessly goes upon a railroad track without looking or listening for an approach-

ities. That it is unsound in principle, and against the weight of authority, is amply demonstrated in the following additional cases: *Chapman v. New Haven R. Co.* 19 N. Y. 341; *Robinson v. New York Cent. & H. R. R. Co.* 66 N. Y. 11; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Bennett v. New Jersey R. & T. Co.* 86 N. J. L. 225; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Corington Transfer Co. v. Kelly*, 86 Ohio St. 86; *Street R. Co. v. Eadie*, 48 Ohio St. 91, 1 West. Rep. 88; *Cuddy v. Horn*, 48 Mich. 596; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; *Danville L. & N. Turnp. Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, C. & L. R. Co. v. Case*, 9 Bush, 728; *Tompkins v. Clay St. R. Co.* 66 Cal. 163.

The question has never been passed upon in this court, but, so far as judicial opinion upon this subject has been expressed by the court of appeals, it has been in harmony with the general current of American authority. *Hunt v. Missouri R. Co.* 14 Mo. App. 160; *Keitel v. St. Louis, O. & W. R. Co.* 28 Mo. App. 657.

The recent and exhaustive consideration which this question has received in many of the cases cited renders unnecessary any extended discussion of the principle involved. It is so plain that to maintain the doctrine

would be to abrogate a well-settled rule of the common law, which gives a right of action for an injury resulting directly from the joint wrongful act of two wrong-doers against either or both of such wrong-doers, and that its effect would be to make an innocent person answerable for the wrong act of another over whom he has and exercises no control, and who is neither his servant nor his agent, that argument would seem unnecessary (whatever the authority to the contrary may have been) to show that such a doctrine ought not to stand. The court committed no error in refusing to instruct the jury that the contributory negligence of the driver, if any, would defeat plaintiff's right to recover.

2. The error complained of in the third instruction given for plaintiff is "that the court therein assumes, as matter of law, that the failure to have the head-light lit or burning at the time of the alleged collision was negligence on the part of the defendant." The uncontradicted evidence in the case was that the collision took place at a public crossing about a mile and a quarter south of the City of Nevada, on the 16th day of January, within half a mile of another crossing south, about 6 o'clock in the evening; that the night was dark: that the train was a passenger train

the train, when by so doing he would have been apprised of its approach, he is guilty of such contributory negligence as precludes a recovery of damages in case of his injury occasioned thereby. *Taylor v. Missouri Pac. R. Co.* 3 West. Rep. 270, 86 Mo. 457; *Pennsylvania R. Co. v. Coon*, 2 Cent. Rep. 823, 111 Pa. 430; *Chase v. Maine Cent. R. Co.* 2 New Eng. Rep. 372, 78 Me. 344.

He is guilty of contributory negligence which will relieve the company from liability notwithstanding the engineer neglected to ring the bell or blow the whistle. *Glascock v. Central Pac. R. Co.* 73 Cal. 137.

One of ordinary faculties, in full possession of his sight and hearing, crossing a railroad track at a street crossing with which he was acquainted, on a dark and stormy evening, without stopping to look or listen, who is killed by a train, is guilty of such contributory negligence as will justify the judge in taking the case from the jury. *Mynning v. Detroit, L. & N. R. Co.* 7 West. Rep. 324, 64 Mich. 93.

It is negligence for one seeing or hearing an approaching train running at ordinary speed to attempt to cross the track in front of the train. *State v. Maine Cent. R. Co.* 1 New Eng. Rep. 236, 77 Me. 538.

Where, at a time when there was nothing to prevent his seeing his danger, a person heedlessly stepped upon the track immediately ahead of a train, the fact that on account of the noise he could not hear the approach of the cars will not excuse him from the duty of using his eyes to see their approach. *Sabine & E. T. R. Co. v. Dean*, 76 Tex. 78.

An attempt to cross a railroad track immediately in front of a train which is so close that the person is instantly struck, and which he could not possibly have looked for without seeing, is gross carelessness which precludes any recovery for the injuries received. *Mariand v. Pittsburgh & L. E. R. Co.* 123 Pa. 457.

A person driving towards a railroad track, who, when about to cross the track, is warned by a person standing near of the approach of a train, but pays no attention, and who also has opportunity to look and listen, but neglects to use ordinary caution, is guilty of contributory negligence which will bar a recovery for personal injuries sustained by a collision with the train. *Harris v. Minneapolis & St. L. R. Co.* 37 Minn. 47.

To walk along the middle of a railroad track between crossings when it is dark, and without knowing and remembering whether a train is due or not, and without looking out in both directions for trains that may be due, and without listening attentively and anxiously for the roar and rattle of machinery, as well as for the sound of bell or whistle, is gross negligence. *Central R. & Bkg. Co. v. Smith*, 78 Ga. 604.

A person who undertakes to drive a team of horses attached to a wagon across a railroad crossing cannot recover for personal injuries inflicted by the running away of the frightened team. *Union Pac. R. Co. v. Hutchinson*, 39 Kan. 485.

Contributory fault defeats recovery.

Negligence of the railroad company in failing to observe the obligation imposed on it by statute of signaling its approach will not excuse one who sustains an injury at a crossing, through his own want of care and diligence. For no one shall recover damages for an injury not purposely or wantonly inflicted, to which his own negligence contributed. *Cincinnati, H. & I. R. Co. v. Butler*, 1 West. Rep. 110, 108 Ind. 31; *Freeman v. Duluth, S. S. & A. R. Co.* 3 L. R. A. 594, and note, 74 Mich. 86.

A traveler will not be exonerated from the presumption of contributory negligence, if it appears that by the exercise of diligence he might have avoided the injury. *Cincinnati, H. & I. R. Co. v. Butler*, *supra*.

The law lays it down clearly that a man must look and listen. And if, by looking and listening, he could ascertain the approach of a train, and failed to do so, he is guilty of contributory negligence, and cannot recover. *Ibid.*; *Stubley v. London & N. W. R. Co.* L. R. 1 Exch. 13; *Chase v. Maine Cent. R. Co.* 2 New Eng. Rep. 372, 78 Me. 346; *Heaney v. Long Island R. Co.* 112 N. Y. 122; *Greenwood v. Philadelphia, W. & B. R. Co.* 3 L. R. A. 44, 124 Pa. 572; *Fletcher v. Fitchburgh R. Co.* 3 L. R. A. 743, 149 Mass. 134; *Union R. Co. v. State* (Md.) March 18, 1890.

One who sees, or could have seen if he had looked, and has the faculties to understand, the dangers to

from Joplin, going north to Kansas City, and was running at about twenty-five miles an hour. The court submitted to the jury the question whether the head-light was lit and burning and whether it was dark at the time of the collision; and if it was dark, and the head-light was not lit or burning, whether the collision occurred in consequence of the omission to have the head-light lit and burning. All the disputed facts were submitted to the jury. "The court takes judicial notice of the power, speed and management of railroad trains and of common experience." "Where the facts are undisputed, the question whether they amount to negligence or not may be one of law or fact." *Pierce, Railroads*, 315.

"We agree that it is the province of the jury to . . . declare the law on the facts as found. In some cases the question of negligence may be determined by the court on the facts found or admitted. . . . Where, from the facts found or agreed upon, the question of negligence is one about which reasonable minds may differ, it should be left to the jury to make the deduction from all the circumstances to determine the ultimate fact." *Tabler v. Hannibal & St. J. R. Co.*, 93 Mo. 79, 11 West. Rep. 458.

"If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but, if reasonable minds may differ as to the conclusion to be drawn from the given facts, then the question of negli-

gence must be determined from all the surrounding circumstances. The question of negligence then becomes one of mingled law and fact and must be determined by the jury." *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62.

"If the facts are such that all reasonable men would be likely to draw from them the same inferences, the question of negligence is one of law for the court; but, if they might differ as to the conclusion, the question is one of fact for the jury." *Pierce, Railroads*, 316.

These quotations from the authorities define as well as may be the limit upon the power of the court to declare when an act is negligent. Reasonable minds might well differ as to whether a railroad company was guilty of negligence in not having a watchman stationed at a particular crossing, because the stationing of watchmen at all crossings is not the common and usual means of warning adopted by prudent railroad companies; hence it was error for the court to declare, as matter of law, that the absence of such watchman was negligence, as was held in *Welch v. Hannibal & St. J. R. Co.*, 73 Mo. 451. But it is not possible that reasonable minds could come to any other conclusion than that the failure of those having in charge a passenger train, running through a populous country at the rate of twenty-five miles an hour, approaching a crossing near the suburbs of a city, in the night-time, on a dark

which he is exposed, is charged with a knowledge of them; and his failure to act upon that knowledge as a prudent and cautious man would act under like circumstances is negligence which, notwithstanding the negligence of the defendant, will defeat a recovery. *Glascock v. Central Pac. R. Co.* 73 Cal. 137.

If the injured party, by looking up the track in the direction of the approaching train, could have seen it in time to have avoided the injury, his omission to do so was negligence. *Mynning v. Detroit, L. & N. R. Co.* 7 West. Rep. 337, 64 Mich. 93.

If one is injured at a railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and if this presumption is not repelled, a recovery for the injury cannot be had. *Chase v. Maine Cent. R. Co. supra*.

If the plaintiff at the time of crossing the track could have heard the train, seen the smoke of the engine and have avoided the collision by not attempting to cross or by urging her horse out of a walk, defendant was not liable though signals required by the St. Louis Ordinance of January 22, 1877, were omitted. *Neler v. Missouri Pac. R. Co.* (Mo.) 4 West. Rep. 597.

One who is approaching a railroad with a team, knowing that a train is coming, but not the direction it is running, and is unable to have a view of the track in one direction, is negligent in attempting to cross the track, unless he exercises sufficient care to determine that the train is not on the part of the track concealed from his view, within a distance which would deter a man of ordinary prudence from attempting to cross the track. *Griffin v. Chicago, R. I. & P. R. Co.* 83 Iowa, 633.

The fact that a train is behind time and is running faster than its usual speed does not excuse one attempting to cross the track from exercising all the care and caution required of him when the train

is on time and running at its usual rate of speed. *Cincinnati, I. St. L. & C. R. Co. v. Howard (Ind.)* 3 L. R. A. 593.

Rule in Missouri, as to right to recover.

If plaintiff or deceased was guilty of negligence contributing directly to the injury he cannot recover although the negligence of the defendant is conceded. *Huelsenkamp v. Citizens R. Co.* 84 Mo. 45; *Matthews v. St. Louis G. & E. Co.* 59 Mo. 474; *Taylor v. Missouri Pac. R. Co.* 8 West. Rep. 270, 86 Mo. 457; *Bell v. Hannibal & St. J. R. Co.* 4 West. Rep. 391, 86 Mo. 599; *Spiva v. Osage Coal & Min. Co.* 4 West. Rep. 82, 88 Mo. 68; *Sullivan v. Hannibal & St. J. R. Co.* 4 West. Rep. 454, 88 Mo. 160; *Harris v. Hannibal & St. J. R. Co.* 5 West. Rep. 412, 89 Mo. 233; *Thorpe v. Missouri Pac. R. Co.* 6 West. Rep. 671, 89 Mo. 650; *Yancey v. Wabash, St. L. & P. R. Co.* 13 West. Rep. 250, 93 Mo. 423; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 160; *Loeffler v. Missouri Pac. R. Co.* 96 Mo. 297; *Williams v. Kansas City, S. & M. R. Co.* Id. 275; *Erwin v. St. Louis, I. M. & S. R. Co.* Id. 230; *Schlereth v. Missouri Pac. R. Co.* Id. 509; *Curley v. Missouri Pac. R. Co.* 98 Mo. 13; *Barker v. Hannibal & St. J. R. Co.* 98 Mo. 50; *Evans & H. F. R. Co. v. St. Louis & S. F. R. Co.* 17 Mo. App. 624.

But where, after the negligence of plaintiff, or deceased, defendant might have avoided the injury by the exercise of proper care, plaintiff may recover. *Morrissey v. Wiggins Ferry Co.* 43 Mo. 380; *O'Flaherty v. Union R. Co.* 45 Mo. 70; *Rine v. Chicago & A. R. R. Co.* 3 West. Rep. 800, 88 Mo. 393; *Bergman v. St. Louis, I. M. & S. R. Co.* 4 West. Rep. 594, Id. 678; *Kelm v. Union R. & T. Co.* 7 West. Rep. 144, 90 Mo. 34; *Dunkman v. Wabash, St. L. & P. R. Co.* 10 West. Rep. 396, 95 Mo. 23; *Kelly v. Union R. & T. Co.* 14 West. Rep. 721, 95 Mo. 279; *Guenther v. St. Louis, I. M. & S. R. Co.* 14 West. Rep. 735, 95 Mo. 226; *Williams v. Kansas City, S. & M. R. Co.* 96 Mo. 275; *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 113.

night, to have the head-light of the engine lighted and burning, was an act of negligence. This is a common and necessary means adopted by all railroad companies for the protection alike of those rightfully on the train, and on the track, or approaching it, in the night-time. No engine is constructed without such a light, and no train is run in the night-time by any railroad company, under any ordinary circumstances, without having it lighted. This is a fact known to all reasonable minds by common experience, and the court committed no error in declaring that it was negligence if the defendant's servants failed to have such light lighted and burning at the time of the collision. It is the duty of those approaching a railroad track at a public crossing in the night-time to look that they may see an approaching train, and the corresponding duty is imposed upon the employes of the railroad company to have the light burning, by means of which the approach of the train may be seen by those whose duty it is to look.

8. The last objection urged against the instructions is that the damages to be assessed

are fixed by the court at the sum of \$5,000. There was no error in this. By statute, that sum is fixed as the damages to be given "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé whilst running, conducting or managing any locomotive, car or train of cars." Rev. Stat. 1879, § 2121. The negligence in this case was that of the employes of the defendant in failing to give the statutory signal, or in failing to have the head-light lighted and burning. Either was negligence of the employes "whilst running, conducting or managing any locomotive, car or train of cars;" and in the application of this section "it can make no difference whether the negligence resulting in death is a breach of a statutory or a common-law duty." *Crumpley v. Hannibal & St. J. R. Co.* 98 Mo. 34; *King v. Missouri Pac. R. Co.* 98 Mo. 235.

Finding none of the errors assigned well taken, the judgment is affirmed.

All concur, except **Barclay, J.**, not sitting.

INDIANA SUPREME COURT.

John M. CONGER *et al.*, *Appts.*,

v.

Louisa LOWE *et al.*

(....Ind....)

1. A condition may be attached to the right to enjoy a devised estate the non-

performance of which will give the property to another if there is vested in him a valid remainder or reversion of which the taking effect in possession is contingent upon the event which defeats the precedent estate, and he is entitled to take advantage of the prohibited act.

2. When an estate is given to one for life with the remainder to his heirs, the law by

Norm.—Claimant under will must accept its provisions as a whole.

One claiming under a will must accept its provisions as a whole or not at all. *Wooley v. Schrader*, 8 West. Rep. 422, 116 Ill. 29; *Brown v. Pitney*, 39 Ill. 423.

There is an implied condition that he who accepts a benefit under a will shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it. *Ditch v. Sennott*, 5 West. Rep. 122, 117 Ill. 322; 1 Jarman, Wills, 386.

One not an heir can take only upon the condition expressly created by the will; and where that condition fails, the claim under the devise fails. *Gibson v. Seymour*, 1 West. Rep. 251, 102 Ind. 438.

Distinction between words of limitation and words of condition.

Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation. *Summit v. Yount*, 6 West. Rep. 923, 109 Ind. 503.

The one specifies the utmost time of continuance, and the other marks some event which, if it takes place in the course of that time, will defeat the estate. *Ibid.*; 4 Kent, Com. 123.

The word "proviso" is an appropriate one to constitute a common-law condition in a deed or will; but it has frequently been applied as expressing simply a covenant or limitation in trust. *Stanley v. Coit*, 73 U. S. 5 Wall. 119, 18 L. ed. 502.

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In the sentence, "I will and bequeath to my wife all my estate, both real and personal, so long as she remains my widow," the words "so long as she remains my widow" are in the strictest sense words of limitation, and not of condition, and are not within the purview of Rev. Stat. 1881, § 2537, declaring that "a devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void." The words specify the widowhood of the devisee as the utmost time of continuance of the estate devised to her; and they do not mark or indicate any event the occurrence of which in the intermediate time will defeat such estate. *Summit v. Yount*, 6 West. Rep. 921, 109 Ind. 506; *Harmon v. Brown*, 58 Ind. 207.

If a man desires to devise his wife an estate for life or in fee, and so expresses himself in his will, and makes it dependent upon the condition that she should not marry, the condition will be regarded as in *terrorem* and void. Such condition will not cut down an estate to a period less than that to which it is limited. *Summit v. Yount*, *supra*.

Conditions precedent.

If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition is precedent; and unless it is performed the devisee can take nothing. *Finlay v. King*, 28 U. S. 8 Pet. 346, 7 L. ed. 701.

A devise to A on condition that he shall marry B, if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marries B at any time during his life. *Ibid*.

In this country a condition which is reasonable

an arbitrary rule vests the whole estate in the ancestor.

3. The word "heirs," when found in a will, will be construed as a word of limitation, even although the testator's intention may be thereby frustrated, unless it clearly appears from the context that the word was not used as a word of limitation but of purchase.

4. Where an estate is devised to one for life upon a condition, with remainder, in case of his death or refusal to comply therewith, to his "lawful heirs," the words "lawful heirs" will be construed as synonymous with "children" and as being words of purchase, and the entire estate will not unite in the ancestor; but in case he fails to comply with the condition his children will be entitled to the estate.

(June 21, 1890.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Fulton County sustaining a demurrer to the complaint in an action brought to recover possession of certain real estate. *Reversed.*

The facts are fully stated in the opinion.

Messrs. James H. Bibler and Holman & Stephenson for appellants.

Messrs. Rowley & Baker and Essick & Montgomery for appellees.

Mitchell, J., delivered the opinion of the court:

The controversy here is over the construction of a clause in the last will and testament of Lewis B. Conger, late of Fulton County, deceased, which reads as follows: "My be-

loved wife Hannah is to have and to hold the two above-described pieces of land during her lifetime. At her decease I will, devise and bequeath the same to my son Samuel M. Conger, during his natural lifetime, provided, he will live on and occupy the same. At his death or his refusal to live on or occupy the same, then and in that case, as well as at the said Samuel M. Conger's death, I will, devise and bequeath the same to the said Samuel M. Conger's lawful heirs."

The testator died in 1874, and at the time of his death his son Samuel M. Conger had four children living, born in lawful wedlock. Others have been born to him since. The testator's widow died in 1880. Upon the death of his mother, Samuel M. took possession of the farm devised to him as above, and occupied it with his family until the 21st day of May, 1886, when he conveyed it by warranty deed to Louisa Lowe, wife of Peter D. Lowe, since which time he has ceased to live upon or occupy the land.

This suit is by the children of Samuel M. Conger, who is still in life, their claim being that under the will of their grandfather the title vested in them and that they became entitled to the possession when their father abandoned and conveyed away the farm.

It is abundantly clear that the purpose of the testator was, (1) to create an estate for life in his widow, with a remainder over for life to his son Samuel M.; and, (2) to limit the fee over to the "lawful heirs" of his son, the limitation over to take effect in possession, either upon the refusal of his son to

as a condition against disputing one's will, as being in conformity to good policy in prevention of litigation, will be held valid and binding. 2 Redf. Wills, chap. 2, § 13, pl. 84; Cooke v. Turner, 14 Sim. 493.

"If any or either of my children shall enter a caveat against this, my will, he or they shall pay all expenses of both sides," is a good condition in a will, without a gift over, against a devisee taking real estate under the will. *Holt v. Holt*, 5 Cent. Rep. 800, 42 N. J. Eq. 388.

A condition precedent that a provision in favor of a *caveat que trust* shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with the limitation over to another person, are valid. *Nichol v. Levy*, 72 U. S. 6 Wall. 493, 18 L. ed. 596.

The court will not construe a condition imposed by the testator as a condition precedent, where the performance of it is liable to be made impossible by the act of God, or inevitable accident, without fault on the part of the legatee or devisee, if at the same time it appears that the testator designed to make the gift depend upon the option of the beneficiary to be exercised under the circumstances existing when the will was made, and not upon events over which he had no control. *Deorow v. Moody*, 73 Me. 103; *Aislable v. Rice*, 3 Madd. 266, 3 Taunt. 459, 4 E. C. L. 166-171; *Burchett v. Woolward*, 1 Turn. & R. 442; *Merrill v. Emery*, 10 Pick. 507; *Finlay v. King*, 28 U. S. 3 Pet. 346, 7 L. ed. 701; *Hughes v. Edwards*, 22 U. S. 9 Wheat. 489, 6 L. ed. 142; 2 Story, Eq. Jur. § 1804.

Conditions precedent and subsequent. See *note* to *Phillips v. Ferguson* (Va.) 1 L. R. A. 837.

Conditions subsequent.

If the act does not necessarily precede the vesting of the estate, but may accompany or follow it, 9 L. R. A.

if this is to be collected from the whole will, the condition is subsequent. *Finlay v. King*, 28 U. S. 3 Pet. 346, 7 L. ed. 701.

Conditions subsequent as to gifts of personalty are, in accordance with the rule of the civil law, held to be void, *in terrorem* merely, if there be no gift over; but if there be a gift over, the condition is good, such gift over being sufficient evidence that they were not meant to be *in terrorem* only. It has also been held that this doctrine of the necessity of a gift over has never been applied to devises of real estate. *Holt v. Holt*, 5 Cent. Rep. 801, 42 N. J. Eq. 388; *Bradford v. Bradford*, 19 Ohio St. 548; *Chew's App.* 45 Pa. 223; *Powell v. Morgan*, 3 Vern. 90; *Loyd v. Spillet*, 3 P. Wms. 344; *Morris v. Burroughs*, 1 Atk. 404; 2 Redf. Wills, 298, § 34; *Theob. Wills*, 452-456; 2 Wms. Exrs. 1146; *Jarman, Wills*, R. & T. ed. 582.

Where a devisee takes real estate at the expiration of a life estate, upon condition that he maintains the life tenant and provides for her decently, from the proceeds of the real estate or otherwise, and for that purpose he is authorized to use the real estate by farming the same, and in case of his failure to provide for the life tenant, she is empowered to call on the selectmen to provide for her, in her own house, he takes the estate upon condition subsequent. *Birmingham v. Lessan*, 1 New Eng. Rep. 280, 77 Me. 494.

If he fails to perform the condition subsequent, the heirs of the deviser have a right to create a forfeiture by an entry therefor, although the will contained no clause to that effect. Such a forfeiture cannot be enforced by proceedings in equity. *Ibid.*; *Thomas v. Record*, 47 Me. 500; 4 Kent. Com. 123; *Story*, Eq. § 1819; *Smith v. Jewett*, 40 N. H. 534.

Where a condition subsequent is broken, relief may be given upon equitable terms; but where it is precedent, and neither fulfilled nor waived,

occupy the land, or upon his death. Shortly expressed, the devise was to Samuel M. Conger for life, upon condition that he occupy the estate, with a limitation over in fee to his "lawful heirs," to take effect upon the death or upon the refusal of the life tenant to occupy.

A preliminary inquiry arises concerning the validity and effect of the condition, which makes, or attempts to make, the precedent life estate of Samuel M. defeasible upon his failure or refusal to occupy the land. The purpose and practical effect of the condition was to impose a restraint upon the power of the life tenant to alienate his estate in the land, either voluntarily or involuntarily. Surely, if the continuance of his estate depended upon his taking and remaining in possession during his lifetime, his power to sell was effectually restrained, for of what value was the right to sell if the estate sold was defeated the moment the vendor put the purchaser into possession. It is a settled rule in the law, that conditions in conveyances or devises in fee, in general restraint of the power of alienation, are void, as being contrary to the policy of the law, and inconsistent with and repugnant to the estate granted. *Allen v. Craft*, 109 Ind. 476, 7 West. Rep. 512; *Mandlebaum v. McDonald*, 29 Mich. 78, 18 Am. Rep. 71; *McCleary v. Ellis*, 54 Iowa, 811, 27 Am. Rep. 205, 20 Am. Law Reg. 180, and *note*; *DePeyster v. Michael*, 6 N. Y. 487; 1 Lead. Cas. Real Prop. 180; 6 Am. & Eng. Encyclop. Law, 877.

Where, however, an estate for life or years

is created, with a reversion to the grantor, or a valid remainder over to designated persons, conditions imposing restrictions and qualifications upon the power to alienate or use the estate are valid and maintainable upon reason and authority. Even estates in fee simple may be subjected to valid limitations over and be made defeasible or subject to forfeiture, upon condition that the grantee or devisee uses or fails to use the estate in a particular way, or for a particular purpose, or conveys it to a certain person or to any person whatever, or allows it to be sold on execution, or to become incumbered or the like.

Where a precedent estate is made defeasible upon the happening of a certain event, which event also marks the taking effect in possession of a valid limitation over, the happening of that event puts an end to the precedent estate and gives the right of possession to the person in whom the remainder or reversion is vested. The foundation of the power to restrain alienation rests upon the fact that there remains or is vested in someone a valid remainder or reversion, whose estate in possession is contingent upon some event which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use. *Harmon v. Brown*, 58 Ind. 207; *O'Harrow v. Whitney*, 85 Ind. 140; *Mandlebaum v. McDonald* and *DePeyster v. Michael*, *supra*.

If, then, it shall be found that the devisee created an estate for life in Samuel M. Conger, defeasible upon the condition that he

equity can do nothing for the party in default. *Giddings v. Northwestern Mut. L. Ins. Co.* 102 U. S. 103, 25 L. ed. 32.

The breach of the condition does not *ipso facto* produce a reverter of the title. The estate continues in full force until the proper step is taken to consummate the forfeiture. This can be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. *Ruch v. Rock Island*, 97 U. S. 603, 24 L. ed. 1101; *Davis v. Gray*, 58 U. S. 16 Wall. 203, 21 L. ed. 447; *Schulenberg v. Harriman*, 38 U. S. 21 Wall. 44, 23 L. ed. 551; *Schow v. Harriman*, 22 U. S. 1 Led. 555, not elsewhere reported.

The person to whom lands are devised over on breach of a condition subsequent on which his right depends is the only person who can, by an entry, take advantage of the condition subsequent. *Webster v. Cooper*, 55 U. S. 14 How. 483, 14 L. ed. 510.

The rule at law is that, if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate, once vested, is not thereby divested, but becomes absolute. But equity may apply this rule in the interests of justice merely to the extent of enlarging the time for performance, where it has been hindered at the time when it should have been executed. *Davis v. Gray*, 58 U. S. 16 Wall. 203, 21 L. ed. 447.

A condition annexed to an estate, if broken, forfeits the estate, and the heirs become seised of the estate free from intermediate charges and incumbrances. *Stanley v. Colt*, 73 U. S. 5 Wall. 119, 18 L. ed. 502.

Conditional devises; operation and effect.

Where real estate is devised upon condition that devisee pay a certain annuity, the annuity becomes a charge upon the estate devised, which equity will

¶ L. R. A.

enforce. *Merritt v. Bucknam*, 8 New Eng. Rep. 270, 78 Me. 504; *Bugbee v. Sargent*, 23 Me. 200; *Merrill v. Bickford*, 65 Me. 118; 8 Pom. Eq. Jur. 244.

Where a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. *Brown v. Knapp*, 79 N. Y. 143; *Dodge v. Manning*, 1 N. Y. 208; *Reynolds v. Reynolds*, 16 N. Y. 207; *Gridley v. Gridley*, 24 N. Y. 130; *McLauchlan v. McLauchlan*, 9 Paige, 534, 4 N. Y. Ch. L. ed. 806; *Harris v. Fly*, 7 Paige, 421, 4 N. Y. Ch. L. ed. 213; *Mensch v. Mensch*, 3 Lans. 236; *Wood v. Wood*, 23 Barb. 356; *Olmstead v. Brush*, 27 Conn. 530; *Birdsall v. Hewlett*, 1 Paige, 82, 2 N. Y. Ch. L. ed. 550.

Where a devise is expressly made to depend upon the happening of a given event, it excludes the inference that it was intended to be an absolute devise. *Gibson v. Seymour*, 1 West. Rep. 251, 102 Ind. 483.

Where a gift is made to two, subject to a condition that if both die without issue before the day of payment the subject of the gift shall revert to the testator's estate, no reverter will occur unless both die without issue before the day of payment. *Neilson v. Bishop*, 45 N. J. Eq. 473.

Where land is given to a *cestui que trust* during life upon condition of performing certain covenants, a subsequent provision that at the *cestui que trust's* death the land shall go to the heirs forever gives the remainder in fee to them subject to the covenants. *Little v. Wilcox*, 11 Cent. Rep. 850, 119 Pa. 430.

A devise of land on condition that the devisee come and live with the testator's sister, to be under her sole guidance and guardianship, until he shall arrive at the age of twenty-one years, is intelligible and lawful; and where the estate is devised over to others in case the condition is not complied with, the fact that the sister was satisfied to waive the

refused to occupy, with a valid reversion or remainder over in fee to persons who are entitled to take advantage of the condition, it must follow that the condition was valid and enforceable. In that event creditors, purchasers, all persons dealing with the land, were chargeable with notice of the will and of the defeasible character of the estate of the devisee and of the fact that it was limited over to others to take effect upon the refusal of the life tenant to occupy. We adopt the language of *Mr. Justice Miller in Nichols v. Eaton*, 91 U. S. 716 [28 L. ed. 254], wherein the learned justice says: "Nor do we see any reason, in the recognized nature and tenure of property, and its transfer by will, why a testator who gives,—who gives without pecuniary return; who gets nothing of property value from the donee,—may not attach to that gift the incident of continual use, of uninterrupted benefit of the gift during the life of the donee. Why a parent, or one who loves another and wishes to use his own property in securing the object of his

affection, so far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived." *Cowell v. Colorado Springs Co.* 100 U. S. 55 [25 L. ed. 547]; *Woodworth v. Payne*, 74 N. Y. 196.

As a matter of course, all that has preceded depends upon whether or not the will creates a life estate, with a valid remainder over in fee. If, as is contended, Samuel M. Conger took an estate in fee, within the rule in *Shelley's Case*, then the condition is void, because no one can create an estate that in law constitutes a fee, and then deprive the owner of those essential rights and privileges which the law annexes to it, without reserving a reversion to himself, or to someone in whom the right to insist upon the condition is vested.

It is proper now to examine the scheme that the testator had in his mind, and to which he desired to give effect in his will, so as to ascertain if possible whether the

condition is not material. *Johnson v. Warren*, 74 Mich. 491.

How. Stat., § 5562, providing that merely nominal conditions annexed to a grant or conveyance may be disregarded, can have no reference to devises. *Ibid.*

A provision that the income of the estate, and further sums as her wants demand, shall be given to a married woman during her marriage relation with her husband, but, that relation ceasing by death of her husband or otherwise, the whole estate shall go to the legatee, is a valid condition. *Thayer v. Spear*, 1 New Eng. Rep. 336, note, 58 Vt. 327.

A condition on which a devise is made is gone forever when once performed. *Manifold v. Jones*, 117 Ind. 212.

No heir, under Spanish law, can claim a devise without performing a condition annexed to it. *Meegan v. Boyle*, 60 U. S. 19 How. 130, 15 L. ed. 577.

A condition that the legatee shall preserve the property for or return the same to a third person is null; but a disposition by which a third party is called to take the gift in case the donee does not take it is valid, and so is a disposition by which the usufruct is given to one and the naked property to another. *Williams v. Western Star Lodge*, 38 La. Ann. 620.

When a condition contrary to law or public policy, as that a person filing caveat shall pay costs, is imposed upon a devise, the devise may be sustained, although the condition fail. *Hoit v. Hoit*, 2 Cent. Rep. 199, 40 N. J. Eq. 478.

A condition in a will creating a substitution in favor of the children of a testator, that only those who profess the Protestant religion shall be entitled thereto, is void. *Kimpton v. La Compagnie du Chemin de Fer du Pacifique Canadien* (Super. Ct.) 4 Montreal L. Rep. 338.

Enforcement of condition.

Where a legacy or devise is given upon a condition, either express or implied, the legatee or devisee cannot in equity be permitted to take the benefit thereof without performing the condition upon which it is given. And if he receives the legacy, or enters into possession of or disposes of the property devised without previously performing the condition, this court will compel him to perform it. *Leonard v. Crommelin*, 1 Edw. Ch. 206, 6 N. Y. Ch. 9 L. R. A.

L. ed. 412; *Spofford v. Manning*, 6 Paige, 383, 3 N. Y. Ch. L. ed. 1030.

If a release or discharge of any kind is necessary to carry out the will of the testator and give effect to the conditions annexed to a gift, the donee will be compelled to execute the proper instrument. *Chamberlain v. Chamberlain*, 43 N. Y. 443; *Spofford v. Manning*, 6 Paige, 383, 3 N. Y. Ch. L. ed. 1030; *Earl of Northumberland v. Marquis of Granby*, 1 Eden, Ch. 489; *Earl of Northumberland v. Aylesford*, 2 Amb. 640, 657.

Devise of life estate to wife.

A will giving testator's wife all his estate, real and personal, "during the whole period of her natural life," and after her death giving all such property, "or so much thereof as may remain unexpended," to his children, gives her only a life estate in the real property. *Cox v. Sims*, 125 Pa. 522.

Where testator gives all his real estate to his wife for her life, and on her death "to be divided equally" among the heirs of his body, those who were alive at his death take a vested interest, and not those only who survive the tenant for life. *McDaniel v. Allen*, 64 Miss. 417.

A devise without words of inheritance, expressly declaring the estate "to be enjoyed" by the devisee "as long as she lives," and that her husband is not to have any estate by the curtesy therein, with devise over to children of the devisee if she shall have any, creates an estate for life with remainder over to the children. *Wilson v. O'Connell*, 6 New Eng. Rep. 314, 147 Mass. 17.

A devise to a wife "to be held and enjoyed by her as her own," providing that at her death it should be given "to our adopted daughter absolutely," gives the wife only a life estate. *Munro v. Collins*, 13 West. Rep. 663, 95 Mo. 23.

Where real and personal property was given to the widow during life to use, with a direction that all the property unused or undisposed of should go to others, the life estate is not enlarged. *Logue v. Bateman*, 9 Cent. Rep. 484, 43 N. J. Eq. 431.

Devises and bequests of life estate. See notes to *McCullough v. Anderson* (Ky.) 7 L. R. A. 836; *Trumbull v. Trumbull* (Mass.) 4 L. R. A. 117.

Devise and bequest of use of estate; bequest for life only. See notes to *Peckham v. Lego* (Conn.) 7 L. R. A. 419.

"Heirs" construed. See notes to *Johnson v. Knights of Honor* (Ark.) 8 L. R. A. 753.

phrase "lawful heirs" was used in the popular or technical sense. If it was the intention that the lawful heirs of Samuel M. Conger should take the estate from their father by descent, after the termination of his life estate, then the whole estate must have vested in him. When an estate is given to one for life, with the remainder to his heirs, the law by an arbitrary rule vests the whole estate in the ancestor. *Sicclaff v. Redman*, 26 Ind. 257; *Klepper v. Laverty*, 70 Pa. 70; 6 Am. & Eng. Encyclop. Law, § 379.

The rule is an unbending one, that if an estate be given as an immediate remainder to the heirs of one in whom an interposed estate is vested, the whole estate is united and vests as an executed estate of inheritance in the ancestor, upon the principle that the inheritance cannot be greater than the estate vested in the ancestor. *Doebler's App.* 64 Pa. 9.

The rule that the word "heirs," when found in a will, will be construed as a word of limitation, and not of purchase, unless there be explanatory words clearly showing that it was used in a popular or restricted sense, admits of no exception, and when the word is used as a word of limitation it is wholly immaterial that the testator's intention may be frustrated by the application of the rule. *Allen v. Craft*, *supra*, and cases cited.

It is only when it clearly appears from the context that the word was not used as a word of limitation, but of purchase, that the rule will not be permitted to defeat the manifest intent of the testator. When the intention to use a word, supposed to be a word of limitation, as a word of purchase, unmistakably appears in the will, the rule has always yielded to the clear intention of the testator. *Belzay v. Engel*, 107 Ill. 182; *Millett v. Ford*, 109 Ind. 150, 6 West. Rep. 424.

The rule in *Shelley's Case* is not regarded as a device to discover the testator's intention. It is only applied after his intention has been discovered, when, by its own inexorable force, it unites in the ancestor any estate which his heirs are to take as such, after a precedent estate given to him, no matter what the purpose of the testator may have been.

It should be remembered that there is a material and controlling distinction between a devise of an estate to a person named and his lawful heirs, and a devise to the lawful heirs of a person named; and the fact should be kept in view that the devise under consideration falls within the latter class. Thus in *Simms v. Garrot*, 1 Dev. & B. Eq. 393, where a bequest of personal property was made to a person during her natural life, and at her death to her lawful heirs, it was held that a legacy to the lawful heirs of a person living is equivalent, as a description, to a legacy to his next of kin, or to his children. *Shimer v. Mann*, 99 Ind. 190; *Darbyson v. Beaumont*, 1 P. Wms. 229.

Where the devise is made directly to the heirs of a person living, since no one can be heir to the living in the technical sense, there would be no one capable of taking the estate devised, except by construing the word

"heirs" to mean kinsmen or children. Where the devise is to a person and his lawful heirs, no such obstacle is encountered.

The language employed in the will under consideration makes it certain that the persons referred to therein as Samuel M. Conger's lawful heirs were to take under the will directly from the testator, and not by descent from Samuel M. Conger, as heirs. The testator declared in terms that cannot be mistaken that upon the death of his son, or upon his refusal to occupy or live on the farm, "I will, devise and bequeath the same to the said Samuel M. Conger's lawful heirs." It is clearly apparent that the testator contemplated that the persons designated as "lawful heirs" should be persons in being before the death of Samuel M. Conger, because not only the title, but the possession of the estate in remainder over, was to vest in them by the terms of the will, as well upon the failure or refusal of his son to occupy the farm as upon his death. Uncontrolled by the context, the phrase "lawful heirs" would designate those persons who, under the Statute of Descents, would succeed to the property in case the testator's son should die intestate. But there was a contingency provided for in the will upon which the remainder over was to take effect before the death of his son, and it is therefore absolutely certain that the testator did not use the phrase for the purpose of designating the whole class of lineal or collateral relatives, who, at the death of his son, might fall within that denomination. It is true that the word "heirs," unless other parts of the will imperative require it, is to be taken as having been used in its technical sense, yet, when to use it in that sense renders the general purpose and intent of the will insensible under any rule of law, and defeats the manifest purpose of the testator, the circumstances are persuasive that the testator must have used the word to designate some other class of persons than those technically denominated heirs. When it becomes manifest that it was used as a synonym for children, or in some modified sense, the rule in *Shelley's Case* will not be applied to overturn the testator's intentions. *Underwood v. Robbins*, 117 Ind. 308; *Millett v. Ford*, 109 Ind. 159, 6 West. Rep. 424; *Ridgeway v. Lanphear*, 99 Ind. 251.

As is pertinently said in *Daniel v. Wharfenby*, 84 U. S. 17 Wall. 639 [21 L. ed. 661]: "But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

As we have already seen, it is clear that the phrase "lawful heirs" could not have been used by the testator to designate those who should succeed to his son's estate upon his death. To give it such a construction would render nugatory and meaningless the provision that the estate was devised to the lawful heirs of the life tenant, in case the latter refused to occupy it. The will is therefore to be read as if the word "children" had been used instead of heirs. The conclusion follows that upon the death of the testator

Samuel M. Conger took a life estate in the land in controversy, which was defeasible upon condition that he refused to live upon or occupy the estate, and that the will created a vested remainder over in fee in his children, to take effect in possession upon the termination of the estate of their father. Upon the death of the testator the remainder in fee vested in the children then living, subject, however, to open and let in after-born children, who should be born in lawful wedlock during the lifetime of their father. *Surden v. Cornell*, 116 N. Y. 805; *Monarque v. Monarque*, 80 N. Y. 320.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with costs.

STATE OF INDIANA, *Appl.*,

v.

HIRSCH.

(....Ind....)

1. A primary election is within the letter and spirit of Rev. Stat. 1881, § 2098, prohibiting the sale of intoxicating liquors in quantities less than a quart on "the day of any election."
2. In considering Rev. Stat. 1881, § 2098, prohibiting the sale of intoxicating liquors in quantities less than a quart on the day of any election, the next section, prohibiting sales by druggists upon the day of any state, county, township, primary or municipal election, is to be taken as showing the meaning of the words "any election."
3. Courts will take judicial knowledge of the fact that primary elections have grown to be an essential part of our political system.

(*Elliott and Coffey, JJ., dissent.*)

(June 24, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Randolph County quashing an indictment for an alleged illegal sale of intoxicating liquors. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. L. T. Michener, Atty-Gen., and James B. Ross for appellant.

Messrs. L. W. Norton and J. S. Engle for appellee.

Olds, J., delivered the opinion of the court:

The defendant was indicted under § 2098, Rev. Stat. 1881, for selling intoxicating liquors at the Town of Winchester, on the day of a primary election in the Town of Winchester, Township of White River, in the County of Randolph, and State of Indiana, held by a political party for the election of candidates for various offices to be voted for at the next general election. The defendant moved to quash the indictment, and the court sustained the motion and quashed the indictment, to which ruling of the court the State at the time excepted, and prosecuted this appeal, and assigns such ruling as error. The question involved is whether or not it is a crime for a person having a license under § 1 R. A.

the law to sell intoxicating liquors in a less quantity than a quart at a time on the day of a primary election held by a political party to select, by primary election, candidates to be voted for at a general election. No objection is made as to the form of the indictment.

Section 2098, Rev. Stat. 1881, is as follows: "Whoever shall sell, barter or give away, to be drunk as a beverage, any spirituous, vinous, malt or other intoxicating liquor upon Sunday, the 4th day of July, the 1st day of January, the 25th day of December (commonly called Christmas Day), Thanksgiving Day, as designated by proclamation of the governor of this State or the President of the United States, or any legal holiday, or upon the day of any election in the township, town or city where the same may be holden, or between the hours of 11 o'clock P. M. and 5 o'clock A. M., shall be fined," etc.

This section of the Statute makes it a crime to sell, barter or give away, to be drunk as a beverage, intoxicating liquors upon the day of any election in the township, town or city. This section, as will be seen, does not designate any particular election, or what elections are included within its provisions, and we are therefore compelled to look beyond the section to determine what is meant by, or what elections are included within, the words "any election." It is contended by counsel for appellee that the words mean all legal elections, or all elections authorized or regulated by law, and that we cannot look to the other sections of the law to ascertain what was meant by the Legislature in the use of these words. This theory of construction would give the section a much wider scope than is contended for by counsel for the appellant. There are many elections authorized and regulated by law. But it is manifest that it was not contemplated by this Act to prohibit the sale of intoxicating liquors upon the day on which they may be held. The Statute provides (§ 4424, Rev. Stat. 1881) that the township trustees of the several townships of each county shall meet on the first Monday of June of each year, and elect a county superintendent. Such an election is as much an election within the town where the same may be holden as an election for any other county, township, town or city officers; and, if we construe the words "any election" to mean any legal election or election authorized by law for the election of an officer, or accept the words in their ordinary sense without looking to the other sections of the same Act to ascertain their meaning, it would manifestly include the day fixed by law for the election of a county superintendent, and it would constitute a crime to sell intoxicating liquors upon that day within the township, town or city where such election is holden; but we think it was not intended to prohibit the sale of liquors upon the day of such election, and that the Statute will not warrant any such construction.

It is contended that the Statute relating to criminal offenses must be strictly construed, and that we can only look to the particular sec-

tion defining the offense to ascertain its meaning; that to constitute a crime the act done must both come within the letter and spirit of the language used. This is true in a limited sense, but in giving this section a strict construction, primary elections come within both the letter and spirit of the language used. The word "election" is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place and manner prescribed by law.

The Century Dictionary (vol. 2) defines "election" to mean "a deliberate act of choice; particularly a choice of means for accomplishing a given end; the choice of a person or persons for office of any kind by the voting of a body of qualified or authorized electors. The persons voted for are called candidates, or, with reference to their selections as candidates, nominees."

Rapalje & Lawrence's Law Dictionary gives the words "primary election," and defines it to be "a popular election, held by members of a particular political party for the purpose of choosing delegates to a convention empowered to nominate candidates for that party, to be voted for at an approaching election."

In Worcester's Dictionary the word "election" is defined as "the act of electing or choosing; power of choosing; free choice; preference; selection." The same author defines the word "primary" to mean "first in time; original; primitive; first."

In Webster's Dictionary the word "election" is defined as meaning "the act of choosing; choice; the act of selecting one or more from others; the act of choosing a person to fill an office or employment by any manifestation of preference, as by ballot, uplifted hands, or *viva voce*," and the same author defines the word "primary" to mean "first in order of time or development; original; first in order; preparatory to something higher."

Under our form of government we have a well-defined system of choosing or electing officers, regulated by law. There exists equally as well defined and unbroken custom on the part of the various political parties to choose or elect candidates by such parties for the various offices prior to the holding of the election at which they shall be voted for, and the choice made by all the electors of the persons to fill the various offices. There is chosen first a candidate by the members of each political party for each particular office to be filled, to be voted for at the final election.

The respective parties first make choice of candidates, and, secondly, all of the electors make choice between the various candidates, and the words "primary election" well express the choice made by the respective political parties. The words "primary election," we may say, are as well understood to mean the act of choosing candidates by the respective political parties to fill the various offices as the word "election" is to mean the final choice of all the electors of the persons to fill such offices; so that the words "any

election" clearly include primary election, and such elections come within the letter of the Statute. The object and purpose of the Statute were to prevent elections from being influenced by the use of intoxicating liquors, and to put it beyond the power of any person to secure an election to office by the use or influence of intoxicating liquors; and, as it is the first step to an election to an office by all the electors to be chosen as a candidate of some political party at the primary election held by such party, it is manifestly as important to prohibit the sale of intoxicating liquor on the day of a primary election as upon the day of the final election by all the electors; therefore primary elections manifestly come within the spirit as well as the letter of the law. Public welfare demands purity in primary elections at which the candidate is elected, as well as the election at which the officer is chosen to fill the office; and it is but fair to presume that the Legislature intended to remove all improper influences from one as well as the other; and by the use of the words "any election" it was intended to prohibit the sale of intoxicating liquors both on the day of electing or choosing the candidates, as well as the day of electing or choosing the officer.

In the case of *Strasburger v. Burk*, 18 Am. L. Reg. N. S. 607, decided by the City Court of Baltimore, it was held that the principles of public policy which make void all contracts tending to the corrupting of elections held under authority of law, apply equally to what are called primary or nominating elections. In that case *Brown, Ch. J.*, delivering the opinion of the court, says: "The same principles of public policy, therefore, which apply to elections ordained by law must, for the same reasons, be applicable to the primary elections. It is equally injurious to the public whether a man sells his influence with the voters at a primary election or at a legal election; and it is equally corrupting to the voters whether they are treated to beer and cigars to influence their votes at a primary election or at a legal election." In speaking of primary elections the court, in the same case, says: "In fact they have grown to be an essential part of our political system. Imperfect and unsatisfactory and liable to gross abuse as they are, they constitute almost the universal mode by which candidates everywhere are now brought before the people for their suffrages. If they are tainted by fraud or corruption our political institutions are contaminated at their source."

While, as we have stated, primary elections are, as we believe, fairly within both the letter and spirit of the law if section 2098 is given a strict construction, without looking to the other portions of the Act, yet it is a well-recognized rule that, in construing any portion of a statute, that sense of the words is to be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and object of the Legislature; that in construing a statute the whole context is to be considered together, and not construed by parts or sections. Upon the subject of the construction of statutes in

Endlich on the Interpretation of Statutes, in section 329, it is said that "the rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times, when the number of capital offenses was one hundred and sixty or more; when it was still punishable with death to cut down a cherry tree in an orchard, or to be seen for a month in the company of gypsies. But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object." Again, in the same authority (§ 337), it is said: "The rule of strict construction, however, whenever invoked, becomes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and object of the Legislature. [It is said that words descriptive of an offense or its punishment are not to be bent on the one side or the other. They are to be construed by reference to the subject matter and the context,—the apparent policy and objects of the Legislature by the whole context, not by a mere division into sections,—so as to give effect to the objects and intent of the whole, as well as by a comparison of statutes *in pari materia* and consequently the old law, the mischief and the remedy.] The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken [not in their strict technical sense if that would defeat, but in a more popular sense if that will uphold and carry out, the intention of the Legislature, but] in the widest sense, sometimes even in a sense more wide than etymologically belongs to or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use *Lord Coke's* words, to suppress the mischief and advance the remedy. Nor is the rule of strict construction ever violated by permitting the words of a statute to have their full meaning, or by the application of common sense to its terms in order to avoid an absurdity."

And this rule of construction is well supported by other authorities. Keeping closely within the rule, we are furnished an interpretation and construction of the words "any election," and are informed what elections the Legislature had in mind, and upon what days it was intended to prohibit the sale of intoxicating liquors, within the Statute of which said section 2098 is a part, for section 2099 prohibits the sale of intoxicating liquors by druggists or druggists' clerks on Sunday, the 4th day of July, 1st day of January, the

25th day of December, Thanksgiving Day, or any legal holiday, or upon the day of any state, county, township, primary or municipal election in the township, town or city where the same may be holden. Thus the Legislature, in the same Act, have defined what elections it is intended the law shall apply to. There is a little difference in the phraseology of the two sections, but it is manifest, when we construe them together, that they were intended to apply to the same days, and prohibit the sale of intoxicating liquors by all persons on those days. In section 2099, in fixing the days, "Thanksgiving Day" is named without designating by what authority it shall be proclaimed. In section 2098 there are used the words "Thanksgiving Day, as designated by proclamation of the governor of this State, or the President of the United States." It is manifest that Thanksgiving Day, as used in section 2099, includes only such days as are proclaimed as such by the governor of this State, or the President of the United States. To hold that the Legislature intended to prohibit druggists and their clerks from selling intoxicating liquors on the days when primary elections are held within a township, town or city, and to allow all others who have license to sell upon those days, would be an absurdity. When we look to the whole Act to determine what the Legislature intended, we find a well-regulated system in regard to the sale of intoxicating liquor, whereby the sale of it is prohibited by all persons on certain days, viz.: Sunday, the 4th day of July, the 1st day of January, the 25th day of December, Thanksgiving Day, as designated by proclamation of the governor of this State, or the President of the United States, or any legal holiday, or upon the day of any State, county, township, primary or municipal election in the township, town or city where the same is holden. Such we think is clearly the interpretation which should be given to the Statute.

The words "primary election" are well understood as applying to such elections as that described in the indictment in this case,—an election held by the qualified voters of a political party to nominate or elect candidates for various offices. We have no other election to which those words apply, except the election held by political parties to nominate and elect candidates. To hold that the Act does not apply to those elections is to hold that the Legislature used the words where there were no elections to which they could apply; and it is well said in the case of *Strasburger v. Burk, supra*, that "they have grown to be an essential part of our political system," which is a matter of common information of which courts will take judicial knowledge. The Legislature of 1889 passed an Act making it a crime to hire, or use money or other means to influence, voters at primary elections of any political party. Section 1396, Elliott's Supplement, 1889. We refer to this to show that it is a recognized term for elections held by political parties to nominate candidates. It follows from the conclusion we have reached that the

court erred in sustaining the motion to quash the indictment.

Judgment reversed, with instructions to overrule the motion to quash the indictment.

Elliott, J., dissenting:

I think that the omission of the word "primary" in the section of the Statute upon which the indictment is based is one that the courts cannot supply, and that, in the absence of that word, the Statute refers to ordinary elections, that is, elections held under the law and for the choice of officers.

Coffey, J., concurs with **Elliott, J.**

Petition for rehearing overruled September 26, 1890.

John WOOD, Appt.,

v.

Daniel WOOD and Martha J. Wood.

(....Ind.....)

1. A verbal agreement is not sufficient to create a lien upon land in favor of a surety upon a note given to raise the money with which to make payment therefor.

2. A surety on a note for money borrowed to pay for land although he has paid the note, has no equitable lien upon the land for his claim against the principal.

(June 18, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jasper County in favor of defendants in an action brought to enforce an alleged lien upon certain real estate. *Affirmed.*

The facts fully appear in the opinion.

Messrs. Edwin P. Hammond and William B. Austin, for appellant:

As the appellant became the surety of Daniel for the payment of money to be used and

which was used by the latter in the purchase of the real estate conveyed to Martha, under an agreement that appellant was to have an equitable lien upon said real estate to secure him from loss as such surety upon the payment of said debt, appellant became subrogated to the rights of the vendor and thereby acquired a vendor's lien.

See *Dwoenger v. Branigan*, 95 Ind. 221; *Carey v. Boyle*, 53 Wis. 575; *Jones v. Parker*, 51 Wis. 218; *Carey v. Boyle*, 56 Wis. 145; *Barrett v. Lewis*, 8 West. Rep. 739, 106 Ind. 120; *Otis v. Gregory*, 10 West. Rep. 791, 111 Ind. 504; *Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah, 819; *Nichols v. Glover*, 41 Ind. 24; *Boyd v. Jackson*, 82 Ind. 525; *Austin v. Underwood*, 87 Ill. 438; *Beal v. Harrington*, 2 West. Rep. 867, 116 Ill. 118; *Russell v. Watt*, 41 Miss. 602; 93 Am. Dec. 270; *Barroilhet v. Anspacher*, 68 Cal. 116; *Motherwell v. Taylor* (Idaho) March 8, 1886; 2 Lead. Cas. Eq. 8d Am. ed. 712, 713; 8 Dev. Deeds, 1150.

The fact that the land was conveyed by Gish to appellee, Martha, with the consent of appellant does not affect the lien.

Humphrey v. Thorn, 68 Ind. 296; *Martin v. Cauble*, 72 Ind. 67; *Fleece v. O'Rear*, 88 Ind. 200; *Pylant v. Reeves*, 53 Ala. 183, 25 Am. Rep. 605.

Mr. Simon P. Thompson, for appellee, Martha J. Wood:

John having advised and consented to the grant direct from Gish to Martha without any condition of which either Gish or Martha had knowledge, neither John nor Daniel became, by anything connected with that transaction, either a legal grantor or equitable vendor of the land.

Atkinson v. Lindsey, 89 Ind. 296; *Merrill v. Allen*, 38 Mich. 487.

No one not privy to the purchase, and of whose rights Gish had notice, could be a vendor or an equitable assignee of Gish.

Jones, Liens, § 1067.

NOTE.—Payment of another's debt creates no equitable lien.

A party who has an interest in property to be protected by discharging an incumbrance upon it has the right to pay it and to substitute himself to the rights of the lien holder, whether either the creditor or the debtor gives his assent or not. *Fleavel v. Zuber*, 67 Tex. 275.

So if a third party pay the entire debt in pursuance of an agreement between him and the debtor, he may, by virtue of such agreement, be subrogated to the creditor's rights and stand in the creditor's place as to all persons interested in the property of the security. *Ibid.*

Subrogation is enforceable whenever one, not a mere volunteer, discharges another's debt. *Miller's App.* 12 Cent. Rep. 272, 119 Pa. 620.

But a mere volunteer in paying the debt of another person is not entitled to subrogation. *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. ed. 537; *Clute v. Emmerich*, 99 N. Y. 351; *Banta v. Garmo*, 1 Sandf. Ch. 883, 7 N. Y. Ch. L. ed. 368.

He is not entitled to subrogation, although induced to do so by fraud practiced upon him by the latter's agent. *McCleary's App.* (Pa.) 11 Cent. Rep. 177.

So one who lends money to pay off a lien on land is not subrogated to the rights of the lien holder. 9 L. R. A.

when the money is so applied. *Kline v. Ragland*, 47 Ark. 111; *Mather v. Jenswold*, 72 Iowa, 550.

Subrogation, in equity, requires that the person to be benefited has paid an obligation to a third party, constituting a superior lien or claim, to save himself from loss. *Ætna L. Ins. Co. v. Middleport*, *supra*.

Generally, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor or in the place of the creditor, such person will be so substituted. *Yaple v. Stephens*, 38 Kan. 680.

The doctrine of substitution, being one of mere equity and benevolence, will not be enforced at the expense of a legal right. *Barnes v. Dickey* (Pa.) 25 W. N. C. 168.

Under *Manaf. (Ark.) Dig.*, § 474, providing that a lien of the vendor, when expressed on the face of the conveyance, shall inure to the benefit of the assignee of the note or obligation to secure payment of the purchase price, the lien will not pass by assignment of the debt where the vendor conveys the title by an absolute deed. *Crossland v. Powers* (Ark.) April 19, 1890.

Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid. *Well v. Enterprise Ginney & Mfg. Co. (La.)* April 21, 1890.

The lien arises only when the vendor has parted with his title.

Dev. Deeds, § 1252.

Using borrowed money to pay for land does not give the lender the right even to be subrogated to a vendor's lien.

Gray v. Baird, 4 Lea, 212-216.

The complaint does not make out any case for John to enforce a grantor's lien against Martha.

Dev. Deeds, § 1252; Herman, Mortgages, § 185; Jones, Liens, § 1067; *Stansell v. Roberts*, 13 Ohio St. 149; *Palmer v. Sterling*, 41 Mich. 218; Perry, Trusts, § 238; Jones, Mortgages, 8d ed. § 193; 2 Washburn, Real Prop. 2d ed. p. 92; *Way v. Patty*, 1 Ind. 102; *Crane v. Caldwell*, 14 Ill. 468; *Skaggs v. Nelson*, 25 Miss. 88; *Chapman v. Abrahams*, 61 Ala. 108; *Notter's App.* 45 Pa. 361.

John, by paying the security debt, simply became Daniel's creditor.

Kane v. State, 78 Ind. 103.

The parol agreement of John and Daniel was void.

Haskell v. Scott, 56 Ind. 567.

It is the unpaid purchase money which creates the lien and is the debt.

Nichols v. Glover, 41 Ind. 24-34.

John could have no interest in the Gish land on February 5, 1883, as a mere promise is not a transfer even in equity.

Christmas v. Russell, 81 U. S. 14 Wall. 69, 20 L. ed. 762; *Christmas v. Griswold*, 8 Ohio St. 559.

Berkshire, Ch. J., delivered the opinion of the court:

The facts involved in this case, briefly stated, are as follows: McCoy & Thompson were bankers at Rensselaer, Ind., on the 5th day of February, 1883, and on that day the appellee Daniel and the appellant executed their note to said McCoy & Thompson for \$111, due in one year, the said Daniel being the principal in said note, and the appellant his surety. When said note became due, the said Daniel not being prepared to make payment thereof, it was taken up and a new note given by the said parties thereto. Renewal notes were given from time to time until the 7th day of March, 1887, when the appellant executed his own note in payment and satisfaction of said indebtedness. That on said 5th day of February, 1883, one Christian Gish was the owner of the following described real estate in Jasper County, Ind., to wit, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 18, township 28, range 6, and continued so to be until the 8th day of February, 1883, when he conveyed the same by warranty deed to the appellee Martha J. Wood; that the consideration to said Gish for the said real estate was \$200, \$100 paid in cash, and the promissory note of the said Martha and Daniel executed for the sum of \$100, payable in one year from the date of said deed, secured by a mortgage executed by them upon said real estate; that the cash payment made to said Gish was the proceeds of said note first executed by the said Daniel and the appellant to said McCoy & Thompson, and was borrowed for that purpose; that when the said note was executed, and loan made, the said Daniel had bargained with said Gish for the said real estate, and so informed the appellant, and promised

and agreed with him that, if he would become his surety in borrowing said money, said real estate should be bound to him, and he should have a lien thereon to secure him from loss as such surety; that the appellant relied upon said agreement, and was induced thereby to become surety on said note; that the said conveyance was executed by said Gish to said Martha at the instance of the said Daniel, with the knowledge and consent of the appellant; that, after the said note which the said appellees had executed to said Gish became due, the same was paid by the said Martha, and she had no knowledge of said agreement as to said lien between the appellant and the said Daniel until long thereafter, and no knowledge of any intention on the appellant's part of asserting or claiming a lien upon said real estate, but she did know, at the time she received said conveyance, that said Daniel and the appellant had executed their note to McCoy & Thompson to obtain the money to make the first payment on the land, and that the appellant was Daniel's surety on said note, and that the money thus obtained had been used in making said first payment, and she knew then and thereafter that it had not been repaid. The consideration which moved from Martha to Daniel was a credit of \$100 upon an indebtedness in the sum of \$235 which he had owed to her for nearly ten years. At the time the loan was made by McCoy & Thompson to Daniel, he was insolvent, and has been so ever since. During all of the foregoing transactions the appellees were husband and wife.

Upon the foregoing statement of facts, the question which we are called on to determine is, Has the appellant an equitable lien upon the real estate described on account of his said payment to McCoy & Thompson? We think he has not. This court is more liberal than are the courts of most of our sister States in the recognition of equitable liens upon real estate; but we find no case decided by this court, or elsewhere, to support the theory of the appellant in this case. In the case of *Dwenger v. Branigan*, 95 Ind. 231, the decision is placed expressly upon the ground that the relation of vendor and vendee existed between the parties.

In *Barrett v. Lewis*, 106 Ind. 120, 8 West. Rep. 739, the facts of the case as given in the opinion are as follows: "Hester A. Lewis conveyed a tract of land in Marion County to Gottfried Muhlman, and to secure part of the purchase price took a mortgage. Subsequently she obtained a decree of foreclosure; and, upon a sale of the land made in pursuance of the decree, she became the purchaser, and received from the sheriff a certificate of purchase in due form. Before the period for redemption expired, she sold and assigned the certificate, and all her rights thereunder, to Lucy B. Barrett, who paid part of the consideration for the assignment in cash, and for the residue executed her promissory note due in two years. It was stipulated in the note that it was given for 'purchase money for real estate.' At the expiration of the year for redemption, which was about four months after taking the assignment, Mrs. Barrett received a sheriff's deed upon the certificate, and went into possession of, and has ever since continued to own, the land." Upon the foregoing statement of facts, it was

held that the assignor of the sheriff's certificate was entitled to enforce a vendor's lien as against the title held by her assignee, and acquired through such assignment. Under the facts of that case the assignor, if not technically a vendor, was one in equity. As between the parties, the note represented the unpaid purchase money for the real estate to which Mrs. Barrett had acquired title. The parties had so recognized it in their contract, and it would have been contrary to the rules of equity, and in violation of good conscience, not to have recognized and enforced the lien. See *Jones, Liens*, § 1094; *Yarborough v. Wood*, 43 Tex. 91.

In the well-considered case of *Otis v. Gregory*, 111 Ind. 504, 10 West. Rep. 791, the conclusion reached was that the facts disclosed a payment of part of the purchase money by the appellant for the execution of the conveyance to the appellee, and hence he was entitled to enforce a vendor's lien. The facts in that case, as we find them stated in the opinion of the court, are as follows: "On the 15th day of October, 1873, the plaintiff and her husband became indebted to the defendant in the sum of \$460. This indebtedness was secured by a mortgage executed by the plaintiff on her separate property in Michigan. Afterwards, in June, 1874, the plaintiff sold her Michigan property, and purchased that in question, in La Porte County. To enable her to make the purchase, it became necessary that she should be able to use the entire purchase money arising from the sale of the Michigan property, including the amount due the defendant on his mortgage debt. The defendant agreed that he would release his mortgage on the property in Michigan, and permit the plaintiff to use the amount due him in paying the purchase money of the La Porte County property, she agreeing to give him a mortgage on the latter when the transaction should be completed. The defendant released his mortgage accordingly, and took a mortgage executed by the plaintiff, without the joinder therein of her husband, upon the property described in the complaint. Mrs. Gregory paid for the property purchased with the proceeds of that sold. This last mortgage, it is averred, was executed in the State of Michigan, both parties believing in good faith at the time that the law of Indiana, as in Michigan, empowered a married woman to incur her separate real estate without the joinder of her husband. But for such belief, the defendant says, he would not have released his mortgage on the Michigan property, and received that on the property in Indiana."

In the case of *Strohm v. Good*, 113 Ind. 93, 13 West. Rep. 690, it was held that Mrs. Good, the appellee, held a vendor's lien upon the real estate there involved. The facts in that case, as given in the opinion, are as follows: "On the 27th day of April, 1888, Magdalena Good was the owner of a parcel of land; and on that day she and her husband entered into a written contract with Joseph Strohm wherein she agreed to sell and convey it to him. Among other promises forming part of the consideration agreed to be paid for the land was a promise on the part of Joseph Strohm to assume and pay a mortgage previously executed by Magdalena Good to Solomon Stahley. This mort-

gage covered the land purchased by Strohm, and also other lands of the mortgagor. The contract as originally drawn provided that Joseph Strohm should receive a deed on or before the 1st day of July, 1888, but by a subsequent writing the contract was so modified as to provide that he should receive a deed when he had paid one half of the mortgage assumed by him. Prior to the time of the maturity of the mortgage debt, Magdalena Good desired to remove the incumbrance of the mortgage from the real estate embraced in it, but which was not sold to Strohm; and an oral agreement was entered into between her and Strohm wherein it was stipulated that, if she would pay the mortgage debt, he would, when the first notes evidencing it became due, and the deed was ready for delivery, pay one half of the mortgage debt, and execute a mortgage for the remainder upon the real estate conveyed to him. Relying on this promise of Strohm, the appellee caused her agent, Isaac Good, to pay the Stahley mortgage with his own money, agreeing with him that he should be repaid in accordance with Strohm's contract. Strohm requested that his wife, Mary Strohm, should be substituted as grantee, and this was done, in the deed executed by the appellee and her husband. The deed was delivered on the 24th day of January, 1884, and was executed to Mary Strohm, the wife of Joseph Strohm, as requested by the latter. Of the contract between him and his vendor, Mrs. Strohm had full knowledge, and she paid no consideration. Joseph Strohm repudiated his promise, and refused to pay one half of the amount of the mortgage debt in money, and also refused to execute a mortgage for the remainder." It is said in that case: "Mrs. Good had a right to protect her property by paying the mortgage; and, under the verbal contract, she had a right to have her lien kept alive. Until Strohm paid the purchase money as he had agreed to do, the lien remained in life, binding the land in his hands, and in that of his wife, who claimed through him. There was no surrender or merger of this equitable lien, and it remained in force for the protection of the vendor."

The case of *Nichols v. Glover*, 41 Ind. 24, is summed up by the court, in a nutshell, as follows: "The question in this case resolves itself into this: If A owes B, and A conveys land to C, and has a lien for the purchase money on the land so conveyed, and they all meet together, and agree that C shall execute his note to B for the unpaid purchase money, instead of giving the note to A, which is done, and B releases A from his debt, has B a lien on the land conveyed by A to C for the purchase money? We hold that he has. It is clear that, if C had given his note to A for the unpaid purchase money, A might have assigned it to B and thus transferred his vendor's lien to B. Or, if no note had been given by C to A for the purchase money, yet A might have, by a written instrument, assigned his vendor's lien to B."

A vendor's lien cannot be created by agreement between the parties, but exists by operation of law.

Jones, in his valuable work on Liens, at section 1064, says: "This lien does not spring from any agreement of the parties, and is

wholly independent of any such agreement. Moreover, the fact that there is a verbal agreement of the parties that the vendee shall reconvey the land if he does not pay the purchase price does not prevent the enforcement of the lien; for such an agreement is void under the Statute of Frauds." See *Gallagher v. Mars*, 50 Cal. 28.

When a vendor's lien once arises, it may be kept alive or waived by the agreement of the parties, but cannot be thus created. *Jones, Liens*, §§ 1089, 1090; *Strohm v. Good*, *supra*; *Yaryan v. Shriner*, 28 Ind. 364.

"Whenever the notice of the transaction is such that the existence of a lien is repelled, and consequently the lien does not arise by implication or operation of law, evidence cannot be given of the declaration of the purchaser that the vendor would have a lien; for a right to charge lands dependent upon the agreement of the parties must be manifested by writing. It cannot rest in parol." *Jones, supra*, § 1064 (see § 70); *Printup v. Barrett*, 46 Ga. 407. See *Stringfellow v. Irie*, 73 Ala. 209.

As a vendor's lien must arise by implication, a lien which depends upon the agreement of the parties is not a vendor's or grantor's lien. "A lien reserved is a lien by contract. A lien for the purchase money expressly reserved by a vendor . . . is a lien created by contract, and not by implication of law." *Jones, supra*, § 1111.

So, also, is a mortgage lien a lien by contract. It can in no other way be created. In Indiana a specific lien upon real estate dependent upon contract can be created in but one of two ways: by reservation in the deed of the grantor; by mortgage duly executed by the owner. Hence the appellant, by the verbal agreement with Daniel, acquired no lien by contract. The further conclusion, therefore, must be that the said verbal agreement can have no controlling influence in the decision of the question before us. Disregarding, as we do, the verbal contract between the appellant and Daniel, the situation is as follows: McCoy & Thompson loaned a sum of money to Daniel Wood with which to make a purchase of real estate. To secure the loan, the appellant became Daniel's surety to McCoy & Thompson. Daniel purchased the real estate, paid the money borrowed to the vendor, and, with the appellant's consent, caused a deed to be executed to the appellee Martha. Had the appellant loaned the money to Daniel to make the payment, he would not have been entitled to a vendor's lien. A mere loan of money in the purchase of land does not create a lien on the land as a security for its repayment. See *Jones, supra*, § 75; *Collinson v. Owens*, 6 Gill & J. 4.

A lien will not arise in favor of one who advances money to pay the purchase price for real estate purchased. *Jones, supra*, §§ 75, 1067; *Chapman v. Abrahams*, 61 Ala. 108; *Gray v. Baird*, 4 Lea, 212.

In this last case the court said: "Be this as it may, however, the court is of the opinion that the debt stayed by Marchbanks was not the purchase money for the land. The land had been bought by Grey under a decree of the county court. He had paid for it. Hall had advanced or loaned him the money to pay

for the land, and had taken his notes, retaining a lien on the face of them on his land. These notes were the basis of the judgment stayed by Marchbanks. This could in no sense be held to be the purchase money of the land. That had been paid by Grey. This was a debt for borrowed money, advanced or loaned, it is true, to pay for the land, but still but a debt for loaned money. The lien on the face of the note did not make it such. That was a form of security carried out by the parties themselves, but is not a vendor's lien, but one by contract." If money advanced to pay for real estate will not give to the lender the right to enforce a vendor's lien, with stronger reason may it be asserted that such a lien will not be implied in favor of the surety who signs a note given for borrowed money to pay for real estate.

When McCoy & Thompson loaned the money to Daniel Wood, it became his money absolutely. He was under no legal obligation to purchase the real estate, and, if he did so, might or might not, as he saw proper, pay the money to the vendor. He could have used the money for any other purpose at his pleasure. The transaction was one to which the appellant was not a party, except that he loaned his name to Daniel Wood. It was a transaction between McCoy & Thompson on one side, and Daniel Wood on the other. After the note had been executed to them, McCoy & Thompson would no more have been justified in paying the money over to the appellant, except upon the order of Daniel, than to have paid to the appellant any other money in their hands belonging to Daniel without such order. It was Daniel, therefore, who furnished the purchase money, and not the appellant. This seems to be clear; and as the appellant paid no part of the purchase money, he has no shadow of a claim to a lien on the land. His position is the same as that of any other general creditor. But if the appellant, because of the parol agreement made between Daniel and himself, was entitled to enforce a vendor's lien as against a purchaser of the real estate with notice of his lien, or as against a mere volunteer, it is probable, in view of the rule as declared in *Wert v. Naylor*, 93 Ind. 431, that Mrs. Wood would be regarded as a purchaser for value without notice; but as to this we decide nothing. We find no error in the record.

Judgment affirmed, with costs.

Petition for rehearing overruled September 17, 1890.

John McPHEETERS, *Appt.*,

v.

John D. WRIGHT.

(.....Ind.....)

1. Title cannot be acquired by the owner of an undivided interest in land against his co-tenant in common at a sale under an incumbrance which was created by a former owner through whom both parties claim title.

NOTE.—Tenant in common cannot purchase for his own benefit an adversary claim. See note to *Chapin v. Weed*, Clarke, Ch. 464, 7 N. Y. Ch. L. ed. 172.

3. A forfeiture under Rev. Stat. 1881, § 4347, of a contract for the purchase of school lands for default in payments does not divest the purchaser's title to the real estate, but simply authorizes the State to sell the lands for its own reimbursement.

(May 20, 1890.)

APPPEAL by defendant from a judgment of the Circuit Court for Noble County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The facts are fully stated in the opinion.

Mr. R. P. Barr for appellant.

Messrs. H. G. Zimmerman and Wilson & Davis for appellee.

Berkshire, Ch. J., delivered the opinion of the court:

This is an action in ejectment. The appellee was the plaintiff, and the appellant the defendant, in the court below. The appellant filed a cross-complaint, to which a demurrer was addressed, which was sustained by the court, and the appellant reserved an exception. The main action having been put at issue, the same was submitted to the court for trial; and, after the evidence had been heard, the court returned, at the request of the parties, a special finding. The only alleged errors which we are called upon to consider are those which call in question the ruling of the court in sustaining the demurrer to the cross-complaint, and its conclusions of law upon the facts found. As our reasoning and conclusion as to the special finding are alike applicable to the action of the court in sustaining the demurrer to the cross-complaint, we will confine ourselves to the special finding. After entitling the cause, the following is the special finding of the court:

"The court, having been by the plaintiff and defendant requested to find specially the facts and conclusions of law thereon, in accordance with section 551 of the Code of the State, finds specially the following facts:

"(1) That the lands described in the complaint, to wit, the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter, of section 16, township 33 north of range 10 east, in Noble County, Ind., were on the 13th day of April, 1847, part of the congressional school lands of said township.

"(2) That on the said day the said lands were by the county auditor and the school commissioners of said county duly and legally sold to one Adam Dingman,—the former parcel for \$229, and the latter tract for \$160; and that at the time thereof the purchaser paid down \$57.25, being one fourth of the purchase money, and also paid \$12.02, one year's interest, in advance.

"(3) That on the last day named the auditor and school commissioner executed and delivered to said purchaser a certificate of purchase for each parcel separately; which certificates of purchase were on the said 13th day of April, 1847, recorded by the auditor in Book A of Commissioner's Record, on pages 555 and 556.

"(4) That on the 3d day of October, 1853, said purchaser assigned each of said certificates of purchase to one Nicholas Skeels, which as-

signment was duly acknowledged before the county auditor.

"(5) That said installments of annual interest on each parcel were paid by the said Dingman until the assignment, in 1853; and then by the said Skeels until his decease in the year 1854,—each successively occupying and making valuable improvements on said lands; and thereafter by Julia A. Skeels, the widow of said Nicholas Skeels, until the year 1867, when she died.

"(6) The interest installments on said purchase money remained unpaid on the 5th day of April, 1868, for the years, to wit, 1877, 1878, 1879, 1880, 1881, 1882, 1883; the interest having been paid each year in advance up to and including April, 1876, the payment made in April, 1876, being for the year ending April, 1877.

"(7) That on the 26th day of February, 1868, the said annual installments of interest for said several years remaining unpaid, and certain portions of the principal being due and unpaid, the county auditor and county treasurer declared the original contract of purchase and sale forfeited, and immediately on said day caused said lands, and each parcel thereof, to be separately advertised for sale on the 5th day of April, 1868, at the court-house door in Albion, said Noble County, by publishing notices of said sale, and notice for each of said parcels separately, duly signed by the auditor and treasurer, and published in the *Weekly News*, a newspaper of general circulation printed and published in said county, for four successive weeks,—the last of which publication was one week prior to the date of sale; and that a copy of each notice of the sale of each parcel was also posted at the court-house door of said county four weeks and more prior to the day of sale; and also that a copy of each one of said notices of the sale was posted in three public places in Green Township, said County of Noble, being the township in which said lands to be sold were situated.

"(8) That the notice for the sale of the N. W. one fourth of the N. E. one fourth recited that there was due, on the principal, \$51.75; on unpaid interest installments, \$24.84,—in all, \$76.59,—to which was to be added all costs and damages at date of sale; and that the notice for the sale of the N. E. one fourth of the N. W. one fourth recited that the principal due thereon was \$120; unpaid interest, \$57.60,—in all, \$177.60,—to which was to be added costs and damages to day of sale.

"(9) That on the day of sale, to wit, April 5, 1868, there was due on the N. W. one fourth of the N. E. one fourth the following: amount of principal due, \$51.75; interest due, \$24.84; printer's fees, \$7; auditor and treasurer's fees, \$2; five per cent damages, \$3.82; sheriff's fees, \$2.80; certificate of purchase, and recording same, \$3,—total, \$95.21.

"(10) That on the day of the sale there was due on the N. E. one fourth of the N. W. one fourth the following amount: of principal due, \$120; interest due, \$57.60; printer's fees, \$6.75; auditor and treasurer's fees, \$2; five per cent damages, \$3.88; sheriff's fees, \$2.80; certificate of purchase and recording, \$3,—total, \$201.03.

"(11) That on the 15th day of April, 1868,

in pursuance of said notice, the county auditor sold the said N. W. one fourth of the N. E. one fourth of said section 16 at the court-house door of Noble County, in the Town of Albion, Noble County, Ind., at public auction, to the plaintiff, John B. Wright, for \$700; and at the same time and place said auditor in like manner sold the N. E. one fourth of the N. W. one fourth of said section to the plaintiff for \$800, the county treasurer attending thereat, and taking an account thereof.

"(12) That on said purchase money the purchaser, Wright, immediately upon such sale paid down the sum of \$175 on the purchase of the N. W. one fourth of the N. E. one fourth, and the further sum of \$42 interest on the purchase money, in advance; and the said Wright also, upon the purchase of the N. E. one fourth of the N. W. one fourth, immediately paid down the sum of \$200, and the further sum of \$48 interest, in advance, on the purchase money.

"(13) That immediately upon said sale and payment of the one fourth of the purchase money and interest the county auditor and county treasurer executed and delivered to the plaintiff as such purchaser a certificate of purchase for the northwest quarter of the northeast quarter of said section, which was by the auditor duly recorded in commissioner's record book, at page 240; and also in like manner, and at the same time, the said county auditor and county treasurer executed and delivered to said purchaser Wright a certificate of purchase for the northeast quarter of the northwest quarter of said section 16, which was by the county auditor recorded in commissioner's record, in Book N, page 239.

"(14) The court further finds that said Nicholas Skeels died about the year 1854, leaving surviving him several children by different wives; that the plaintiff's mother was the last wife of said Nicholas, by whom he had one child living at the decease of said Nicholas; that by the last will of said Nicholas Skeels, executed on the 18th day of May, 1854, and which will was, upon the 21st day of June, 1854, duly proven and admitted to probate in the office of the clerk of the Common Pleas Court of said Noble County, and duly recorded therein, on pages 205 and 206 of the record of wills, he (the said Nicholas) devised the lands in the complaint described to his widow by the following provision therein contained, to wit: 'I give and bequeath to my beloved wife, Julia Ann Skeels, all my right, title and interest in the northeast quarter of the northwest quarter of section 16, and the northwest quarter of the northeast quarter of said section, both in town 33 north, of range 10 east, in the county and State aforesaid, supposed to be eighty acres, for her own benefit during the term of her natural life, or so long as she remains my widow.'

"15 That said Nicholas Skeels at the time of his decease was residing on said land, and after his decease his said widow, Julia Ann Skeels, with her daughter, who was then a minor, and was the youngest of said children of said Nicholas Skeels, continued to reside on and occupy said premises, said widow residing thereon until her death, in 1867; that said daughter resided with her mother as a member

of her family until after her majority, when she was married to one Abraham Schedule; that after her said marriage she and her husband resided on said premises, and farmed the same, and the said Schedule paid the widow rent therefor; and that one of the sons of said Nicholas Skeels also for a time resided on said premises, farmed the same and paid the widow rent therefor; that said widow paid the taxes accruing on said land from the year 1864 to the year 1867, and paid the several installments of interest accruing on said contract of purchase of April, 1847, up to her death; and that there is no other evidence as to whether or not she elected to take under the provisions of said will.

"(17) That since the death of said Julia Ann Skeels, in 1867, the annual interest installments on said original contract of purchase have been paid by the plaintiff up to and including the year 1876.

"(18) That on the 25th day of March, 1880, one Caleb Skeels, son and heir-at-law of said Nicholas Skeels, deceased, conveyed by quitclaim deed all his interest in said land to the defendant, said deed being recorded on the — day of —, 1880, in deed record 45, page 21, of the record of deeds of Noble County, Ind., said conveyance being made in consideration and completion of an oral contract made in April, 1879, between defendant and said Caleb, whereby, in consideration of \$100, said Caleb agreed to convey to defendant his interest in said premises; and that, under said oral contract, defendant, on said day of April, 1879, entered into possession of said premises, made improvements thereon of the value of \$300, and has ever since remained in possession of the same, claiming title to and interest therein under said deed.

"(19) That on the 28th day of October, 1881, one Rebecca Jones, a daughter and heir-at-law of said Nicholas Skeels, conveyed by quitclaim deed to the plaintiff all her right, title and interest in said lands, and that the plaintiff thereafter, and up to the time of said auditor's sale of said land on the — day of April, 1883, claimed a title and interest therein under said deed; but since he received said auditor's certificate of purchase at said sale he has disclaimed any interest therein under said deed, and did not when this suit was commenced, and does not now, claim any interest in said land, except under and by virtue of said auditor's sale.

"(20) That on the 7th day of April, 1883, the defendant being in possession of the premises, claiming title as aforesaid, the plaintiff and defendant made an oral agreement by which it was agreed that the defendant should remain in possession of the house in which he was then living on said premises, and the garden appurtenances thereto situate, in the southeast corner of said northeast quarter of the northwest quarter of section 16, township 33 north, of range 10 east, until September 1, 1883, and the defendant then agreed to pay the plaintiff for the use of the same \$20, part to be paid in work; that at and prior to that time the plaintiff and defendant had, and still have, an unsettled account for work and labor performed; that thereafter, in the month of —, 1883, the defendant's minor son, by request of plaintiff and by direction of defendant, worked for him — days,

nothing being at the time said by either plaintiff or defendant as to what the same should be applied on, nor has any application of said work to the payment of said \$20 been made by either party with the consent of the other; that defendant has, ever since April 7, 1883, been in possession of said premises, claiming title thereto, and refusing to surrender the same to plaintiff as sole owner of the same, under said purchase at said auditor's sale, but has never denied that the plaintiff had an interest therein in common with the defendant.

"(21) The defendant is now in possession of said lands, claiming title to an interest therein by virtue of said purchase and said conveyance from said Caleb Skeels, and not otherwise.

"And thereupon the court finds and files the following conclusions of law, based upon said special finding of facts, to wit: And the court, upon the facts found as aforesaid, states as his conclusions of law: The plaintiff was, when this suit was commenced, and now is, the owner of all the lands described in the complaint, and of each tract; that the defendant is unlawfully in possession of the same, and wrongfully and unlawfully keeps plaintiff out of possession thereof, and that plaintiff is entitled to recover possession of said premises, with \$1 damages and the costs of this action, and is entitled to have his title thereto quieted as against defendant."

Under the facts found, there can be no question but what at the time of the sale made in April, 1883, and under which the appellee claims title, he and the appellant were tenants in common of the real estate in question, nor that the appellee acquired any title to the real estate by inheritance from his mother; for the court could well conclude from the facts found that the widow, Julia Ann Skeels, elected to take under the will of her husband, and at the time of her death was only a life tenant. From the facts stated we must come to the conclusion that Nicholas Skeels died intestate, except so far as he made provision for his said widow. He died, leaving his said widow and eleven children. Subject to the widow's life estate, his said children inherited as tenants in common the said real estate, the interest of each being equal to an undivided one eleventh thereof. At the time of the sale through which appellee claims title, he was the owner of an undivided one eleventh of said real estate by purchase and conveyance from one of the children of said decedent, and the appellant was the owner of an undivided one eleventh of said real estate by purchase and conveyance from one of said children. Not only were the appellee and appellants tenants in common as to said real estate, but they held title from one common source, to wit: Nicholas Skeels. The question, therefore, which must rule our conclusion is, Could the appellee acquire title by purchase at the auditor's and treasurer's sale, as against his co-tenant in common? In our judgment, he could not. This case may readily be distinguished from the case of *Eaton v. Piggott*, 94 Ind. 14, which is relied upon by counsel for the appellee, and which, no doubt, influenced the conclusion reached by the court below. We quote the following from the opinion in that case, which may be found beginning at the bottom of page

25: "Appellee's counsel contend that the appellant is precluded from asserting title under the foreclosure sale, because he was, as they affirm, a tenant in common with Martha J. Piggott, and could not, therefore, buy in an outstanding lien, and build a title on it. The general rule unquestionably is that one tenant in common cannot by purchasing an outstanding lien acquire a title which will evict his co-tenant. This rule, however, is subject to many exceptions, and obtains only where the relation of tenants in common exists in strictness, and where the relation is such as to require mutual trust and confidence. It is impossible to perceive how one who buys at a sale made by an assignee in bankruptcy of the husband's interest becomes charged, in such a case as that embraced in our general question, with duties of trust and confidence to the wife of the bankrupt. The title is not a common one; the interests are not reciprocal, and there is no fiduciary relationship created. The title is secured by virtue of a judicial sale, and not by the same instruments, nor from the same source, as that from which the wife's claim is derived. . . . It is not to be forgotten that the wife was bound both by the decree and the mortgage, and the case is therefore altogether different from one where the lien is created by the act of the law, as for taxes, or where the incumbrance was created by a former owner, through whom both parties claim title. In such cases the burden is a common one. In the present case the burden rests alone on one of the tenants."

That part of the question which we have underscored covers just the case we have under consideration. In this case the incumbrance, because of which the sale was made at which the appellee became the purchaser, was "created by a former owner, through whom both parties claim title."

In *Sharswood & Budd's Leading Cases American Law Real Property* (vol. 8, p. 89 *et seq.*) there is a learned discussion under the following head note: "Rule that purchase of outstanding title by one co-tenant inures to the common benefit." The author says: "An important result of the intimate relations existing between tenants in common is that one will not be permitted to purchase, and set up against his co-tenants, an outstanding title; and from this it follows that, generally speaking, if one tenant in common take from a third person a conveyance of any title to an estate in the property held in common, such conveyance will inure to the benefit of all the tenants." The following authorities are cited: *Van Horne v. Fonda*, 5 Johns. Ch. 409, 1 N. Y. Ch. L. ed. 1125; *Liggett v. Bechtol*, cited in *Smiley v. Dixon*, 1 Pen. & W. 440; *Weaver v. Wible*, 25 Pa. 270; *Keller v. Auble*, 68 Pa. 410; *Lloyd v. Lynch*, 28 Pa. 419; *Knolls v. Barnhart*, 71 N. Y. 474; *Jones v. Stanton*, 11 Mo. 433; *Buchanan v. King*, 22 Gratt. 414; *Tittsworth v. Stout*, 49 Ill. 78; *Montague v. Selb*, 106 Ill. 49; *Bracken v. Cooper*, 80 Ill. 221; *Rothwell v. Dewees*, 6 U. S. 2 Black, 619 [17 L. ed. 811]; *Lee v. Fox*, 6 Dana, 172; *King v. Rowan*, 10 Heisk. 675; *Tisdale v. Tisdale*, 2 Sneed, 596; *Brown v. Homan*, 1 Neb. 448; *Manderville v. Solomon*, 39 Cal. 125; *House v. Fuller*, 18 Vt. 165; *Shell v. Walker*, 54 Iowa, 886; *Dillingier v. Kelley*, 84 Mo. 561. We also cite the fol-

lowing additional authorities: 2 Story, Eq. Jur. § 1211; 4 Kent, Com. 12th ed. 871, and *note*; *Brittin v. Handy*, 20 Ark 381; *Venable v. Beauchamp*, 8 Dana, 821, 28 Am. Dec. 74.

In a note to this case by the annotator it is said: "It is a well-established principle in equity that a person placed in a situation of trust or confidence with respect to the subject of a purchase cannot retain such purchase for his exclusive benefit. This is a general principle, applying to all persons who come within the rule that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchaser. Joint tenants, parceners and tenants in common are within this principle, and therefore a joint tenant, co-parcener or tenant in common is not permitted to purchase in an outstanding title or incumbrance for his own exclusive benefit, or to set up such title as against his co-tenant. But such purchase will inure to the joint benefit of all the co-tenants upon their contributing to the expense of it, in proportion to their respective interests." See *Moon v. Jennings*, 119 Ind. 130.

A number of the authorities cited above are cited there, and the following additional: *Swinburne v. Swinburne*, 28 N. Y. 568; *Picot v. Page*, 26 Mo. 398; *Duff v. Wilson*, 72 Pa. 442; *Davis v. King*, 87 Pa. 261; *Sullivan v. McLane*, 2 Iowa, 437; *Thruston v. Masterson*, 9 Dana, 228; *Gossom v. Donaldson*, 18 B. Mon. 280; *Funk v. Newcomer*, 10 Md. 301; *Flagg v. Mann*, 2 Sumn. 486; *Freem. Co-Tenancy*, § 154; 1 Hilliard, Real Prop. 815; 1 Washb. Real Prop. 430.

In *Van Horne v. Fonda*, *supra*, Chancellor Kent said: "I will not say, however, that one tenant in common may not in any case purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor, there would seem naturally and equitably to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due portion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties as joint devisees created. Community of interest produces a community of duty; and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance or an adverse title to disseise and expel his co-tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with

each other, and to cause no harm to their joint interest."

The rule must be the same when applied to joint heirs as to joint devisees; and, as the appellee and the appellant had each purchased from the heirs, their position is the same as though this controversy was between the heirs themselves. In the American and English Encyclopedia of Law (vol. 11, p. 1082), under the head of "Joint Tenants," it is said: "*Purchase of Outstanding Title*. The general rule is that a co-tenant's purchase of an outstanding title inures to the benefit of all, whether the several interests of the different tenants accrue under the same instrument, under different instruments or by act of law; and in some States this rule seems to apply, however the tenancy may have been formed, whatever the relations of the co-tenants with each other may have been and from whatever source the outstanding title may have been acquired." In addition to the authorities cited already, the following are cited: *Clements v. Cates*, 49 Ark. 242; *Olney v. Sawyer*, 54 Cal. 879; *Boskowitz v. Davis*, 12 Nev. 446; *Grim v. Wicker*, 80 N. C. 343; *Threadgill v. Redwine*, 97 N. C. 241; *Page v. Branch*, Id. 97; *Braintree v. Battles*, 6 Vt. 395; *Rountree v. Denson*, 59 Wis. 522.

As supporting the second proposition: *Lloyd v. Lynch*, 28 Pa. 419; *Gossom v. Donaldson*, 13 B. Mon. 230.

We quote further from the authority above: "But in other States this rule applies only when the tenants stand in some confidential relation in regard to one another's interest, so that it would be inequitable to permit one to acquire a title solely for his own benefit, in which case he will be treated as a trustee for the share of his co-tenant; but persons acquiring unconnected interests in the same subject are not, it appears, bound to any greater protection of one another's interests than would be required of strangers." To support the rule as last stated, *Roberts v. Thorn*, 25 Tex. 728; *Brittin v. Handy*, *supra*; *King v. Rowan*, *supra*; *Frentz v. Kloitch*, 28 Wis. 312, and *Buchanan v. King*, *supra*, are cited.

Our own State is in accord with the general rule. *Wilson v. Peelle*, 78 Ind. 884; *Bender v. Stewart*, 75 Ind. 88; *Elston v. Piggott*, *supra*. But see further upon this subject, 11 Am. & Eng. Encyclop. Law, 1083 *et seq.* and *notes*.

In a note to the leading case of *Keech v. Sandford*, 1 Hare & W. Lead. Cas. 74, it is said: "But tenants in common probably are subject to this mutual obligation only when their interest accrues under the same instrument or act of the parties or of the law, or where they have entered into some engagement or understanding with one another; for persons acquiring unconnected interests in the same subject by distinct purchases, though it may be under the same title, are probably not bound to a greater protection of one another's interests than would be required between strangers." The only case cited to support this note is *Matthews v. Bliss*, 22 Pick. 48. The case is not an authority in support of the position assumed. The rights of tenants in common, holding title under the same or different instruments, were not even remotely invoked in that case. *Shaw, Ch. J.*, delivered the opinion of the court. He said: "Most of the princ-

ples and rules applicable to the case of procuring money or goods by false and fraudulent pretenses, and of avoiding and vacating contracts obtained by false representations, are applicable to this case. The gist of the action was the conspiracy of the three defendants, after having agreed upon the sale of the brig at a large price, to induce the plaintiff's agent, by a concealment of the fact that the vessel could be sold for such price, and by false and fraudulent representations, to sell the plaintiff's quarter part of the vessel at a price much below that which they had agreed to sell for. The court are of the opinion that the direction of the judge who tried the cause was correct in stating to the jury that the mere non-disclosure of the fact within their own knowledge that they could sell, and had agreed to sell, the brig for a higher price, would not be sufficient to support the action, and that they were under no legal obligation to disclose that fact, and that withholding it was not such a fraudulent concealment of the truth as would of itself maintain the action. The court are of the opinion that the tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence towards each other, in respect of the sale of such vessel, that each is bound, in his dealings with the other, to communicate all the information of facts within his knowledge which may affect the price or value. A different rule may prevail in respect to any contract for the use or employment of the common property, in which relation, perhaps, they may be deemed to place confidence mutually in each other. But, as in common cases of tenants in common of a vessel, they are independent of each other in all matters of purchase and sale, and may deal with each other in the same manner as owners of separate property." The case in its facts, and in the conclusions reached by the court, is just as far away from the doctrine which it is cited to support as it well could be.

In *Roberts v. Thorn*, 25 Tex. 728, the *note supra* is quoted and followed, and the case of *Smiley v. Dixon*, 1 Penr. & W. 441, cited in support of the conclusion of the court. But that case seems to be as far away from the question before the court in *Roberts v. Thorn*, as was *Matthews v. Bliss* from the text which it was cited to support.

We quote again *Leading Cases on Real Property* (Sharsw. & B.), vol. 3, at page 91, as giving the author's opinion as to what was decided in *Smiley v. Dixon*, *supra*, including a quotation therefrom: "It is manifest that here there was no tenancy in common, for each purchaser bought a certain number of acres, which were set off, and not an undivided interest or share; and upon this ground the court went. *Huston, J.*, in delivering the opinion of the court, said, after recognizing the general rule: 'In this case these men did not purchase jointly. Neither had anything by purchase from Maxwell. They were not joint tenants nor tenants in common, and there was no privity between them. The bare fact that each had been cheated, neither gave any right to the other, nor deprived him of the full and absolute right, to purchase from the real owner when discov-

ered. The State was the real owner, and Smiley purchased from the State by his actual settlement.'" *Roberts v. Thorn* was afterwards cited with approval in *Rippetos v. Dwyer*, 49 Tex. 505.

In *King v. Rowan*, *supra*, it was held that there were two exceptions to the general rule as declared in *Van Horne v. Konda*, *supra*. We quote from *note* to *Venable v. Beauchamp*, *supra*: "(1) Where facts wholly inconsistent with a trust are clearly made to appear; (2) where all the parties hold by the purchase of different titles, even though all come from a common source." In addition to the fact that the cases last above are not sustained by the authorities on which they assume to rest, they attempt to draw a distinction where there seems to be no solid reason for a difference, and are out of line with all of the authorities. See *Rothwell v. Dewees*, 67 U. S. 2 Black, 618 [17 L. ed. 809]; *Bracken v. Cooper* and *Montague v. Sell*, *supra*; 3 Sharsw. & B. Lead. Cas. Real Prop. 92; *note* to *Venable v. Beauchamp*, *supra*.

It may be said of the case of *Brittin v. Handy*, 20 Ark. 381, that that was a case where the co-tenant's interest was sold on execution against him alone. But it is claimed that, as there had been a forfeiture of the contract as provided in section 4347, Rev. Stat. 1881, the title was in the State, and not in the heirs of Nicholas Skeels or their grantees, and therefore the purchase at the auditor's and treasurer's sale was not a purchase of the interest of a co-tenant to the real estate. Had the appellant's title been divested by virtue of the section of the Statute *supra*, the point would be well made. *Watkins v. Eaton*, 30 Me. 529; *Hurley v. Hurley*, 148 Mass. 444; *Reinboth v. Zerbe Run Imp. Co.* 29 Pa. 139; *Freem. Co-Tenancy*, § 159; *Lewis v. Robinson*, 10 Watts, 854; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Coleman v. Coleman*, 3 Dana, 898.

But we do not construe a forfeiture under section 4347 as having the effect to divest the title of the purchaser to the real estate, but simply as authorizing the State to sell the real estate for its own reimbursement. This is evident from the fact that it is provided that in case the real estate shall sell for more than a sum sufficient to pay the sum owing therefor, with interest and costs and 5 per cent damages, the residue, when collected, shall be paid over to the purchaser or his legal representative. If, when the contract is forfeited, the title vests in the State absolutely, then there could be no reason why the surplus, after principal, interest, cost and damages are paid, should go to the purchaser. It should fall back into the county treasury, for the benefit of the school fund. But it makes no difference how much the land brings. Though the surplus be largely in excess of what the purchaser has paid out, he is entitled to it all. The word "revest," as employed in the Statute as used in the "law," simply means to return. Sweet, Law Dict.

Worcester's definition is: "To fall back into the possession of the donor, or of the former proprietor."

Webster has it: "To return to the proprietor after the determination of a particular estate granted by him."

The real estate returns to or falls back into

the possession of the State, to be disposed of for the benefit of the school fund, and the mortgagor or his grantees as well, to be converted into money, and, after sale, the proceeds to be distributed as we have already indicated. As against the holder of the legal title, the State cannot withhold the land from sale, and thus deprive him of the surplus which may arise from the sale.

We are of the opinion that the court erred

in its conclusions of law, and in overruling the demurrer to the cross-complaint. What the effect may be if the appellant should fail to do equity within a proper time we are not now called on to decide.

Judgment reversed, with costs, with directions to the court below to grant a new trial.

Petition for rehearing overruled September 17, 1890.

ILLINOIS SUPREME COURT.

Annie HERMAN *et al.*, *Plffs. in Err.*,
v.

PEOPLE OF the State of ILLINOIS.

(181 Ill. 504.)

1. Several counts involving the same criminal transaction or charging distinct stages in the same offense may be joined in an indictment, although some of them charge a felony and others a misdemeanor, where the practice of the State permits conviction of misdemeanor under an indictment for felony.
2. If two or more offenses charged by different counts in an indictment form parts of one transaction and are of such a nature that the defendant may be guilty of both or all, the prosecution will not, as a general rule, be put to an election as to which it will rely on.
3. A general verdict of guilty is sufficient under an indictment charging the same

offense in several counts, although some of them charge a felony and others a misdemeanor; at least where each count would justify the punishment inflicted and none of them charge an infamous offense.

(October 31, 1890.)

ERROR to the Criminal Court for Cook County to review a judgment entered upon a verdict of guilty after trial upon an indictment for conspiring to defile a female and enticing her away for purposes of prostitution. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. M. Salomon*, for plaintiffs in error:

An indictment containing counts for felonies and also counts for misdemeanors cannot be sustained, and such an indictment should be quashed on motion.

Lyons v. People, 68 Ill. 271; *Beasley v. Peo-*

NOTE.—*Indictment; offenses of the same general character may be joined.*

Offenses, though differing from each other and varying in the punishments authorized, may be included in the same indictment if they be of the same general character, and the mode of trial be the same. *Carlton v. Com.* 5 Met. 532; *Josslyn v. Com.* 6 Met. 236; *Com. v. Costello*, 120 Mass. 358; *Com. v. Brown*, 121 Mass. 69; *People v. Rynders*, 12 Wend. 425; *Hoskins v. State*, 11 Ga. 93; *Johnson v. State*, 29 Ala. 62; *Orr v. State*, 18 Ark. 540; *Engleman v. State*, 2 Ind. 91; *State v. Kibby*, 7 Mo. 317; *Baker v. State*, 4 Ark. 56; *Edge v. Com.* 7 Pa. 275; *Mills v. Com.* 13 Pa. 631; *United States v. O'Callahan*, 6 McLean, 596; *Reg. v. Fussell*, 3 Cox, C. C. 291. Compare *State v. Hood*, 51 Me. 363; *Kane v. People*, 8 Wend. 208; *Com. v. Birdsall*, 69 Pa. 432; *State v. Reel*, 30 N. C. 442; *Moody v. State*, 1 W. Va. 337.

Separate offenses of the same nature, charged in separate counts, may be included in the same indictment. *State v. Frazier*, 3 New Eng. Rep. 629, 79 Me. 95.

When two or more crimes result from the same act only one indictment will lie, but the different offenses may be separately charged in distinct and different counts in the same indictment. *State v. Cook* (La.) Jan. 6, 1890.

An indictment containing in separate counts the charge of "assault with intent to commit murder," and of "inflicting a wound less than mayhem" is not void for duplicity. *State v. McDonald*, 39 La. Ann. 959.

But murder cannot be joined with conspiracy to commit murder. *United States v. Scott*, 4 Bias. 29. Indictment may charge intent to kill, and in the second count intent to wound. *Cline v. State*, 1 West. Rep. 31, 43 Ohio St. 332.

An indictment charging both burglary and lar-

ceny in the same count is not void for duplicity. *State v. Morgan*, 39 La. Ann. 214.

The offenses of burglary and of larceny as bailee may be joined in the same indictment. *Com. v. Shutte*, 130 Pa. 272.

Counts for burglary and larceny, or for burglary and receiving stolen goods, may be joined in the same indictment. *Parker v. People*, 4 L. R. A. 803, 13 Colo. 155.

Under the Alabama Code, an indictment for burglary may contain an alternative count averring that the act was committed with the intent to commit a rape, or with the intent to steal. *Dismukes v. State*, 63 Ala. 287.

Counts for grand larceny and for unlawfully and feloniously receiving the property stolen may be properly joined in the same information or indictment. *State v. Blakesley*, 43 Kan. 250.

An indictment charging the offense of putting out an eye with a club, and an assault with intent to kill, is not bad for duplicity. *State v. Pierre*, 33 La. Ann. 91.

Felonies and misdemeanors may be joined.

Felonies and misdemeanors forming part of the same transaction may be joined where they constitute successive grades of the offense (*State v. Hood*, 51 Me. 363; *Cawley v. State*, 37 Ala. 152); or where the misdemeanor is of the nature of a corollary of the felony. *State v. Coleman*, 5 Port. 32; *Stephen v. State*, 11 Ga. 225; *Kepper v. State*, 4 Ind. 243; *Maynard v. State*, 14 Ind. 427; *State v. Sutton*, 4 Gill, 495; *Burk v. State*, 2 Harr. & J. 426; *Com. v. O'Connell*, 12 Allen, 451; *Com. v. Adams*, 7 Gray, 43; *State v. Stimpson*, 45 Me. 603; *State v. Daubert*, 43 Mo. 243; *State v. Speight*, 69 N. C. 72; *State v. Baker*, 70 N. C. 530; *State v. Lawrence*, 51 N. C. 522; *State v. Hazard*, 2 R. L. 474; *State v. Gaffney*, Rice 431; *State*

ple, 89 Ill. 579. See also Archbald, Or. Pl. 202; *Hilderbrand v. State*, 5 Mo. 548; *State v. Kennedy*, 63 Iowa, 197.

The verdict in this case will not support the judgment, and cannot be allowed to stand.

Tales v. Cole, 11 Ill. 563; *Knox v. Breed*, 12 Ill. 61; *Lyons v. People*, 68 Ill. 275; *Day v. People*, 76 Ill. 880; *Tobin v. People*, 104 Ill. 565; *Andrews v. People*, 4 West. Rep. 189, 117 Ill. 201; *State v. Major*, 14 Rich. L. 85; *Guest v. State*, 24 Tex. App. 530; *Slaughter v. State*, 24 Tex. 410; *Buster v. State*, 42 Tex. 815; *State v. Montague*, 2 McCord, 257; *Casey v. State*, 8 Cr. L. Rep. 597; *Com. v. Haskins*, 128 Mass. 61; Wharton, Cr. Pl. 8th ed. p. 910; *Armistead v. State*, 22 Tex. App. 51; *Jenkins v. State*, 41 Miss. 583; *State v. McCauley*, 9 Ired. L. 875; *Hoback v. Com.* 28 Gratt. 925; *State v. Terrill*, 79 Iowa, 149; *State v. Kennedy*, 63 Iowa, 197; *Ex parte Burford*, 7 U. S. 3 Cranch, 452, 2 L. ed. 496.

Mr. George Hunt, Atty-Gen., for the People:

Where a general verdict of guilty has been rendered, the verdict will be sustained if any count of the indictment which is supported by the evidence will support the verdict.

Murphy v. People, 104 Ill. 528; *Mayes v. People*, 106 Ill. 806; *Duffin v. People*, 107 Ill. 118.

The logical effect of the verdict is, that the defendants are guilty as charged in each count.

Curtis v. People, 1 Ill. 197; *Lyons v. People*, 68 Ill. 276.

Indictments will be sustained which join a felony with a misdemeanor forming distinct stages in the same offense.

v. Boise, 1 McM. 191; *State v. Montague*, 2 McCord, 257; *Dowdy v. Com.* 9 Gratt. 727.

So a felony and a misdemeanor forming distinct stages of the same offense may be joined. *People v. Satterlee*, 5 Hun, 167; *Stevick v. Com.* 78 Pa. 460; *Hunter v. Com.* 79 Pa. 508.

But robbery and assault, in Georgia, have been held demurrable. *Davis v. State*, 67 Ga. 66.

Felonies and misdemeanors, or different felonies, may be joined in the same indictment, if the counts cover the same transactions. *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273; *Stevens v. State*, 5 Cent. Rep. 557, 66 Md. 202.

A count charging defendant with having taken indecent and improper liberties with the person may be added, under Mich. Laws 1887, Act 153, to an information charging rape, although defendant was not examined for this offense before a justice. *People v. Goulette* (Mich.) May 2, 1890.

Separate offenses of the same class.

Separate offenses of the same class, and growing out of the same transaction, may be joined. *State v. Straup*, 68 Mo. 437; *Ex parte Peters*, 12 Fed. Rep. 461; *People v. Milne*, 60 Cal. 71; *State v. Buzzell*, 59 N. H. 63; *State v. Lincoln*, 49 N. H. 464; *Nance v. State*, 21 Tex. App. 457.

They may be joined, although committed at different times. *United States v. Wentworth*, 11 Fed. Rep. 52.

Where all the counts in an information are manifestly based upon one and the same transaction, it will be assumed that it was the intention to charge but one offense. *State v. Glidden*, 8 New Eng. Rep. 642, 35 Conn. 44.

There is no duplicity in an indictment containing two counts,—one for an assault with intent to rape, the other for the attempt. *Reagan v. State*, 28 Tex. App. 227.

— L. R. A.

Wharton, Cr. Pl. §§ 298, 289, 291; *Stevick v. Com.* 78 Pa. 460; *Hunter v. Com.* 79 Pa. 508; *People v. Satterlee*, 5 Hun, 167; *Hutchison v. Com.* 82 Pa. 472; *United States v. Peterson*, 1 Woodb. & M. 805; *Reg. v. Ferguson*, 6 Cox, C. C. 454; *Andrews v. People*, 4 West. Rep. 189, 117 Ill. 195; *Bish. Or. Proc.* § 457; *Kennedy v. People*, 11 West. Rep. 48, 122 Ill. 649; *Harman v. Com.* 12 Serg. & R. 69; *Henwood v. Com.* 53 Pa. 424; *Hawker v. People*, 75 N. Y. 487; *Com. v. Birdsell*, 69 Pa. 482; *Crowley v. Com.* 11 Met. 575; *State v. Hood*, 51 Me. 863.

Baker, J., delivered the opinion of the court:

Annie Herman, Charles Busse and William Siekman, plaintiffs in error, were indicted in the Criminal Court of Cook County, and, upon trial and conviction before the court and a jury, were sentenced to the penitentiary, Herman and Busse for five years each, and Siekman for four years. The indictment contained eleven counts, but, as pending the trial there was a *nolle prosequi* of the sixth, seventh, eighth, ninth and eleventh counts, and the case was submitted to the jury only upon the first, second, third, fourth, fifth and tenth counts, it will be necessary to refer only to these latter counts. The first, second and third counts are based upon § 46 of the Criminal Code, as amended by the Act approved June 16, 1887, and in force July 1, 1887. Laws 1887, p. 167; Ill. Rev. Stat. ed. 1889, chap. 88, § 46.

The first count charges a conspiracy by false pretenses, etc., to induce Catherine Sievers

A count for burning sheds and barns, under Vt. Rev. Laws, § 4123, may properly be joined with a count for doing the same act with intent to burn a dwelling-house, under § 4127. *State v. Ward*, 61 Vt. 153.

An indictment for forgery, which in separate counts charges forgery and the utterance of forged instruments, knowing them to be forged, is not vulnerable to a motion to quash, upon the ground that it is duplicitous and charges two offenses; nor is it obnoxious to the objection that two distinct and separate offenses are charged in the same indictment. *Chester v. State*, 23 Tex. App. 577.

Forgery of an account and an affidavit of certificate of the same, if alleged as one act, may be joined. *Rosekrans v. People*, 5 Thomp. & C. 467.

So violating two liquor statutes may be united in one indictment. *State v. Klein*, 73 Mo. 627.

Three distinct offenses of using the mails for fraudulent purposes, committed within the same six months, may be joined in the same indictment; and, when joined, there is to be a single sentence for all. *Re Henry*, 123 U. S. 372, 31 L. ed. 174.

Larceny with conspiracy to defraud may be joined where both are based on the same transaction. *Henwood v. Com.* 52 Pa. 424.

An indictment is not bad for duplicity because it charges in one count murder by instruments and in another murder by drugs. *State v. Baldwin*, 79 Iowa, 714.

Separate misdemeanors may be joined.

In the case of misdemeanors, several distinct offenses of the same kind may be joined in the same indictment. *Burrell v. State*, 26 Neb. 581.

It is no objection to an information that it contains several counts charging different misdemeanors. *Alexander v. State*, 27 Tex. App. 533.

Each count need not conclude "against the peace and dignity of the State;" it is sufficient if the in-

to have illicit criminal intercourse; the second charges a conspiracy to entice and take her away for the purpose of prostitution, and the third a conspiracy to entice and take her away for the purpose of concubinage. The punishment fixed by said amended section 46 for a violation of its provisions is imprisonment in the penitentiary not exceeding five years, or a fine not exceeding \$2,000, or both. These three counts are for misdemeanors; for the rule in respect to offenses made punishable by our Statute by imprisonment in the penitentiary, or fine, or both, is that they are misdemeanors and not felonies. *Lamkin v. People*, 94 Ill. 501; *Baits v. People*, 123 Ill. 428, 14 West. Rep. 591.

The fourth and fifth counts are predicated upon § 1 of the Criminal Code (Rev. Stat. chap. 38, § 1). The one charges an enticement and taking away for the purpose of prostitution, and the other an enticement and taking away for the purpose of concubinage. The punishment fixed for a violation of this section 1 is imprisonment in the penitentiary not less than one nor more than ten years. The tenth count is based upon section 2 of "An Act to Prevent the Prostitution of Females," approved June 17, 1887, and in force July 1, 1887. Laws 1887, p. 170; Rev. Stat. ed. 1889, chap. 38, § 57c.

Said tenth count charges that plaintiffs in error, by force, false pretenses and intimidation, detained and confined said Catherine Sievers in a room against her will for purposes of prostitution, etc. The punishment provided by the Statute for a viola-

tion of this section 2 is imprisonment in the penitentiary for not less than one nor more than ten years. It will thus be seen that, under our Statute, these fourth, fifth and tenth counts charge felonies. The verdict returned by the jury at the trial was as follows: "We, the jury, find the said defendants guilty in manner and form as charged in the indictment, and fix the punishment of the defendants Annie Herman and Charles Busse at imprisonment in the penitentiary for the term of five years each, and fix the punishment of the defendant William Siekman at imprisonment in the penitentiary for the term of four years." Upon this verdict the plaintiffs in error were sentenced to the penitentiary for the terms allotted to them respectively. The evidence and the instructions of the court are not preserved by a bill of exceptions. Only two questions arise upon the record. One of these is, Is there a misjoinder of counts? and the other, Is the verdict sufficiently explicit to sustain the judgment of the court?

Plaintiffs in error contend that, as three of the counts are for felonies, and the other three for misdemeanors, they are improperly joined; and that their motions to quash the indictment, and to compel the people to make an election, should have prevailed; and that it was error to deny such motions. It was a principle of the English law, and the rule has been adopted in some of our States, that there can be no conviction for a misdemeanor upon an indictment for a felony, even where the allegations of the indictment include

formation or indictment as a whole has that conclusion. *Ibid*.

So counts for several libels or for several assaults may be joined in the same indictment. *Quinn v. State*, 49 Ala. 353; *Weinzorfflin v. State*, 7 Blackf. 186; *People v. Costello*, 1 Denio, 83; *Harman v. Com.* 12 Serg. & R. 69; *Com. v. Gillespie*, 7 Serg. & R. 476; *State v. Randle*, 41 Tex. 222; *State v. Gummer*, 22 Wis. 441; *United States v. Porter*, 2 Cranch, C. C. 60; *Young v. Rex*, 3 T. R. 105; *Rex v. Jones*, 2 Campb. 122; *Rex v. Benfield*, 2 Burr. 984; *Rex v. Kingston*, 8 East, 41; *Whart.* 8th ed. § 978.

So counts for misdemeanors may be joined with counts for conspiracy to commit misdemeanors. *Com. v. Gillespie*, 7 Serg. & R. 476, 6 Phila. L. J. 283; *Whart. Cr. L.* 8th ed. § 1387.

Several counts may be joined.

An indictment may contain several counts stating the transaction in different phases, to meet the proof. *State v. Harris*, 106 N. C. 682.

It may charge in separate counts the same crime to have been committed by different means. *People v. Dimick*, 9 Cent. Rep. 855, 107 N. Y. 13.

An indictment, one count of which charges defendant with the commission of a larceny, and the other count charges him with having aided and abetted its commission, charges but one offense. *Corley v. State*, 50 Ark. 305.

An indictment, under R. I. Pub. Stat., chap. 80, § 1, charging in one count that defendant maintained a tenement for the illegal sale and keeping of intoxicating liquors, and for the habitual resort of disorderly persons, is not multifarious. *State v. Brady*, 6 New Eng. Rep. 226, 16 R. I. —.

An indictment for keeping a disorderly house is not bad because it charges the same offense in different ways in two different counts. Though it is usual to charge the offense as if the offense in each

count was a distinct offense, that is a matter of form. *State v. Doyle*, 4 New Eng. Rep. 600, 15 R. I. 527.

The joinder of a multitude of counts for the same offense is not ground for quashing an indictment, although the government may be required to elect on which count it will prosecute. *United States v. Harman*, 38 Fed. Rep. 827.

An indictment in a capital case will not be quashed upon the ground that it charges murder both at common law and under the statute because it alleges that the crime was committed "feloniously, willfully, of his malice aforethought and from a premeditated design to effect the death," as, if objectionable, those words may be treated as surplusage. *Hodge v. State (Fla.)* June 7, 1890.

Several indictments preferred at different times, but alleging the same facts in different forms, will be treated as separate counts of one indictment, and may be joined whenever a joinder of counts would be authorized. *State v. Brown*, 95 N. C. 635; *State v. Watts*, 33 N. C. 654.

Counts at common law and under the Statute.

A count at common law and a count under the Statute may be joined in an indictment. *Com. v. Sylvester*, 4 Pa. L. J. 233, Bright. 331; *State v. Williams*, 2 McCord, 301; *State v. Thompson*, 2 Strobb. L. 12.

If two offenses grow out of the same act they may be joined though one be punishable by statute and the other by the common law (*United States v. O'Callahan*, 6 McLean, 590); or though the punishment be different in each. *Tillery v. State*, 10 Lea, 35; *Gilbert v. State*, 65 Ga. 449.

That an indictment contained the double charge of a rape at common law and of the statutory offense, carnally knowing a female under sixteen, under the Act of Congress of 1880, was not an error

such misdemeanor. The reason for the rule was that persons charged with misdemeanors had certain advantages at their trials, which were not allowed to those arraigned for felony, and it was deemed unjust to suffer the too heavy allegation to take from them these privileges. But the practice of withholding any substantial privilege from a person indicted for felony which is allowed to one indicted for misdemeanor does not obtain in this country; and therefore in many of the States it is the practice to permit convictions for misdemeanor on indictments for felony where the latter includes the former. 1 Bish. Cr. Law. 5th ed. §§ 804, 805.

It is the established doctrine in this State that, where a defendant is put upon his trial for a crime which includes an offense of an inferior degree, he may be acquitted of the higher offense, and convicted of the lesser. *Carpenter v. People*, 5 Ill. 197; *Beckwith v. People*, 26 Ill. 500; *Prindenville v. People*, 42 Ill. 217; *Yos v. People*, 49 Ill. 410; *Earll v. People*, 78 Ill. 329; *Reynolds v. People*, 83 Ill. 479; *Ruth v. People*, 99 Ill. 185; *Kennedy v. People*, 122 Ill. 649, 11 West. Rep. 43.

In 1 Bishop's Criminal Procedure, 2d ed.

§§ 445, 446, it is stated in substance that, according to the English practice, and the practice prevailing in most of our States, there cannot be a conviction for a misdemeanor on an indictment for felony; that if we examine the reasons upon which the rule rests we shall see the result to be that, in States where it prevails, a count for a misdemeanor and a count for a felony cannot be joined in the same indictment; but that, in States where there can be a conviction for misdemeanor on an indictment for felony, counts for felony and misdemeanor may, under some circumstances, be properly joined, as where both counts relate to the same transaction.

In Wharton's Criminal Pleading and Practice, §§ 288, 289, it is said: "An indictment may also contain a count at common law, and another under a statute; nor does it vary the case that one offense is a felony and the other a misdemeanor. . . . Indictments will be sustained which join larceny with conspiracy to defraud, both based on the same transaction; and a felony with a misdemeanor forming distinct stages in the same offense."

In the late case of *State v. Stewart*, 59 Vt.

which made the indictment fatally defective, or which deprived the court of jurisdiction to try and sentence the prisoner on the latter charge. *Re Lane*, 135 U. S. 443, 34 L. ed. 219.

Charging acts in a single count.

Where a statute enumerates a series of acts either of which separately or all of which taken together may constitute an offense, all such acts may be charged in a single count. *People v. Frank*, 28 Cal. 507; *People v. De LaGuerra*, 31 Cal. 416; *United States v. Fero*, 18 Fed. Rep. 901.

No matters, however multifarious, will operate to make a count double, if they constitute but one connected charge or transaction, provided that in no view can they be regarded as more than one offense. *State v. Haven*, 4 New Eng. Rep. 619, 59 Vt. 369.

Where a statute forbids several acts enumerated disjunctively, and punishes them alike, their commission may usually be charged in one count. *State v. Brady*, 6 New Eng. Rep. 225, 16 R. I. —.

But two offenses, one capital and the other a misdemeanor created by separate sections of the Statute, cannot be joined (*United States v. Sharp*, Pet. C. C. 181); yet if the several acts are subject to the same punishment and are committed by the same person at the same time they may be joined in one count. *Byrne v. State*, 12 Wis. 519; *Russell v. State*, 71 Ala. 348.

Although the joinder of two or more offenses in one count cannot be permitted, it is not an objection to an indictment that the charge might be branched out into two offenses, if the whole be but parts of one fact or endeavor. *Sprouse v. Com.* 31 Va. 374.

It is a common practice to join counts for distinct felonies when constructed on different sections of the same statute, as for arson or burglary; where the common-law offense is divided into distinct grades, counts may be joined embracing each section. *Com. v. Sullivan*, 104 Mass. 552; *Com. v. Hope*, 23 Pick. 1.

Where several cognate acts are forbidden disjunctively, the complaint or indictment may ordinarily charge them all conjunctively in a single count. *State v. Nolan*, 4 New Eng. Rep. 754, 15 R. I. 529.

9 L. R. A.

Ind. Rev. Stat. 1881, § 2003, declaring what acts shall constitute a prostitute, falls within the rule that all things mentioned in the Statute may be charged conjunctively in a single count as a single offense. *State v. Stout*, 11 West. Rep. 353, 112 Ind. 245.

An indictment charging in the same count an aggravated and common assault is not duplicitous, as the former includes the latter. *Akin v. State* (Tex. App.) Nov. 27, 1899.

An indictment which charges the burning of a warehouse, and, in consequence thereof, the setting fire to a dwelling-house, charges but one offense. *Early v. Com.* (Va.) 14 Va. L. J. 383.

Burglary with intent to commit larceny, and larceny actually consummated, may be charged in the same count in an indictment. *Becker v. Com.* (Pa.) 8 Cent. Rep. 388.

An allegation, in an indictment, of each one of the series of acts named in Cal. Pen. Code, § 470, either one of which will constitute the crime of forgery, is not the allegation of two offenses, as all constitute but the single crime. *People v. Harold*, 84 Cal. 567.

An indictment charging a forgery of letters-patent, and also that defendant offered the instrument for record, or caused it to be recorded, is not bad for charging two offenses, as the allegation as to recording the instrument is merely surplusage, there being no statute making that a criminal offense. *Ibid.*

Falsely making and counterfeiting a written instrument may be charged in one count (*State v. Hastings*, 53 N. H. 452); but drawing and issuing county warrants cannot be so charged. *State v. Ferriss*, 3 Lea, 700.

The allegation in a single count that defendant registered bets and sold pools is not bad for duplicity. *Com. v. Ferry*, 5 New Eng. Rep. 739, 146 Mass. 208.

A single offense of larceny may be charged in one count, where the articles stolen are of different values and belonged to different owners, if the larceny was one act committed at one time and place. *People v. Johnson* (Mich.) June 27, 1890.

In case of larceny the taking of several articles may be charged in a single count. *State v. Pierce*, 77 Iowa, 245.

373, it is said: "Although authorities can be found that lay down the rule that felonies and misdemeanors, or different felonies, cannot be joined in the same indictment, still the rule in this and most of the States is otherwise. It is always and everywhere permissible for the pleader to set forth the offense he seeks to prosecute in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. If the counts cover the same transaction, though involving offenses of different grade, the court has it in its power to preserve all rights of defense intact." See also *Stewick v. Com.* 78 Pa. 460; *Hunter v. Com.* 79 Pa. 503; *Hutchison v. Com.* 82 Pa. 472; *Hawker v. People*, 75 N. Y. 487; *Crowley v. Com.* 11 Met. 575; *State v. Hood*, 51 Me. 363; *Com. v. McLaughlin*, 12 Cush. 612; *State v. Lincoln*, 49 N. H. 464.

In the case of *Thomas v. People*, 113 Ill. 531, this court, while it held that all the counts there involved were for misdemeanors, explicitly refused to concede that a count for a misdemeanor can, under no circumstances, be joined with a count for felony. See also *Thompson v. People*, 125 Ill. 256.

It is urged, however, that the court has, in *Lyons v. People*, 68 Ill. 275, and *Beasley v. People*, 89 Ill. 571, decided that counts for felony and for misdemeanor cannot be joined. We do not so understand those cases. The question of joining counts for felony and for misdemeanor in the same indictment did not arise in either case. In the *Lyons Case* one count was for burglary and the other was for petit larceny, and, under the law of the State as it then stood, petit larceny was a felony; and it was held that, as the two counts were based on a single transaction, they were properly joined. In the opinion reference was made to certain text-books, and it was stated that the rule laid down in them was "that, although it is not proper to include separate and distinct felonies in different counts of the same indictment, it is proper to state the same offense in different ways, in as many different counts as the pleader may think necessary, even although the judgment on the several counts be different, provided all the counts are for felonies, or all for misdemeanors." This language was evidently taken from the books as found therein, and because it was applicable to and decisive of the case then before the court; but that case did not call for a decision upon the proviso or last clause of the sentence quoted. In the *Beasley Case*, also, all the counts were for felonies, and the question here under consideration was not at issue; and what was there said cannot be regarded as a decision of such question. The reasons upon which was based the English rule against joining felonies and misdemeanors in the same indictment have ceased to exist, and that rule, if now enforced, would be purely technical and arbitrary, and would subserve no useful or beneficial purpose, and its tendency would be to embarrass, delay and prevent the administration of justice. *Cessante ratione legis, cessat et ipsa lex.* Besides this, the rule is inconsistent with the practice which has long and uniformly pre-

vailed in this State, of permitting, upon an indictment for felony, a conviction for a misdemeanor, which is included in the greater offense charged. It would be unreasonable to hold that upon an indictment for a felony a defendant may be convicted of a misdemeanor, there being no count specifically charging such misdemeanor, and yet hold that, if there is such specific count, there can be no such conviction. We think the better rule to be to permit the joinder of counts, whether for felony or for misdemeanor, where one and the same criminal transaction is involved in the different counts, or the felonies and the misdemeanors charged form distinct stages in the same offense. In the indictment before us the several counts are merely statements in various forms of the proceedings in one and the same transaction, and are not inconsistent with each other, and may well have formed parts of the same offense. It is not impossible that plaintiffs in error should have formed a conspiracy to induce Catherine Sievers to have illicit criminal intercourse, and conspiracies to entice and take her away for the purpose both of prostitution and concubinage; that they should actually have enticed and taken her away for the purposes of prostitution and concubinage, and should have confined her in a house or room against her will for purposes of prostitution. If two or more offenses form parts of one transaction, and are of such a nature that a defendant may be guilty of both or all, the prosecution will not, as a general rule, be put to an election. The right of demanding an election, and the limitation of the prosecution to one offense, is confined to charges which are actually distinct from each other, and do not form parts of one and the same transaction. *Goodhus v. People*, 94 Ill. 37; *Andrews v. People*, 117 Ill. 195, 4 West. Rep. 139.

In our opinion there is no misjoinder of counts in this case, and it was not error to overrule the motions to quash the indictment and to compel the prosecution to make an election.

The other question is whether the verdict is sufficient to sustain the judgment of the court. As has been already stated, the instructions of the court are not preserved in the record, and it must therefore be presumed the court instructed the jury to disregard the five counts that had been abandoned by the prosecution. The verdict found the defendants "guilty in manner and form as charged in the indictment." The logical conclusion from the verdict is that the defendants were found guilty by the jury upon each of the six remaining counts in the indictment. *Curtis v. People*, 1 Ill. 197; *Armstrong v. People*, 87 Ill. 459; *Lyons v. People*, 68 Ill. 271; *Tobin v. People*, 104 Ill. 565.

In this case, as we have seen, the counts are not inconsistent with each other, and it is possible the evidence may have been such as to establish guilt under each and all the counts submitted to the jury, and, as the evidence is not contained in the record, it is to be presumed that such was the case. The punishments fixed by the verdict were five years of imprisonment in the penitentiary

for two of the defendants, and four years imprisonment in the penitentiary for the other defendant. These penalties were legally applicable to each and every count remaining in the indictment, and were no greater than was authorized for either of the offenses for which the defendants were tried. This not only tends further to show the defendants were found guilty upon all the counts, but also indicates they were not damnified by the form of the verdict. Besides this, not one of the counts in the indictment charges an offense which, under the statutes of the

State, is deemed infamous. We are unable to take any view of the case that renders it probable, or even possible, that the rights of plaintiffs in error might have been injuriously affected by the fact that the jury in their verdict did not specify any particular count or counts, but returned a general verdict of guilty upon all the counts submitted to them.

We find no error in the record, and the judgment is affirmed.

Petition for rehearing denied March Term, 1890.

RHODE ISLAND SUPREME COURT.

Robert R. LEIGHTON

v.

John P. CAMPBELL *et al.*

(17 R. L.....)

1. "Debts contracted" before recording a certificate of the payment of stock for which directors are liable under a statute do not include unliquidated claims for damages arising *ex delicto*.
2. A judgment in tort is not a "debt contracted" for which directors of a corporation are liable under Pub. Stat., chap. 155, §§ 2, 3.
3. An excess of indebtedness for which directors of a corporation can be held liable under Pub. Stat., chap. 155, § 15, cannot include any claim or debt not existing before the excess unless contracted or voluntarily incurred, and therefore cannot include a judgment of tort.

(May 17, 1890.)

ACTION to render directors of a corporation personally liable for the payment of a judgment recovered against the corporation for damages for personal injuries resulting from its negligence. On demurrer to the declaration. *Sustained.*

The case sufficiently appears in the opinion. *Messrs. Edwin D. McGuinness and John Doran* for plaintiff.

Messrs. Joseph C. Ely and Rathbone Gardner for defendants.

Durfee, Ch. J., delivered the opinion of the court:

This is an action of trespass on the case, brought by the plaintiff against the defendants as directors of the Cranston Bleaching, Dyeing

& Printing Company, a corporation created by the General Assembly, and also against two of them as president and treasurer respectively, of said company, to subject said defendants to the payment of a judgment recovered against the company by the plaintiff in an action of trespass on the case, for damages for injuries received by him in consequence of its negligence. The declaration contains seven counts, of which five are designed to charge the defendants under Pub. Stat. R. I., chap. 155, §§ 2, 3, one to charge them under section 4, and the remaining one to charge them under section 15. Said section 2 makes it the duty of the president and directors, with the treasurer and clerk, within ten days after the last installment of the corporate stock has been paid in, to make a certificate, stating its amount, signed and sworn to by the president, treasurer and clerk and by a majority of the directors, and lodge it to be recorded in the office of the town clerk of the town where the corporation is established; and in case of an increase to do likewise in regard to the amount added and paid in. Said section 3 provides that, if any of said officers shall refuse or neglect to perform said duties, "they shall be jointly and severally liable for all debts of the company contracted after said ten days, and before such certificate is recorded." The declaration in the five counts first mentioned alleges a neglect on the part of the defendants to perform the duties imposed by said section 2, and seeks to charge them, on account of such neglect, under said section 3. The defendants demur to the declaration, and contend that they are not liable under said sections 2 and 3, because said sections make them liable only for the debts of the company contracted after said ten days, and not for the com-

NOTE.—Corporations; Liability of directors for "debts contracted."

The California Civil Code, making directors of corporations individually liable for debts created beyond their subscribed capital stock, is applicable to all the subscribed capital stock, irrespective of the mode of disposition, and whether it is paid in or not. *Moore v. Lent*, 81 Cal. 502.

The debts referred to do not include capital stock paid for corporate property. *Ibid.*

The Colorado General Corporation Act, providing that, for failure to file the actual report therein prescribed, "all the directors or trustees of the company shall be jointly and severally liable for the debts" contracted during the year, imposes such

liability only on the directors or trustees chargeable with the neglect or failure to make the required report. *Austin v. Berlin*, 18 Colo. 198.

It is not essential to the liability of a director of a corporation, under the New York Laws providing that if any certificate or report made or public notice given by the officers of any such corporation is false in any material representation, all the officers who sign the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof, that such director know that the report is false; the fact that the report is untrue in any material representation is sufficient. *Huntington v. Attrill*, 118 N. Y. 385.

pany's torts. The plaintiff contends: *first*, that said section 8 should be construed to include demands *ex delicto* as well as *ex contractu*; and *second*, that his demand, though it was originally a claim in tort for damages, has become a debt by having been reduced to a judgment, and that, being a debt, it is recoverable, under said section 8, from the defendants.

The plaintiff cites, in support of his contention, *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 455, and *Carver v. Braintree Mfg. Co.* 2 Story, 432. These cases relate to the liability of corporators under a Massachusetts statute subjecting them to individual liability for the "debts and contracts" of the corporation, or for the "debts contracted" by it, and not to the liability of officers of corporations under other provisions. In the first case it was held that the phrase covered a claim for unliquidated damages arising *ex contractu*. In the second it was held that the phrase "debts contracted," being broadly construed, covered a liability incurred by the infringement of a patent, or, in other words, a liability for tort. *Judge Story*, in giving this construction, relied somewhat on the authority of *Mill Dam Foundry v. Hovey*, but still more on his view that the provision imposing the liability was to be regarded as remedial, and was therefore to be liberally construed, in fact, virtually conceding that in any other view the construction would be too broad.

In *Child v. Boston & F. Iron Works*, 187 Mass. 516, the court says, in criticism of *Carver v. Braintree Mfg. Co.*: "There are no cases decided by the courts of the Commonwealth in which a stockholder has been held liable for a tort of the corporation, and the decision of *Mr. Justice Story* stands unsupported by any direct authority, either before or since." There are cases in other States in which it has been held that the words "debts contracted" do not subject the corporators to liabilities for the torts of the corporation. *Heacock v. Sherman*, 14 Wend. 58; *Bohn v. Brown*, 33 Mich. 257; *Cable v. McCune*, 26 Mo. 371.

In the case at bar, however, the question relates not to the corporators, but to officers, under provisions relating to them exclusively as such, imposing duties on them, and making them liable in case they neglect or refuse to perform them. These provisions, as contradistinguished from the provisions in regard to corporators, are deemed to be penal, and for that reason to be strictly construed. *Chase v. Curtis*, 113 U. S. 452 [28 L. ed. 1038].

We do not think that any court would hold that the words "debts contracted," if strictly construed, would include unliquidated claims for damages arising *ex delicto*. *Child v. Boston & F. Iron Works*, *supra*.

We pass to the plaintiff's second contention, which is that the defendants are liable under said section 8 because his claim has been reduced to a judgment, and is, technically speaking, a debt of the corporation. The New York cases, under statutory provisions similar to ours, hold that in that State the trustees of corporations are liable, if at all, only on the original claim, and that a judgment against the corporation thereon has no effect as against them. *Miller v. White*, 50 N. Y. 137; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Esmond v. Bullard*, 16 Hun. 65.

9 L. R. A.

It has been held in other States that the reduction of a claim for damages against a corporation arising *ex delicto*, to a judgment, does not change its character as against the delinquent officers so as to charge them thereon as for a debt contracted by the corporation. *Cable v. Gaty*, 34 Mo. 578; *Bohn v. Brown*, 33 Mich. 257. So, also, by the Supreme Court of the United States, *Chase v. Curtis*, 113 U. S. 452 [28 L. ed. 1038].

Under said section 8 the delinquent officers became liable, not generally for the company's debt, but for "all debts of the company contracted" after the ten days mentioned in section 2, and before the recording of the certificate. A judgment in tort is technically a debt, but is it a debt contracted? Manifestly not, if the words are taken in their ordinary and obvious meaning. As before remarked, said section 8 creates a liability which is penal in its character, and therefore its language is neither to be extended by construction, nor tortured into yielding a meaning wider than it naturally bears; but, on the contrary, it is to be construed strictly, so as not to exceed its clear intent. *Whitaker v. Masterton*, 106 N. Y. 277, 280, 3 Cent. Rep. 776.

Under such a rule the liability imposed by said section is limited by its terms to debts existing or arising *ex contractu*. *Chase v. Curtis*, 113 U. S. 452, 464 [28 L. ed. 1038, 1042].

We decide that the defendants are not liable under said sections 2 and 8.

Section 4 authorizes corporations to reduce their capital by vote, but requires that a certified copy of the vote shall be recorded in the town clerk's office within ten days after its passage, and if not so recorded makes the directors "jointly and severally liable for all debts of the company contracted after said ten days, and before the recording." The language is the same as in the preceding section, and must be construed in the same manner.

The final question is whether the plaintiff is entitled to recover under said section 15. Section 15 provides that the debts shall not exceed the capital paid in, and that if they do the directors under whom the excess occurs shall be jointly and severally liable, to the extent of the excess, "for all of the debts of the company then existing, and for all that shall be contracted as long as they shall respectively continue in office, and until the debts shall be reduced to the amount of the capital stock paid in." The language, taken strictly, does not make the directors liable for any debt accruing after the excess occurs, unless it be a debt that is contracted after the excess occurs. The count, which is based on said section, states that the capital paid in was not over \$187,525, and that when the plaintiff's claim originated the debts amounted to \$255,421.07. The claim, whether we regard it as having accrued when the injury was received, or when the judgment was recovered, accrued after the excess occurred, and, if section 15 be strictly construed, cannot be recovered of the defendants, since it is not, strictly speaking, a debt contracted. We think the same reason exists for construing said section strictly as for so construing the others. The liability of the directors under it, as under the others, is penal; and it should not, unless the language requires it, be extended to

any claim or debt not existing before the excess, unless contracted or voluntarily incurred, the theory being, apparently, that, if the debts exceed the capital at any time, it is because the directors consent to, or at any rate do not check,

the increase. Whether, under the section, the directors would be liable for a debt arising *ex delicto*, if it preceded the excess, we need not consider.

Demurrer sustained.

NEW YORK COURT OF APPEALS (2d Div.).

Roland R. DENNIS, *Resp't.*,

v.

MASSACHUSETTS BENEFIT ASSOCIATION, *Appt.*

(120 N. Y. 493.)

1. Failure to pay an assessment by reason of a stroke of apoplexy causing unconsciousness, which continues until death, will not forfeit a benefit certificate which declares that it shall be void for failure to pay assessments, if it also provides that a member may be reinstated by paying assessment arrearages "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment)."

2. "Valid reasons" for which under his con-

tract a person may be reinstated in a benefit association after failure to pay an assessment are not to be arbitrarily determined by its officers, but their determination is subject to review in the courts.

(June 3, 1890.)

APPEAL by defendant from an order of the General Term of the Supreme Court, Second Department, reversing a judgment of the Dutchess Circuit entered upon a verdict directed for defendant in an action brought to recover the amount alleged to be due upon a benefit insurance certificate. *Affirmed.*

Statement by **Parker, J.:**

On the 8d day of August, 1888, the defendant, a mutual benefit association, issued a cer-

NOTE.—Benefit certificate; forfeiture for nonpayment of assessment.

A provision in an application for a policy, that the policy shall be null and void for failure to pay any dues or assessments, is as effectual as if included in the policy itself, where the application is by agreement made a part of the policy. *Mandego v. Centennial Mut. L. Asso. 64 Iowa, 134.*

Members voluntarily seceding and refusing to pay dues, etc., forfeit their endowment certificates. *Goodman v. Jedidjah Lodge of B'nai B'rith, 8 Cent. Rep. 278, 67 Md. 117.*

If, by the laws of the society, nonpayment of an assessment operates as a forfeiture, the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time. *Rood v. Railway Passenger & F. C. Mut. Ben. Asso. 31 Fed. Rep. 63; Bacon, Ben. Societies, p. 577.*

The remedy for an infraction of its rules must be sought in conformity with the laws and rules of the order, and must be exhausted before resort can be had to the judicial courts. *Chamberlain v. Lincoln, 129 Mass. 70; Bacon, Ben. Societies, p. 577.*

The attempt of a lodge to suspend a member without notice and authority to try him is a usurpation which cannot affect the legal rights or status of anyone. *Hall v. Supreme Lodge K. of H. 24 Fed. Rep. 450; Bacon, Ben. Societies, p. 578.*

A member is not suspended, until the lodge or other designated judiciary exercises the power of suspension. *Borgraefe v. Knights of Honor, 22 Mo. App. 127, 142; Olmstead v. Farmers Mut. F. Ins. Co. 50 Mich. 200; Bacon, Ben. Societies, p. 577.*

Benefit certificates of relief associations. See note to *Lorcher v. Supreme Lodge K. of H. (Mich.) 2 L. R. A. 208.*

Contract construed. *Lawler v. Murphy (Conn.) 8 L. R. A. 113.*

Distinction between insurance policy and benefit certificate. See note to *Milner v. Bowman (Ind.) 5 L. R. A. 95.*

Forfeitures not favored in the law.

Certificates issued by a mutual benefit society to its members are in legal effect policies of insurance. *1 L. R. A.*

and subject to all the rules of law governing such policies. *Elkhart Mut. Aid Ben. Rel. Asso. v. Houghton, 1 West. Rep. 284, 103 Ind. 236.*

Forfeitures under insurance policies are not favored, and should not be enforced unless the courts are compelled to do so. *Springfield F. & M. Ins. Co. v. McLimans (Neb.) Feb. 25, 1890.*

An insurance policy should receive a reasonable construction, and one that will carry its provisions into effect, if possible. *Ibid.*

Where it is capable of two interpretations it must be strictly construed against the insurer. *Wallace v. German-American Ins. Co. 41 Fed. Rep. 742.*

Where a promissory note is taken in payment of the premium, the failure to pay the note will not forfeit the policy, although it is so stipulated in the note. *Kline v. National Ben. Asso. 9 West. Rep. 239, 111 Ind. 463.*

A cause of forfeiture will not be created by the words contained in the order given by the assured: "If this order is not paid, then all my rights in said association are hereby forfeited."—where he authorizes the association to deduct for any indebtedness from moneys due him on account of injuries. *Ibid.*

They cannot be declared after the death of the member. *Olmstead v. Farmers Mut. F. Ins. Co. 50 Mich. 200; Bacon, Ben. Societies, p. 578.*

Where the company indicates that tender of premium after death would not be accepted, failure to make tender would not bar recovery on the policy. *Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51.*

The court will, after the death of the member, examine into and determine the adequacy of the reason offered by the member for his delinquency, and, in a proper case, compel the association to pay the amount of the insurance. *VanHouten v. Pine, 38 N. J. Eq. 72; Bacon, Ben. Societies, p. 581.*

The validity of the reason assigned should have been submitted to the jury. *Hull v. Hull, 24 N. Y. 647; Duplex Safety Boiler Co. v. Garden, 2 Cent. Rep. 379, 101 N. Y. 387; Bacon, Ben. Societies, p. 580.*

Life insurance; doctrine of forfeiture. See notes to *Garner v. Germania L. Ins. Co. (N. Y.) 1 L. R. A. 256; McGurk v. Metropolitan L. Ins. Co. (Conn.) 1 L. R. A. 563; Fowler v. Metropolitan L. Ins. Co. (N. Y.) 5 L. R. A. 806.*

Forfeiture not favored in law. See note to *Guntner v. New Orleans Cotton Exch. Mut. Aid Assn. (La.) 2 L. R. A. 118.*

tificate of membership to one J. Fred. Dennis, conditioned that if Dennis should comply with the rules and regulations of the defendant, and forming a part of the contract, the defendant would pay to Anne C. Dennis within sixty days after due proof of his death a sum equal to the amount received from a death assessment, but not to exceed \$5,000.

The seventh condition of the contract is as follows: "A failure to comply with the rules of said Association, as to payment of assessments, or falling into gross and confirmed habits of intoxication, shall also render this certificate void."

The rules in so far as they relate to the payment of assessments are: "Second. Upon the death of any member, the said party to whom this certificate is issued shall at once pay, if required, to its treasurer, an additional assessment of \$6.75. Third. The form of notice to and process of collection from each of the members of the Association above named shall be as follows: A notice shall be sent announcing such assessment, and the number thereof, to the last post-office address given to the Association by each member, and if the assessment is not received within thirty days from the mailing of said notice, it shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the Association, which connection shall thereupon terminate, and the party's contract with the Association shall lapse and be void; but said party may again renew his connection with the Association by a new contract made in the same manner as at first; or for valid reasons to the officers of the Association (such as a failure to receive notice of an assessment), he may be reinstated by paying assessment arrearages."

February 18, 1886, the defendant mailed to Dennis a notice of assessment by the terms of which he was required to make payment on or before March 15.

Seven days before the expiration of the time of payment and on March 8, Dennis, while walking in the streets of the City of New York, and apparently in good health, was suddenly stricken with apoplexy, rendering him immediately speechless and insensible. He never regained consciousness, and died on March 10, four days after the expiration of the time limited in the notice for the payment of the assessment.

The next day, March 20, a second notice was received from the defendant, in all respects like the first, with the exception that it had stamped upon the face in red ink "certificate forfeited for nonpayment. May be renewed by immediate payment if in good health."

The trial court refused plaintiff's request to submit certain specified questions to the jury and directed a verdict in favor of the defendant.

Mr. John A. Mapes, for appellant:

In cases of ordinary life insurance, it has uniformly been held that failure to pay premiums when due by the terms of the policy terminates the contract.

Roehner v. Knickerbocker L. Ins. Co. 63 N. Y. 160; *Evans v. United States L. Ins. Co.* 64 N. Y. 804; *Howell v. Knickerbocker L. Ins. Co.* 44 N. Y. 276; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543; *Holly v. Metropolitan* 9 L. R. A.

L. Ins. Co. 7 Cent. Rep. 263, 105 N. Y. 437; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 28 L. ed. 789; *Douglas v. Knickerbocker L. Ins. Co.* 83 N. Y. 508, 504; *Atty. Gen. v. North America L. Ins. Co.* 83 N. Y. 190; *Fowler v. Metropolitan L. Ins. Co.* 116 N. Y. 889.

The same rule has also uniformly been applied to cases of failure to pay death assessments in mutual benevolent associations where, as in this case, by the terms of the certificate of membership such failure to pay within a specified time in itself terminates the membership.

Carpenter v. Centennial Mut. L. Asso. 63 Iowa, 453; *Yoe v. Benjamin O. Howard Masonic Mut. Benev. Asso.* 63 Md. 86; *Hauksshaw v. Supreme Lodge K. of H.* 29 Fed. Rep. 773; *National Mut. Ben. Asso. v. Miller*, 85 Ky. 88; *Crossman v. Massachusetts Ben. Asso.* 8 New Eng. Rep. 517, 143 Mass. 435; *Borgraefe v. Knights of Honor*, 22 Mo. App. 127; *Illinois Masons Ben. Soc. v. Baldwin*, 86 Ill. 479; *Rood v. Railway Pass. & F. C. Mut. Ben. Asso.* 81 Fed. Rep. 62.

The illness of the insured and his unconscious condition furnish no legal excuse for failure to pay the assessment.

Wheeler v. Connecticut Mut. L. Ins. Co. and *Howell v. Knickerbocker L. Ins. Co.* *supra*; *Carpenter v. Centennial Mut. L. Asso.* 63 Iowa, 453; *Yoe v. Benjamin O. Howard Masonic Mut. Benev. Asso.* 63 Md. 86; *Klein v. New York L. Ins. Co.* 104 U. S. 88, 28 L. ed. 662; *Hauksshaw v. Supreme Lodge K. of H.* 29 Fed. Rep. 773.

Inevitable accident or the "act of God" will excuse one for nonperformance of duties imposed by law, but not of contract obligations.

Harmony v. Bingham, 13 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 275; *Wheeler v. Connecticut Mut. L. Ins. Co.* *supra*.

So also when the contract is for services purely personal in their character, and which cannot be performed by another; but this rule does not apply to cases where the thing to be done may be done by another.

Wolfe v. Howes, 20 N. Y. 197; *Clark v. Gilbert*, 26 N. Y. 279; *Spalding v. Rosa*, 71 N. Y. 40; *Story*, Bailm. § 86, and notes; *Wheeler v. Connecticut Mut. L. Ins. Co.* *supra*.

In this case Dennis' wife could have made the payment.

The failure to pay cannot be attributed to the sickness but was the result of insured's own negligence.

See *Yoe v. Benjamin O. Howard Masonic Mut. Benev. Asso.* 63 Md. 86.

Not being a member of the Association at the time of his death, and by reason thereof having no contract of insurance in force, no action could be sustained upon the certificate thereof.

Kercher v. Supreme Lodge K. of H. 187 Mass. 368; *Borgraefe v. Knights of Honor*, 22 Mo. App. 132, 143; *Yoe v. Benjamin O. Howard Masonic Mut. Benev. Asso.* 63 Md. 86; *Illinois Masons Ben. Soc. v. Baldwin*, 86 Ill. 479; *Blanchard v. Atlantic Mut. F. Ins. Co.* 33 N. H. 9; *Rood v. Railway Pass. & F. C. Mut. Ben. Asso.* 81 Fed. Rep. 62.

McCaers. Tredwell Cleveland and Prescott Hall Butler, for respondent:

Failure to pay the assessment before March 15, 1886, did not, by the terms of the policy, operate as a forfeiture.

Forfeitures are not favored, and the party claiming a forfeiture will not be permitted upon equivocal or doubtful clauses, or words, contained in his own contract, to deprive the other party of the benefit of the right or indemnity for which he contracted.

Baley v. Homestead F. Ins. Co. 80 N. Y. 21, 23; *Burleigh v. Gebhard F. Ins. Co.* 80 N. Y. 220.

If the beneficiary in the policy was, by act of God or other insuperable obstacle, prevented from paying the assessment within the time specified in the notice, there existed a valid reason to the officers of the Association for excusing such nonpayment and reinstating the policy; and whether such valid reason did in fact exist was a question for the jury.

See *Howell v. Knickerbocker L. Ins. Co.* 44 N. Y. 277; *Holly v. Metropolitan L. Ins. Co.* 7 Cent. Rep. 263, 105 N. Y. 437.

The valid reason excusing the default must be a reason valid in the law to the officers of the Association, and not according to their mere whim or pleasure.

Duplex Safety Boiler Co. v. Garden, 2 Cent. Rep. 379, 101 N. Y. 387; *Miscell v. Globe Mut. L. Ins. Co.* 76 N. Y. 115, 119; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 782, 793; *Moore v. Woolsey*, 4 El. & Bl. 248.

Although the insured was dead, the right to a paid-up policy or its value remained to his assignees. If the insured had lived, he was entitled to it, and his assignees succeeded in his right.

Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 554.

Parker, J., delivered the opinion of the court:

If the certificate in question had provided without qualification that, for a failure to pay an assessment within thirty days after the mailing of a notice thereof by the defendant, it should "lapse and be void," its invalidity would be established beyond dispute. *Roehner v. Knickerbocker L. Ins. Co.* 68 N. Y. 160; *Evans v. United States L. Ins. Co.* 64 N. Y. 804.

And the fact that Dennis was prevented from making payment by an act of God which deprived him of consciousness would not relieve him from a forfeiture thus provided for. *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543.

But the question here presented is whether the contract does not fairly admit of a construction which gives to it, after the expiration of thirty days, where a member intends and desires to pay, conditional life, which continues until it shall be determined whether he had sufficient excuse for the omission? And if such a construction be permissible, whether Dennis' severe visitation and subsequent unconscious condition constitute such an excuse as, coupled with an intention to pay and subsequent payment, would continue the policy in force.

Judge Peckham, in *Holly v. Metropolitan L. Ins. Co.*, 105 N. Y. 437, 7 Cent. Rep. 263, stated the rule which should govern courts in construing contracts involving a forfeiture as follows: "A strict construction, it is said, must be insisted upon, and the contract resulting in

a forfeiture cannot be extended beyond the strict and literal meaning of the words used. This is undoubtedly true. In cases where the meaning is not entirely plain, and where it is capable of two constructions, one involving a forfeiture and the other being fair and reasonable and supporting the obligation of the policy against the insurer, that construction is preferred by the courts which does not involve the forfeiture, not only because it is not so harsh, but also because if the language is doubtful it is that employed by the insurer and should be taken most strongly against him."

By the seventh condition of the certificate, forfeiture is made to depend upon "a failure to comply with the rules of said Association as to payment of assessments." The second and third rules have reference to assessments and their payment.

Rule second provides that "upon the death of any member the said party to whom this certificate is issued shall at once pay, if required, to its treasurer an additional assessment of \$6.75.

This rule need not be considered because the defendant did not require Dennis to pay at once. By the terms of the notice he was expressly given until March 15, following, within which to make payment. And the notice was in accordance with the provisions of rule third, which provided, among other things, that "if the assessment is not received within thirty days from the mailing of said notice, it shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the Association, which connection shall thereupon terminate, and the party's contract with the Association shall lapse and be void; . . . or for valid reasons to the officers of the Association (such as a failure to receive notice of an assessment) he may be reinstated by paying assessment arrearages."

The right of the defendant to insist upon a forfeiture could not be doubted were it not for the last clause of the sentence quoted. By it is suggested the inquiry, What was the intent of the defendant in adding this apparently qualifying clause? How did it suppose the persons solicited to become members would interpret it? Certainly it did not expect them to understand it as giving added strength to the provision declaring a forfeiture. It is equally clear that it was intended to be understood as softening somewhat the extreme rigor of the forfeiture clause, which, standing alone and unqualified, would deprive a member of the insurance for which he has contracted and paid, even when by an accident of mail carriage the notice of assessment has failed to reach him, or because of the act of God he has been prevented from making payment within the time prescribed.

It cannot be doubted that it suggests, at least to the average reader, that the company has agreed to accept a valid excuse for nonpayment of an assessment within the thirty days, and thereafter continue the policy in force. It is wholly meaningless and a snare if that be not the intent. That it was intended to have that effect has support in the provision that failure to pay within thirty days "shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with

the Association." It will be observed that the contract does not provide in terms that failure to pay within thirty days shall work a forfeiture, but that failure to pay shall be taken as sufficient evidence of an intention to terminate his connection with the Association, which connection shall thereupon terminate. Thus it is suggested that it is the intention, coupled with the failure to pay, which works the forfeiture. This language, therefore, seems to be in harmony with the last clause of the sentence. For as intention constitutes one of the essential elements of a forfeiture, so if a party intends to pay, but fails, for a valid reason, "such as a failure to receive notice of an assessment," he may be reinstated. No new contract is required. Nothing in fact need be done but pay the assessment if the excuse be accepted. Giving to all the words of the contract their full and proper meaning, as the defendant must have supposed they were understood by the promisee, they cannot, as we think, be construed otherwise than as limiting and making conditional the forfeiture which would otherwise result from a failure to pay the assessment within the time prescribed. "It is a rule of law as well as ethics," says the court in *Hoffman v. Aetna F. Ins. Co.*, 82 N. Y. 418, "that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he has reason to suppose it was understood by the promisee."

The defendant not only had reason to expect that its members would interpret the contract as we have suggested, but it has also by subsequent transactions given to the contract a practical construction to the same effect.

Although the greater number of assessments were paid by Dennis promptly, still three assessments were not paid until after the due date. No other act was required or thing done to continue the policy in force except to pay the overdue assessments. And after he was in default on account of the assessment in question, and on March 19, the defendant mailed to him a notice that he could be reinstated "if in good health."

By this act the defendant indicated that it understood the policy to have conditional life remaining, because no new contract was required or suggested; the mere payment of the over-due assessment, said the defendant, in effect, will support its vitality until another assessment is due and payable.

Such notice cannot be treated as a waiver, because it must be considered in its entirety, and, thus regarded, waiver was conditioned on the good health of Dennis, a condition that the defendant could not impose if reinstatement under the circumstances was a matter of right, because it was not so written in the contract.

Was it a matter of right? Had Dennis instead of dying regained consciousness on the 19th day of March could he have compelled the defendant to accept the excuse he had to offer, and continue his policy in force on payment of the back assessment?

We have said that the contract must be construed as an agreement that a member may be relieved from the effect of forfeiture for valid reasons to the officers. Had he then established by evidence, first, that he had fully intended

to pay; second, that he was prevented by sudden illness depriving him of consciousness; third, that he had tendered payment,—what valid objection could have been interposed to the granting of a decree declaring the policy in full force and virtue?

It could not be urged that an act of God which instantly prostrates a man both physically and mentally does not constitute a legal excuse for the omission to do an act when the making and acceptance of a valid excuse therefor is distinctly contracted for.

This assertion finds support in *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276.

But it is said that the agreement vests the right to determine whether the excuse be valid in the officers of the defendant; that the manner in which they exercise their power is not open to review in the courts. In other words, that the officers may arbitrarily refuse to accept any excuse whatever. If that were true, then failure to receive a notice of assessment, notwithstanding the fact that it is specifically referred to, might be arbitrarily held to be insufficient as an excuse and the party left without redress. But such is not the law. The word "valid," as here used, is equivalent to good, sufficient or satisfactory, and is not without judicial construction.

In *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 887, 2 Cent. Rep. 379, the defendants agreed to pay as soon as they "were satisfied that the boilers as changed were a success," and in an action to recover the contract price the defendants contended that by the stipulation it was for them alone to determine whether the boilers were a success. This position was held to be untenable because "a simple allegation of dissatisfaction without some good reason assigned for it might be a mere pretext and cannot be regarded." Judge Folger, in *Miscell v. Globe Mut. L. Ins. Co.*, 76 N. Y. 115, states the rule as follows: "That which the law will say a contracting party ought to be satisfied with, that the law will say he is satisfied with." This principle is further illustrated and applied in *Folliard v. Wallace*, 2 Johns. 395; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 782, and *Moore v. Woolsey*, 4 El. & Bl. 243.

We are of the opinion, therefore, that had Dennis established the three propositions which we have stated, he would have been entitled to a judgment declaring the certificate in full force.

The death of the assured did not alter the contract obligations of the defendant. Dennis' legal right to reinstatement or to have the certificate declared to be in full force did not die with him, but passed to the beneficiary under the policy.

In *Wheeler v. Connecticut Mut. L. Ins. Co.*, 82 N. Y. 543, 554, this court held that "although the insured was dead, the right to a paid-up policy or its value remained to his assignees. If the insured had lived, he was entitled to it, and his assignees succeeded to his right."

The complaint in this action is appropriate to the relief sought to be obtained.

From the evidence it appears that the reason for nonpayment was properly presented to the defendant, the amount of the assessment ten-

dered and the validity of the policy insisted upon, but the defendant refused to accept the reason given as valid or sufficient, and insisted that the certificate had been forfeited.

We think the evidence as to the intention of Dennis to pay the assessment properly presented a question for the jury. But it cannot

avail the defendant, as it waived its right in that regard by requesting the trial court to direct a verdict in its favor.

The order appealed from should be affirmed, and judgment absolute on defendant's stipulation ordered, with costs.

All concur, except Brown, J., not sitting.

IOWA SUPREME COURT.

Emile CHAVANNES, *Appt.*,

v.

J. T. PRIESTLY.

(....Iowa....)

1. **Adjudging a person insane without notice** to him, under Code, § 1400, when the commissioners think it would be injurious to him to hold the examination in his presence, does not deprive him of his liberty without due process of law, where a regular practicing physician visits and personally examines him, and any relative, or any citizen of the county, may appear and resist the application, and the parties may appear by counsel if they elect.

2. **A person judicially found to be of unsound mind** cannot bring an action for slander in his own name, but it must be brought by his guardian, under Code, § 2569.

(May 23, 1890.)

APPEAL by plaintiff from a judgment of the District Court of Polk County in favor of defendant in an action brought to recover damages for the alleged publication of a slander. *Affirmed.*

Statement by Granger, J.:

The plaintiff is an attorney by profession, and the defendant is a physician. Both are residents of the City of Des Moines. In September, 1888, the plaintiff filed his petition, alleging that the defendant said of and concerning him: "Chavannes is insane; Chavannes is not in his right mind [meaning that the plaintiff was crazy, and unfit to attend to his business as an attorney]." The defendant's answer is in four divisions, averring, in substance: *first*, that the plaintiff had been by the commissioners of insanity of Polk County adjudged insane and ordered confined at the asylum at Mt. Pleasant, which judgment or order had never been set aside or canceled, nor the plaintiff released or discharged from such custody, and that at the commencement of this action he was in the custody of Mrs. Carrie Chavannes as his guardian, by order of said commissioners, and that the action must be abated; *second*, a general denial; *third*, that at the time of speaking the words charged he was the medical adviser of the plaintiff, and that

the words were spoken to persons in care of plaintiff, in the discharge of his duties, or by him as a witness under oath; *fourth*, that the statements were true.

The plaintiff, for reply to the first division of the answer, denied the statements, and said that if true they are of no force or effect, for the reasons (1) that he had no notice of the pendency of the proceeding before the commissioners, and was not present in person or represented by an attorney; (2) that Mrs. Carrie Chavannes had never been duly appointed as his guardian; (3) that the Act creating the board of commissioners of insanity is void in this: that it provides for no notice of such actions, and that the effect is to restrain a person of his liberty without due process of law.

By stipulation, the issues presented by the first division of the answer and the reply thereto were submitted to the court without a jury, and the record of the commissioners put in evidence, and upon its examination the district court sustained the plea in abatement and dismissed the action; and from a judgment favorable to defendant the plaintiff appealed.

Messrs. E. Chavannes in pro. per. and Carpenter & Evans, for appellant:

The sections of the Code providing for adjudging persons insane are unconstitutional, as they may deprive one of his liberty without due process of law.

Res v. Daly, 1 Ves. Sr. 269; *Buswell, Insanity*, §§ 54, 55.

The right of a person to his life, liberty or property shall not be divested except by a judicial determination, after due notice, in pursuance of the general law.

Mason v. Messenger, 17 Iowa, 261; *Newcomb v. Devey*, 27 Iowa, 881; *Koehler v. Hill*, 60 Iowa, 543; *Foule v. Mann*, 53 Iowa, 42.

In the United States it is generally held that the party alleged to be insane has a right to have notice of and be present at the proceedings instituted for determining the issue of insanity.

Buswell, Insanity, § 55, p. 69; *Ex parte Doster*, 4 Baxt. 81; *Eddy v. People*, 15 Ill. 836; *Chase v. Hathaway*, 14 Mass. 222; *Segur v. Pellerin*, 16 La. 63; *Gernon v. Dubois*, 23 La. Ann. 26; *McCurry v. Hooper*, 12 Ala. 823; *Esler v. Lepretre*, 21 Ala. 514; *Wait v. Man-*

NOTE.—Examination and confinement of the insane.

The interrogatories and answers appended to the certificate of the physician are not competent evidence as to whether the party was insane previous to the examination. *Butler v. St. Louis L. Ins. Co.* 45 Iowa, 93.

The provisions contained in § 1401 of the Code
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(§ 2195 of the Rev. Code of Iowa (1888), as modified by § 2201), and the further provisions contained in §§ 2245, 2247, allowing subsequent investigation of the question of insanity, prevent § 2195, as to proceedings for the confinement of the insane, from being in conflict with the constitutional guaranty against deprivation of personal liberty without jury trial. *Blackhawk County v. Springer*, 53 Iowa, 417.

well, 5 Pick. 219; *People v. Turner*, 55 Ill. 280; *Underwood v. People*, 82 Mich. 1.

A party cannot be deprived of life, liberty or property without due process of law.

Griswold College v. Davenport, 65 Iowa, 633.

Due process of law means the ordinary judicial proceedings recognized by law.

Bikenberry v. Edwards, 87 Iowa, 619; *Gatch v. Des Moines*, 68 Iowa, 718; *McCready v. Sexton*, 29 Iowa, 856; *Mason v. Messenger*, 17 Iowa, 261; *Stuart v. Palmer*, 74 N. Y. 188.

Messrs. Read & Read, for appellees:

The constitutionality of the Statute in question has been sustained by this court.

Black Hawk County v. Springer, 58 Iowa, 417.

Granger, J., delivered the opinion of the court:

The range of the arguments embraces many questions that do not arise upon the record before us. The district court held the plea in abatement good. If it erred, the cause must be remanded for further proceeding, and its judgment had on other questions presented in argument before we are to consider them. The commissioners' record before us unmistakably shows that inquiry was instituted upon a complaint duly made, and the plaintiff adjudged insane, and by the commissioners' order he was placed in the insane hospital for care and treatment; that the commissioners thereafter, upon application of his wife, ordered his removal from the hospital and placed him in her custody. These proceedings were by the commissioners had in the absence of the plaintiff and without notice to him. The district court held, and correctly, that no notice was required under the Statute in such a proceeding, and hence we are brought directly to the important question in the case: if the Statute, in so far as it authorizes such a proceeding in the absence of a party, and without notice to him, is void.

Such a question could not well be considered, in the absence of the law showing the exact facts or conditions under which it authorizes jurisdiction. These proceedings are provided for in a chapter of the Code on the subject "Of the Care of the Insane," which provides for the regulation and control of the several hospitals for that purpose, and of the manner of admitting subjects thereto, and determining their fitness therefor. In each county there is organized a board of commissioners of insanity of three members, viz., the clerk of the court, by virtue of his office, and a respectable practicing physician and lawyer, whose duty it is to hear complaints and determine the questions presented, and upon whose order proper subjects may be admitted to the asylum. Applications for such admission are made in the form of informations under oath. The particular facts under which jurisdiction is taken, and determination had, are shown by Code, § 1400, as follows:

"Sec. 1400. On the filing of such information, the commissioners may examine the informant under oath, and, if satisfied that there is reasonable cause therefor, shall at once investigate the grounds thereof. For this purpose they may require that the person for whom such admission is sought be brought before them, and that the examination be had in his presence; and they may issue their warrant

therefor, and provide for the suitable custody of such person until their investigation shall be concluded. Such warrant may be executed by the sheriff or any constable of the county; or, if they shall be of opinion from such preliminary inquiries as they may make,—and in making which they shall take the testimony of the informant, if they deem it necessary or desirable, and of other witnesses if offered,—that such course would probably be injurious to such person, or attended with no advantage, they may dispense with such presence. In their examination they shall hear testimony for and against such application, if any is offered. Any citizen of the county, or any relative of the person alleged to be insane, may appear and resist the application, and the parties may appear by counsel, if they elect. The commissioners, whether they dispense with the presence before them of such person or not, shall appoint some regular practicing physician of the county to visit such person, and make a personal examination touching the truth of the information, and the actual condition of such person, and forthwith report to them thereon. Such physician may or may not be of their own number; and the physician so appointed and acting shall certify, under his hand, that he has, in pursuance of his appointment, made a careful personal examination, as required; and that on such examination he finds the person in question insane, if such is the fact; and, if otherwise, not insane; and in connection with his examination, the said physician shall endeavor to obtain from the relatives of the person in question, or from others who know the facts, correct answers, so far as may be, to the interrogatories hereinafter required to be propounded in such cases, which interrogatories and answers shall be attached to his certificate."

Of course, if the commissioners' warrant should issue, and the party is brought before the board, there would be both notice and presence; and the law seems to contemplate such presence, except if the board at the preliminary inquiry, when the information is filed, shall be of opinion therefrom that such course would probably be injurious to such person, or attended with no advantage, it may be dispensed with. Now, it is easy to imagine a case in which such presence could not with safety to the person be had, nor could such a hearing with safety be had in his presence, and such persons are those most likely to need the beneficial provisions of the law, and they must be deprived of them if there is a constitutional barrier to these proceedings in their absence, and without notice. We assume, of course, that no importance is attached to an idle form of notice in such a case, as, where it would not be understood because of the infirmity, or the notice for any reason be merely formal. The law sometimes provides for these formal notices, but it is in anticipation of results not to be contemplated in this class of proceedings with the precautionary provisions of the Statute under which they are conducted. The law requires that a physician shall visit the person, and examine him, and shall confer with relatives upon the subject; so that in every case there is actual notice to relatives, who may be present, and would be likely to take an inter-

est in behalf of the person. Any citizen of the county, or relative, may appear and resist the application, and a full and free inquiry is permitted. The law and the courts are so jealous of the rights of persons, both as to liberty and property, that they view with distrust any proceedings that may affect such rights in the absence of notice; and to our minds this same jealousy pervades the Statute in question, and the ruling consideration in allowing these proceedings, in the absence of the party and without notice, is personal to him, and designed for his interest. It is not a case in which he is adjudged at fault, or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. The misfortunes of citizens sometimes place them where, for their care and preservation, restraints are necessary, and such restraints are even justified at the hands of private persons. They are not in such cases "deprived of liberty," within the meaning of the Constitution, and plaintiff bases his claim in this respect upon the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law."

The law contemplates the presence of a person whose insanity is sought to be established in all cases, except where, upon inquiry, it is made to appear that such presence would probably be injurious to the person, or attended with no advantage to him. Of the latter reason for

his absence we need express no opinion. The former is sufficient. If mistakes are made as to any facts, the proceeding is not conclusive, but every avenue known to the law is open as a means of correction and release. In this connection, see the case of *Black Hawk Co. v. Springer*, 58 Iowa, 417, which also involves a construction of the same constitutional provision as applicable to such a proceeding as this, although upon somewhat different grounds; but on general principles the cases seem to be alike, and it is there held, as in this case, that the constitutional provision has no reference to proceedings of this character. We do not think the proceedings by which the plaintiff was adjudged insane are void because of the law not providing for notice, nor because of his absence from the proceedings. Regarding the law as valid, we must assume that his absence was justified by the facts. It is a case, then, in which the plaintiff was judicially found to be of unsound mind, and under the provisions of Code, § 2569, the action must be brought by his guardian. This was not done, and the court for that reason properly dismissed the action. Counsel have discussed several questions, such as that the records do not show that the board convened at the proper place, but no such questions are presented by the record. The reply presents only the questions we have discussed.

Affirmed.

VERMONT SUPREME COURT.

Re BARRE WATER CO.

(....Vt....)

1. The words "other purposes" in a charter giving a company the right to furnish water "for the extinguishment of fires and for domestic, sanitary and other purposes" must be considered, in determining the right of eminent domain, to mean "other like purposes," or "other like public purposes," as the statute would be unconstitutional if it attempted to authorize the

taking of private property for private use without consent.

2. **Furnishing power for running small motors for light manufacturing** is not a public use for which water can be taken to the detriment of mill owners on a stream which is the source of the water supply, even when the main which supplies the water would furnish, when not required for fire purposes, more than was necessary for other public uses.

3. **The fact that water from a water supply main, by reason of the high pressure**

NOTE.—Water companies; franchisees.

A grant of a certain water privilege for the purpose of propelling a factory and its machinery and appurtenances, the building to be of a certain size, with necessary appurtenances and machinery, will be construed to measure the quantity of water, and will not limit the use of water to carry only such machinery as may be in the main building, if some of the machinery is in an annex and no more power is required to propel it than if it were in the main building. *Carleton Mills Co. v. Silver*, 8 L. R. A. 446, 82 Me. 215.

If it is doubtful from the terms of a grant whether the kind of mill or particular machinery mentioned therein, for which water is to be furnished, indicates the quantity of water and measures the extent of the power intended to be conveyed, or is referred to as a limit of the use to the particular kind of mill or specified machinery, the former construction will be favored. *Ibid.*

Where it appears that appropriating the lands in question will cut off the supply of water to a mill standing on adjoining land, petitioners may show 9 L. R. A.

in rebuttal the cost of other sources of water supply. *Illinois & St. L. R. & C. Co. v. Switzer*, 5 West. Rep. 178, 117 Ill. 899.

Condemnation of water must be for a public use. See *notes to Pittsburg, W. & K. R. Co. v. Benwood Iron Works (W. Va.)* 2 L. R. A. 680; *Harold v. Jones (Ala.)* 3 L. R. A. 408; *Ulbright v. Eufaula Water Co. (Ala.)* 4 L. R. A. 572.

Franchisees granted not exclusive.

A charter giving a corporation a right to convey water from a certain pond for the purpose of supplying villages with pure water, but giving no right to take or use it for the purpose of propelling machinery, and nowhere expressly giving an exclusive right or in terms prohibiting a charter to a rival corporation, does not constitute a contract so as to prevent the Legislature from afterwards chartering a rival corporation. *Boekland Water Co. v. Camden & R. Water Co.* 1 L. R. A. 888, 80 Me. 544.

The charter of a corporation, giving it the right to raise the level of a pond owned by the State as public property held in trust for public uses, and use the water as it flows from it, but containing no

in the pipes, would be worth much more for running motors than for supplying power in dams on the stream from which the water supply is taken, gives no right to use it for running such motors for private use without consent of the owners of such dams.

(May 23, 1890.)

EXCEPTIONS by mill owners to a judgment of the Washington County Court permitting the taking of water from a certain stream for purposes which they alleged were not public. *Sustained.*

The Barre Water Company proceeded under its charter to appropriate private waters for its use, and commissioners were appointed to appraise the damages. They assessed the damage at a certain sum if the water was used only for the extinguishment of fires and for sanitary and domestic purposes, and at a larger sum if used for all purposes, and returned their report to the county court for judgment. The court gave judgment for the larger sum, to which certain mill owners excepted upon the ground that the Company had no right to use the water for all purposes but only for the purposes covered by the smaller award.

Mr. George W. Wing for exceptants.

Messrs. E. W. Bisbee and S. C. Shurtleff for the Water Company.

Rowell, J., delivered the opinion of the court:

The Barre Water Company is incorporated by special charter, "for the purpose of furnishing the Town of Barre, in the County of Washington, and the inhabitants thereof, with water for the extinguishment of fires, and for domestic, sanitary and other purposes." Laws 1886, No. 171. For these purposes it is authorized to take, by purchase or otherwise, the water from Jail Branch and other waters. The Company proposes to dam that branch about two miles above Barre Village, and take water therefrom in a sixteen-inch main to supply the village. A main of that size is fairly and reasonably

necessary for protecting the village in case of a general conflagration, but for domestic and sanitary purposes only a small part of the water that it will supply will be needed, and the Company intends to use the surplus water for running small motors for light manufacturing, and to rent water for that purpose, and claims the right to do so. The exceptants own mills on the stream below the Company's proposed dam, and claim that the Company has no right, as against them, to use the surplus water as intended. And this is the question. The Company contends that, as at times it may be necessary for fire purposes to use all the water that a sixteen-inch main will supply, it has a right to take that amount at any time, and when not needed for the purposes specified in its charter to use it for its own benefit for any other lawful purpose; that the words of its charter are general, and that the words "other purposes" must be construed to mean any lawful purposes other than those specified; and that, by reason of the high pressure in the pipes, the water would be worth much more for running motors than for supplying power in the exceptants' dams.

Statutes are to be construed according to the intention of the Legislature, and the presumption is that the Legislature does not intend to do that which it has no authority to do; and, as it has no authority to take private property for private use without the consent of the owner, the presumption is that it did not intend to authorize that to be done in this case, unless the contrary unmistakably appears, supposing for the present that the construction contended for would amount to such an attempted authorization. It is said in *Furnessworth v. Goodhue*, 48 Vt. 209, in reference to statutes incorporating aqueduct companies, that they are "strongly derogatory to common right, and no case can be brought within them except such as come within their terms with imperative necessity." It is our duty to adopt that construction of the Statute in question that will,

necessary implication of a grant of the exclusive use of the waters, is subject to the paramount power of the State to use the water for public purposes. *Watappa Reservoir Co. v. Fall River*, 1 L. R. A. 468, 147 Mass. 548.

The Pennsylvania Act of April 23, 1874, providing that a water company shall have and enjoy the exclusive franchise in the locality, does not give such a company an exclusive right to furnish water as against an individual who, at the time of the incorporation, was already engaged in the business. *Freeport Water Works Co. v. Prager*, 129 Pa. 605.

A grant by a city to a water company, for the purpose of supplying the city with water, of the right to purchase necessary real estate, upon the condition that the company shall, when requested, furnish water to the city for fires and other purposes, is not a grant of an exclusive privilege. *Syracuse Water Co. v. Syracuse*, 5 L. R. A. 548, 116 N. Y. 187.

Words coupled or associated are understood in the same sense.

The coupling of words together indicates that they are to be taken in the same sense (4 Bacon, 23); for it is a settled rule of construction that, in accordance with the maxim *nosctur a sociis*, the meaning of a word may be ascertained by reference to the meaning of words associated with it; and the coupling of words together shows that they are to be understood in the same sense. *Myers v. Seaberger*, 10 West. Rep. 474, 45 Ohio St. 232; *State v. Bryant*, 13 West. Rep. 340, 93 Mo. 273; *McNichol v. United States M. R. Agency*, 74 Mo. 457. See *Dalrymple v. Gamble*, 11 Cent. Rep. 523, 68 Md. 523; *King v. Melling*, 1 Vent. 235; *Sanderson v. Dobson*, 1 Eron. 141; *Doe v. Barles*, 15 Mees. & W. 450; *Vandeleur v. Vandeleur*, 3 Clark & F. 98; *Wood v. Michigan Cent. A. L. R. Co.* (Mich.) June 6, 1890.

Statutes must be interpreted, if possible, so as to make them consistent with the Constitution and the paramount law. *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615; *Parsons v. Bedford*, 28 U. S. 8 Pet. 487, 7 L. ed. 732; *United States v. Coombs*, 37 U. S. 12 Pet. 72, 9 L. ed. 1004; *Brewer v. Blougher*, 39 U. S. 14 Pet. 173, 10 L. ed. 408; *Grenada County v. Brown* ("Grenada County Supra v. Brogden") 119 U. S. 261, 28 L. ed. 704.

Every statute must be so construed as to uphold its constitutionality if that may be done by a fair and reasonable interpretation of its language. *People v. O'Brien*, 2 L. R. A. 555, 111 N. Y. 67.

without doing violence to the fair meaning of its language, harmonize it with the Constitution. Therefore the general words under consideration should not be so construed as to carry the grant of the Statute beyond the legislative power, and thereby render the Act unconstitutional to that extent, unless such a construction is imperatively necessary. *Grenada County Supra. v. Brogden*, 112 U. S. 261 [28 L. ed. 704].

But we do not regard such a construction necessary, and think that on well-settled principles of very general application it would be erroneous. It is a maxim of greater or less universality of application, both in the construction of written instruments and of statutes, that general words may be aptly restricted according to the persons or the subject matter to which they relate. Lord Hale's maxim of *noscitur a sociis* is akin to this, from which the rule is deduced that the meaning of a word may be ascertained by reference to the meaning of words associated with it. And it is laid down by Lord Bacon that the coupling of words together shows that they are to be used in the same sense. In *Archbishop of Canterbury's Case*, 2 Coke, 46a, it is said that when an Act of Parliament begins with words that describe persons or things of an inferior degree, and concludes with general words, the general words shall not be extended to persons or things of a higher degree. So it is a general rule of construction that when a particular class of persons or things is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class. Thus the words "boat, barge or other vessel" in an Act of Parliament have been held not to include ships, as ships are vessels not *ejusdem generis* with boats and barges. Per Pollock, C. B., in *Lyndon v. Standbridge*, 2 Hurlst. & N. 45.

An Act of Parliament imposed certain duties on copper, brass, pewter, tin and "all other metals not enumerated," and it was held that the latter words did not include gold and silver. *Casher v. Holmes*, 2 Barn. & Ad. 592. And see *Beans v. Stevens*, 4 T. R. 224; *Broom, Leg. Max.* 651; *Sedgw. Stat. and Const. Law*, 360, note a, and 361.

Now, applying this rule to the case before us, to which it is manifestly applicable, the words "other purposes" must be construed to refer to purposes *ejusdem generis* with the purposes specially mentioned, and to mean "other like purposes" or "other like public purposes." This makes the Statute constitutional in all respects, and raises the question whether the intended use of the water for running small motors for light manufacturing, and the renting of it for that purpose, is a public use within the meaning of the Constitution.

The theory of the right of eminent domain is that all lands are held mediately or immediately from the State, upon the implied condition that the eminent domain, the superior dominion, remains in the State, authorizing it to take the same for public uses, when necessity requires it, by paying

therefor an equivalent in money. The exercise of this right has been called a "compulsory purchase," and in this aspect is much like the ancient prerogative of purveyance, which at one time prevailed pretty generally throughout Europe, and was regulated in England by *Magna Charta*, but is now abolished there, whereby the Crown enjoyed the right of buying up provisions and other necessities for the use of the royal household at an appraised valuation, and in preference to all others, even without the consent of the owner. But this theory does not embody the idea of an implied condition authorizing the State to take private property for private uses, without the consent of the owner, even by paying an equivalent in money; and the Constitution, by declaring only that private property ought to be subservient to public uses when necessity requires it, by implication declares that it ought not to be subservient to any other uses without the consent of the owner; for here the maxim is justly applicable that the express mention of one thing implies the exclusion of another. But to say what a public use is with sufficient comprehensiveness and accuracy to meet the exigencies of all cases is, to say the least, difficult. Nor is it more easy to define the limit of legislative power in respect of the right of eminent domain. This power must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements and the ever varying and constantly increasing necessities of an advancing civilization. The circumstances and requirements of the particular case, and the practice of other States and governments where constitutional limitation is placed on legislative actions in this respect, must be our guides in determining what is and what is not a public use. It is sometimes easier to say what is not than to say what is. It is so in this case. To say that this proposed use is not a public use is easy. It has none of the elements of a public use. To enter upon an extended discussion of the subject is unnecessary, for this court has laid down the law of it fully and clearly in *Tyler v. Beach*, 44 Vt. 648, in which the Flowage Acts were held unconstitutional. That was an attempt to flow the defendants' land for the benefit of the plaintiff's grist mill, which was found to be "an undoubted public benefit." But because the mill was private property, and there was no law to compel the plaintiff and his successors to grind for the public, nor any part of it, but they were free to do as they pleased about it; and because the public benefit found by the commissioners appertained to the plaintiff in his private business instead of the defendants in theirs, and could not accrue from any use the public would have of the flowage or of the mill, but only from the use the plaintiff and his successors might make of it; and because said benefit, such as it was, was not in any way secured to the public, either by legislative enactment or the proceedings in the case; and because the attempt was not to take the property of the defendants for the grist-mill so long as plaintiff and his successors should maintain and operate it,

but to take the right forever, without limitation, express or implied, except that probably the use would be limited to the purposes for which the taking could be had under the Acts,—the court said the attempt was to take the property of the defendants for the use of the plaintiff, and not for the use of the public. Tested by that case, it is entirely clear that the use here proposed is not a public use, but the merest private use. Nor is the case so strong as that in its facts, for here is no finding of a public benefit, but it is said that by reason of the high pressure in the pipes the water would be worth much more for running motors than for supplying power in the exceptants' dams. But that makes no difference. One man cannot have another's property simply because it would be worth more in his hands.

It is further said that the sewers of the village need daily cleaning, and that the water used for running motors would be discharged into them and clean them, and so be ultimately devoted to a public use. But it does not appear that the sewers need daily or frequent cleaning; nor that the water would be discharged into them; nor that it would be of sufficient quantity to clean them

to any beneficial extent if it was. This is a sufficient answer to that claim without inquiring whether such an incidental and permissive use, though public, would warrant the taking when the primary and principal use is private; to the support of which proposition the case of *Lucia v. Montpelier*, 80 Vt. 537, is cited. But that case is not like this. There the village owned the water, which was more than it needed for public uses, and the surplus was running to waste; and the question was whether the village could lawfully, as against taxpayers, lay an additional main for the primary purpose of rendering the water supply more certain in case of injury to the original main, and more ample in case of extraordinary fire; and it was held that it could, seeing that it had charter authority to supply itself with water for fire and domestic purposes, and was not limited in respect of expenditure nor supply, but was left to exercise its judgment and discretion in the matter, which, for aught that appeared, had been exercised in good faith.

Judgment reversed, and judgments for the exceptants for the smaller sums, etc.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE of New Jersey, SISTERS OF CHARITY of St. Elizabeth, *Prosecutor*,
Ptf. in Err.,

v.

COLLECTOR of the Township OF CHATHAM.

(.....N. J. L.....)

*A corporation owning real estate, the products of which are exclusively expended in the training and furnishing of persons for charitable purposes, such as the visitation of the sick, the care of hospitals, of orphanages and poor schools, is exempted from taxation by force of the fifth section of the Act concerning taxes.

(*Magie, J., dissents.*)

(July 28, 1890.)

ERROR to the Supreme Court to review a judgment sustaining the imposition of a tax upon property alleged to be exempt from taxation. *Reversed.*

The case sufficiently appears in the opinion. Argued before Beasley, *Ch. J.*, Magie, Depue, Garrison and Scudder, *Justices*, Brown, Clement, Cole, Smith and Whitaker, *Judges*, and McGill, *Ch.*

Mr. Theodore Runyon for plaintiff in error.

Mr. James C. Youngblood for defendant in error.

Beasley, *Ch. J.*, delivered the opinion of the court:

The simple question considered and decided in the supreme court was whether the prop-

erty of the plaintiff in error was entitled to exemption from taxation by force of the special Act to that purpose, as it was claimed, approved March 16, 1869. The judgment that resulted was adverse to the claim of such immunity, the ground of decision being that even if the Act referred to was applicable to the property of the plaintiff, such Act must be held to have been annulled by the intrinsic force of the amendatory provision of the Constitution, requiring property to "be assessed for taxes under general laws, and by uniform rules, according to its true value." The general rule that was deemed apposite was thus expressed in the opinion that was read in case in these words, viz.: "That, under our present Constitution, there can be no exemption of property from taxation by force of special or local statutes, except, of course, in case of some contract which the amendment of the Organic Law could not reach." The general proposition thus applied and announced is, in the opinion of this court, wholly indisputable. It is but the expression of the force of a train of decisions in the supreme court, and in this court. In this respect, in the views expressed in the court below, this court concurs. But, notwithstanding this concurrence, we have concluded that the property of the plaintiff in error should not be subjected to this tax. This view is the result of our conviction that there is a clause in section 5 of the General Tax Act that is applicable in this instance, and which exempts the lands in question from taxation. Revision, p. 1152, § 5, subd. 2. This section, after enumerating certain classes of property that are not to be taxed, such as colleges, academies, public libra-

*Read note by BEASLEY, *Ch. J.*

ries, buildings used for religious worship, provides, in these words, "that all buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof," shall be similarly exempted. No reason is perceived why this statutory immunity should not appertain to the lands comprehended in this controversy. They, and the buildings upon them, are devoted solely to charitable uses. By the express terms of its charter, the corporation cannot exist except for such beneficent purposes, for, by the second section of that Act, it is declared "that the essential object of the said corporation shall be the instruction and education of youth, the erection and maintenance of a hospital for the sick and destitute, and affording and rendering assistance to the poor and destitute." And, as the evidence shows, this corporate body has literally and exclusively carried into effect the purposes for which it was thus created. It is the owner of about 800 acres of land, only two thirds of which are productive. Upon this tract is a building in which the incorporators, being the Sisters of Charity mentioned in the charter, live. Part of such building is devoted to the uses of a school. The source of their maintenance and their work is thus described by the intelligent witness who testified on the subject: "They train, discipline and furnish Sisters for charitable purposes, which include the visitation of the sick, the care of hospitals, of orphanages, of poor schools." "For the purpose of ministering to the sick, they train nurses. They train them for taking charge of orphans; for teachers, also. After they are so trained, they send them out to pursue the various duties of their vocations in hospitals, poor schools, and they are Sisters, in general, in orphanages." "All that the farm produces is applied to the support of the institution. None of the products of the farm are ever sold. . . . If anything remains after the necessities of the Sisters are supplied, it must be applied, according to their rules, either to extend their establishments for the public good or appropriated to the relief of the poor." With respect to the school, some of the scholars are educated gratuitously, and the money derived from the tuition of the others "is appropriated, as the rules require, to the support of the Sisters, who minister to the sick in hospitals, take care of orphanages, and otherwise to the relief of the poor, and for the extension of their charitable institutions." In the clear light of this description, it does not seem possible to mistake the character of this institution. Its entire aim and end are to instruct the poor, to nurse the sick and to support the orphan. It seems plain that, if under any conditions, buildings and lands can fulfill the statutory requirements of being "used exclusively for charitable purposes," the property now in question must be able to do so. To tax this establishment is, in fact, to tax the sick and destitute. In our opinion the Statute is a preventative of a course of action so impolitic and deplorable. It is not necessary, but it is not out of place, to remark that this section of the Stat-

§ L R. A.

ute relating to taxation should be construed, not narrowly, by its letter, but liberally, and in view of its object and spirit. This was the method applied in the case of *State v. Ross*, 24 N. J. L. 497, in which it was decided that under the exemption of all colleges, academies or seminaries of learning "was embraced by implication the dormitories for the students, and the houses for the professors erected in the academic grounds. In that instance, it is obvious that the court did not merely interpret the words of the Statute, but construed the clause so as to give effect to the plain legislative scheme. This was putting the subject on the proper plane.

With regard to the question, suggested by a passing remark in one of the briefs of counsel, touching the power of the Legislature to create exemptions, enumerated and provided for in section 5 of the Tax Act, no difficulty is perceived. That clause constitutes not a particular or special regulation, but a general one, for it completely classifies subjects that are respectively possessed of characteristics naturally justifying their immunity from taxation, and which severally demark them from all other things of a taxable nature. This characteristic is that the subjects embraced in each of these classifications are plainly of such public concern that a resort to taxation for their support or promotion would be legitimate. There appears to be no reason to believe that classes of subjects that are so nearly allied to the common welfare that they may, by legislative action, be made a charge upon the public, may not by the same authority be liberated from all contribution to the public rates. The incongruity of the opposite of this rule is at once apparent by an example: Take, for instance, the public schools. They are maintained by means of taxation. Does the law compel the taxation of their property? Obviously, to answer this question in the affirmative is to say, in effect, that what the public gives to these institutions with the one hand, it is bound to take away, in part, with the other; which, of course, is a manifest absurdity. It is deemed that these provisions of the Tax Act are legitimate. It will be observed, therefore, that, although these exemptions were created before the amendment to the Constitution that requires property to be assessed for taxation under general laws, the introduction of such amendment could not in any wise affect them. They are not inconsistent with it, and the amendatory clause repeals *ipso facto* nothing that is not out of harmony with the new scheme which it introduces.

Let the judgment be reversed, and a judgment entered in favor of the plaintiff in error.

Magie, J., dissenting:

The only special reason assigned by prosecutors for vacating the tax brought up to the supreme court by this certiorari was that by an Act of the Legislature passed March 16, 1869, their property was exempted from taxation. The supreme court, it is conceded, correctly held that the Act so relied on has been repealed by the amended Con-

stitution. In my judgment, this court ought not to consider or adjudicate on the exemption of prosecutor's property, under the provisions of the General Tax Law of 1866. The public authorities, interested in maintaining this tax, have had no notice of any claim to exemption under that Act. They were not called on to show what exemption was made thereunder. Incidentally, the evi-

dence does show exemptions under that Act, and, in the absence of proof to the contrary, it should be presumed that all was exempted that the Act directed to be exempted. The public ought not to be concluded on a point not raised or put at issue, as to which they were not notified to produce evidence, and which, I may add, was not raised in the argument. I vote to affirm the judgment below.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Pauline T. GALE *et al.*, *Appts.*,

v.

Seth NICKERSON, Jr., *et al.*

(...Mass....)

1. **A will giving to testator's nephew and two nieces the residue of his property in equal shares to be held in trust by executors or trustees consisting of the nephew and one of the nieces,—in case the other niece marries, the property to be held and owned by the trustees,—transfers the property to the trustees in trust for themselves and the other niece, and no interest passes to the testator's heirs-at-law which will entitle them to maintain a bill for the division of the property according to the Statute of Distributions.**

2. **A forged release will not avail to defeat an action at law brought to recover legacies; hence a suit in equity cannot be maintained for the purpose of canceling such release.**

NOTE.—Bequest to nephews and nieces; instances.

The words "nephews and nieces hereinbefore named," in the residuary clause of a will, do not include grandnephews and grandnieces who have been twice previously referred to in the will as "children" of a "deceased niece." *Re Woodward*, 7 L. R. A. 367, 117 N. Y. 522.

In a devise of money in trust, the income to be divided among testatrix's nieces, the term "nieces" does not include nieces by marriage. *Goddard v. Amory*, 6 New Eng. Rep. 518, 147 Mass. 71.

Where testator bequeathed legacies to his nieces and nephews, and provided that if any of them "shall die or have died before and leaving lawful issue" the issue should take the share the ancestor would have received, the children of the nephews and nieces who died before the testator's will was made were included in the clause. *Re Barker*, 45 Hun, 294. Compare *Re Musther*, L. R. 43 Ch. Div. 569.

Under the Statutes of Maine, which provide that when a devisee who is a relative dies before the testator, leaving descendants, they shall take the share of such devisee, where a will gave the residue of the estate to nephews and nieces in equal portions, the children of nephews and nieces who died before the testator took the parents' share. *Moses v. Allen*, 81 Me. 288.

A will giving the residue of the testator's estate in fee to his nephew, provided he makes no charge for services as executor, and providing that he shall pay a certain annuity, and which in a subsequent clause provides that, in case of the death of the nephew, the property shall be disposed of to other parties named, refers to the death of the nephew before that of the testator. *Webb v. Lines*, 57 Conn. 154.

A residuary bequest to testator's four nephews and nieces, one fourth to each, to be held in trust

3. **Suit to recover a legacy must be brought by the personal representative of a deceased legatee, not by his next of kin.**

4. **Equity will not extend its aid for the recovery of a legacy the amount of which is only \$20.**

(May 8, 1890.)

A PPEAL by plaintiffs to the full court from a decree of the Supreme Judicial Court for Suffolk County sustaining a demurrer to the bill in a suit brought to reach plaintiff's alleged interest in the estate of John Nickerson, deceased. *Affirmed.*

John Nickerson died May 8, 1869, leaving a will of which the eighth, ninth and tenth clauses are as follows:

"Eighthly. I give and bequeath unto my Nephew Seth Nickerson the son of my Brother Seth—and the Children of my brother Eldridge,

for them during life and the income paid to them, and after their deaths in trust to their children who shall attain the age of twenty-one years or marry,—vests the corpus of the trust property in such children when they marry or attain their majority. *Goldtree v. Thompson*, 79 Cal. 613.

Legacy to nephews and nieces. See *note to Re Woodward* (N. Y.) 7 L. R. A. 367.

Residuary estates.

As applied to the estates of decedents, "residue" means all that property which remains after paying charges and debts, and satisfying the devises and legacies. It is ordinarily ascertained when the final account is presented and judicially acted upon by the court; and this is the point of time when the residuary legatee becomes entitled thereto. *Leahy v. Cardwell*, 14 Or. 171.

No particular form of words in a will is necessary to pass a residuum. *Delehanty v. St. Vincent's Orphan Asylum Soc.* 56 Hun, 55.

"The residue and remainder of my estate, if any there shall be, after the payment to the missionary society, I give and bequeath to the children of my niece," is broad enough to embrace as well the legacy to the missionary society, which it was claimed was void, as a bequest to a mission school, which was held to be ineffectual. *Tindall v. Tindall*, 24 N. J. Eq. 515.

The words, "rest, residue and remainder," in a devise of real and personal estate, have been for a long period interpreted to mean that which is left of both realty and personalty, after what has been given before has been deducted. There have been contrary decisions; but the decided preponderance of authority is on the side of such construction. *Lupton v. Lupton*, 2 Johns. Ch. 614, 1 N. Y. Ch. L. ed. 612; *Hoyt v. Hoyt*, 17 Hun, 190; *Forster v. Civil*

Eunice S. Nickerson and Miranda J. Nickerson the residue of my Property in equal shares whither—Real, Personal or Mixed property to be held in trust by my Executors hereafter named or Trustees—

"In case that my niece Miranda J. Nickerson should marry then my said property to be held and owned by my said Trustees

"Ninthly. I order and ordain that my Rail Road Stocks, and my Bank Stocks to remain as they now are and the Dividends to be added to the Capital Stock as they may arise or accrue The safe now in my Brother's House I give & bequeath unto my Neices Eunice and Miranda, I order my Trustees to put tomb Stones at my Grave & to pay all my funeral & other expenses & to pay unto the Children of John E. Thomas the sum of twenty dollars each and I hereby reserve to be kept as a fund the sum of five hundred dollars for the only purpose of keeping my Grave and Yard in repair by my said Trustees

"Tenthly. I ordain and appoint the said Seth Nickerson my Nephew and Eunice S. Nickerson my Niece to be my Executors & Trustees, without bonds."

Among the specific bequests were one of \$500 to Thankful N. Thomas, and one of \$20 each to Pauline T. Gale and Abbey B. Wait, her children.

This action was brought by Pauline T. Gale and Sarah T. Crowell, only surviving child of Abby B. Wait, Thankful N. Thomas and Abby B. Wait having died without claiming their legacies, to recover the shares due to them under John Nickerson's will, both in their own

rights and as representatives of Mrs. Thomas and Mrs. Wait, deceased.

The bill alleged that after the death of Thankful N. Thomas her heirs sought to recover the legacy given to her and for that purpose an administrator was appointed, who instituted a suit for that purpose; that defendants thereupon produced a paper which purported to be a release by Mrs. Thomas, Mrs. Wait and the plaintiffs of all their interests under Nickerson's will; that plaintiffs never executed such release and never knew of it; that their signatures thereto were forgeries; and prayed, *inter alia*, that it might be canceled.

The case further appears in the opinion.

Mr. Harvey D. Hadlock, for appellants: Equity has jurisdiction to decree cancellation of an instrument prepetual in its nature, and which it would be a fraud to keep on foot, and where cancellation is the only effectual remedy.

Jones v. Bolles, 76 U. S. 9 Wall. 364, 19 L. ed. 734; *Hamilton v. Cummings*, 1 Johns. Ch. 520-524, 1 N. Y. Ch. L. ed. 231-233.

Whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust.

Young v. Bradley, 101 U. S. 782, 25 L. ed. 1044; *Poor v. Considine*, 73 U. S. 6 Wall. 458, 18 L. ed. 868.

All parts of a will are to be construed in relation to each other, and so as to form one consistent whole; but when several parts are absolutely irreconcilable the latter must prevail.

20 Hun, 284; *Greville v. Brown*, 7 H. L. Cas. 639; *Shulters v. Johnson*, 38 Barb. 30.

The clause "rest and residue" cannot be taken distributively *reddendo singula singulis*. *Weld v. Strong*, 54 How. Fr. 123.

Unaided and alone, the words that make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate. *Hoyt v. Hoyt*, 35 N. Y. 149; *Scott v. Stobbins*, 27 Hun, 337; 3 Pom. Eq. Jur. 247.

The rule is well supported where the residuary clause is not preceded by any devise of real estate, or when the residue of the entire estate "not heretofore disposed of" is given, and the executor himself is residuary devisee. *Re Mathewson*, 12 R. I. 146; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172; *Dey v. Dey*, 19 N. J. Eq. 137; *Rafferty v. Clark*, 1 Bradf. 473.

"All the residue of my estate I give and bequeath to the trustees of the General Assembly of the Presbyterian Church in the United States, commonly known as the Southern Presbyterian Church, the same being a body corporate, as I am advised,"—is a clear and specific bequest, both as to what is given, and as to what corporation is to take. *Guthrie v. Guthrie* (Va.) 13 Va. L. J. 599.

Where the language of the testator is "whatever balance I may be worth I want given to my sister and her children" it is a residuary bequest and nothing more. *Crouch v. Davis*, 23 Gratt. 85.

A will directing the sale of the residue of an estate and the division of the proceeds between "my brother, J. B. S.'s family and M. J. M.," gives one half the residue to the children of J. B. S. and one half to M. J. M. *Silsby v. Sawyer*, 7 New Eng. Rep. 109, 64 N. H. 580.

Where a testator, by the residuary clause of his will, directed that, on the decease of his wife the

residue, after paying her debts, should be divided equally among his several children, and if any of his children died before his wife, leaving issue, such issue should receive their parent's share, it was held that the children of a son who died in the testator's lifetime were entitled to share in the distribution of the residue. *Outcalt v. Outcalt*, 6 Cent. Rep. 839, 42 N. J. Eq. 500.

The general rule is now established in this Commonwealth, that a general residuary devise will operate as an execution of a power to dispose of property by will, unless there is something to show that such was not the testator's intention. *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 203; *Banga v. Smith*, 38 Mass. 270; *Sewall v. Wilmer*, 132 Mass. 131; *Cumston v. Bartlett*, 149 Mass. 248.

Residuary bequest; what passes.

It is settled law that where the residuary bequest is not circumscribed by clear expressions, and the title of the residuary legatee is not narrowed by special words of unmistakable import, the residuary legatee will take whatever may fall into the residue, whether by lapse, invalid dispositions, or other accident. *Riker v. Cromwell*, 113 N. Y. 127; *James v. James*, 4 Paige, 115, 8 N. Y. Ch. L. ed. 367; *Van Kleeck v. Reformed Dutch Church*, 6 Paige, 600, 3 N. Y. Ch. L. ed. 1118; *King v. Strong*, 9 Paige, 94, 4 N. Y. Ch. L. ed. 623; *Bland v. Lamb*, 2 Jac. & W. 406; *Reynolds v. Kortright*, 18 Beav. 427; *Re Benson*, 96 N. Y. 510; *Re Estate of L'Hommedieu*, 33 Hun, 11. See *Floyd v. Carow*, 38 N. Y. 560; *Peckham v. Newton*, 2 New Eng. Rep. 508, 15 H. I. 321; *Bristol v. Bristol*, 2 New Eng. Rep. 763, 53 Conn. 255; *Gallagher v. Rowan* (Va.) 14 Va. L. J. 237; *Vandewalker v. Rollins*, 1 New Eng. Rep. 859, 63 N. H. 400; *Mathes v. Smart*, 51 N. H. 433, 443; *Tappan's App.* 35 N. H. 817, 324; *Brigham v. Shattuck*, 10 Pick. 306, 409; *Clapp v. Stoughton* Id. 463; *Thayer*

Welch v. Belleville Sav. Bank, 94 Ill. 191; *Nimmons v. Westfall*, 83 Ohio. St. 218.

Where a trust is created for a particular purpose, and no further trust is declared, the unexhausted beneficial interest results to the heirs.

Story, Eq. Jur. § 1200; Lewin, Tr. § 176.

By the words: "I order and ordain that my Rail Road Stocks and Bank Stocks to remain as they now are, and the Dividends to be added to the Capital Stock as they may arise or accrue," a trust was created. The object of that trust was for the purpose of accumulation, and no person is named as the beneficiary, and no limit to its duration is imposed.

Birch v. Wade, 3 Ves. & B. 198; *Wright v. Atkyns*, 19 Ves. Jr. 299; *Broad v. Bevan*, 1 Atk. 511, note; *Van Dyck v. Van Beuren*, 1 Caine, 84; *Whiting v. Whiting*, 4 Gray, 240; *Brickson v. Willard*, 1 N. H. 217; *Van Ames v. Jackson*, 85 Vt. 176; *Harper v. Phelps*, 21 Conn. 257; *Burt v. Herron*, 66 Pa. 400; *Brasher v. Marsh*, 15 Ohio St. 103.

The trust can be made certain as to the persons for whose benefit it was intended, by observing the laws of distribution, and in no other way, as no person was named as a beneficiary; and when it is uncertain as to the person for whose benefit the gift was intended, or as to the object of the gift, it will be void.

v. Wellington, 9 Allen, 285; *Bigelow v. Gillott*, 13 Mass. 107; *Helms v. Francisous*, 3 Bland. Ch. (Md.) 544; *Gore v. Stevens*, 1 Dana, 201, 206; *Bolles v. Smith*, 30 Conn. 217.

Not only that which was undisposed of by the will, and that which becomes undisposed of, but that which becomes so at the death of the testator through disappointment of his intentions, falls into the residue. *Re Chapeau*, Tuok. 421; *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 457; *King v. Strong*, 9 Paige, 94, 4 N. Y. Ch. L. ed. 622; *Banks v. Phelan*, 4 Barb. 30; *King v. Woodhull*, 3 Edw. Ch. 82, 6 N. Y. Ch. L. ed. 579.

Not only the property of the testator in which no interest is devised or bequeathed by other parts of the will, but also all reversionary and contingent interests in property which in the events contemplated by the testator are not otherwise disposed of, go to the residuary devise. *Davis v. Callahan*, 3 New Eng. Rep. 445, 78 Me. 313; *Craig v. Craig*, 3 Barb. Ch. 102, 5 N. Y. Ch. L. ed. 884; *Hopewell v. Ackland*, 1 Salk. 229; *Brigham v. Shattuck*, 10 Pick. 309; *Goodtitle v. Knot*, 1 Cowp. 43; *Willows v. Lydcot*, 3 Vent. 235; *Ridout v. Pain*, 3 Atk. 496; *Doe v. Weatherby*, 11 East, 323; *James v. James*, 4 Paige, 115, 3 N. Y. Ch. L. ed. 367; *Bowers v. Smith*, 10 Paige, 202, 4 N. Y. Ch. L. ed. 945.

A lapsed devise falls into the residue in the same way as a lapsed legacy, where, by statute, the will is made to speak from the testator's death both as to real and personal property. *Cruikshank v. Home for the Friendless*, 4 L. R. A. 140, 113 N. Y. 387.

But a general residuary bequest does not include any part of the residue itself which falls. *Ward v. Dodd*, 4 Cent. Rep. 87, 41 N. J. Eq. 414.

What passes by general residuary bequest.

All lapsed or void legacies will pass by a general residuary bequest to the residuary legatees. *Holbrook v. McCleary*, 79 Ind. 170; *Cambridge v. Rous*, 8 Ves. Jr. 12; *McLeod v. Drummond*, 17 Ves. Jr. 152.

What passes by force of a residuary clause in a will is that which remains after satisfying all legal demands against the estate, including legacies and devises anywhere mentioned in the will. *Burke v. Stiles*, 65 N. H. —.

Upon the death of the devisee of a specific share 9 L. R. A.

Bartlet v. King, 12 Mass. 537; *First Parish in Sutton v. Cole*, 3 Pick. 232.

There must be a distribution because, otherwise, the trust becomes a perpetuity and that would be void, and then the estate would result to the heirs of the testator.

Perry, Tr. § 160; *Brattle Square Church v. Grant*, 3 Gray, 142; *Nightingale v. Burrell*, 15 Pick. 111; *Hooper v. Hooper*, 9 Cush. 122; *Thorndike v. Loring*, 15 Gray, 391; *Foodick v. Foodick*, 6 Allen, 41; *Hall v. Hall*, 123 Mass. 120; *Bates v. Bates*, 184 Mass. 110.

If the court should hold that the trust was so vague and uncertain as to be void, then it must be held to be so much of the testator's estate as remains undisposed of by him during his lifetime, and must be distributed as if he had died intestate.

Story, Eq. Jur. §§ 979a, 979b, 1196a; *Blake v. Dezler*, 12 Cush. 559; *Sears v. Hardy*, 120 Mass. 524.

Messrs. Robert M. Morse, Jr., and William F. Griffin, for appellees:

A suit at law is the ordinary proceeding for the recovery of legacies.

Pub. Stat. chap. 186, § 19.

A bill in equity cannot be maintained for a claim of §20.

Cummings v. Barrett, 10 Cush. 186; *Smith*

of the residue of an estate, in testator's lifetime, such share lapses, but does not sink into the residue; and the testator will be held to have died intestate as to such share. *Ward v. Dodd*, 4 Cent. Rep. 86, 41 N. J. Eq. 414.

Where the share which lapses is a part of the residuary estate it does not pass to the other residuary legatees as part of the residue, but must be deemed intestate estate. *Collins v. Bergen*, 4 Cent. Rep. 406, 43 N. J. Eq. 57.

A residuary clause of the balance of testator's estate passes the real as well as the personal estate. *Cook v. Lanning*, 3 Cent. Rep. 178, 40 N. J. Eq. 393.

The residuary legatee is entitled, to an invalid or illegal disposition as to what remains after payment of debts and legacies. The only exception to the rule is, that where the words used show an intention on the part of the testator to exclude from the operation of the residuary clause certain portions of the estate, such intention, as gathered from the whole will, must not be defeated. *King v. Woodhull*, 3 Edw. Ch. 79, 6 N. Y. Ch. L. ed. 579; *Tindall v. Tindall*, 24 N. J. Eq. 512; *Easum v. Appleford*, 5 Myl. & Cr. 56; *Cambridge v. Rous*, 8 Ves. Jr. 23.

This rule obtains where a legatee, to whom was bequeathed a government bond or its equivalent in money, declined and formally renounced the bequest. *Peckham v. Newton*, 3 New Eng. Rep. 608, 15 R. I. 321.

The testator must use words clearly limiting the gift of the residue and show in express terms an intention to exclude from it portions of his estate that failed to pass under previous clauses of the will in order to take them out of the general rule, that all the rest and residue goes necessarily to the heirs or next of kin. *Floyd v. Carow*, 9 Daly, 542; *Kerr v. Dougherty*, 79 N. Y. 344.

A presumption arises in favor of the residuary legatee against everyone except the particular legatee; for the testator is supposed to have given his personality away from the former only for the sake of the latter. *Sandford v. Blake*, 45 N. J. Eq. 247.

The fact that a devisee is not only a devisee of an interest specifically devised as a life estate, but also the general residuary devise, will not exclude

v. Williams, 116 Mass. 510; *Chapman v. Banker & T. Pub. Co.*, 128 Mass. 478.

The proper remedy to obtain a distributive share of the stocks is by application to the probate court for decree for distribution and by suit on the executor's bond.

Loring v. Steinman, 1 Met. 204; *White v. Weatherbee*, 126 Mass. 450.

Only the administrator of Mrs. Thomas can sue for the legacy of \$500, or for her share in the stocks. Only the administrator of Mrs. Wait can sue for her legacy.

Hooper v. Hooper, 9 Cush. 123; *Osgood v. Foster*, 5 Allen, 560; *White v. Weatherbee*, 126 Mass. 450; *Brown v. Dudbridge*, 2 Bro. Ch. 321.

Knowlton, J., delivered the opinion of the court:

The plaintiffs contend that, as heirs-at-law of John Nickerson, they are severally entitled to a share in his estate under the eighth clause of his will, and if not under the eighth clause then under the ninth; and they argue that the property named or referred to in these clauses

is to be divided among his heirs-at-law in accordance with the Statute of Distributions.

This contention is founded on a mistaken construction of the will. Under the eighth clause all his estate not previously disposed of was given to Seth Nickerson and Eunice S. Nickerson in trust for Miranda J. Nickerson and for themselves. The entire beneficial interest in the property passed to these three persons, and the trust was created to provide for the management of the estate, and to secure the share of Miranda J. Nickerson to the others if she should marry. The plaintiffs have no interest on which the bill can be maintained for the principal purpose for which it was brought.

The only remaining grounds on which they seek to maintain it are that the plaintiff Pauline T. Gale is given a legacy of \$20 by the will, and also, as one of the next of kin of Thankful N. Thomas, is entitled to one half of a legacy of \$500, and that the plaintiff Sarah T. Crowell, as the daughter and heir of Abby B. Wait, who was another of the next of kin of Thankful N. Thomas, is entitled to the other half of this

him from taking the remaining interest in the estate in the character of a residuary devisee. *Davis v. Callahan*, 2 New Eng. Rep. 445, 78 Me. 312.

Action or suit to recover legacy.

Assumpsit will lie on the part of residuary legatees against an administrator *cum testamento annexo*, without proof of an express promise by him. *Holloback v. Van Buskirk*, 4 U. S. 4 Dall. 147, 1 L. ed. 777.

In some cases it has been held sufficient, under certain circumstances, to make the administrator alone a party—though more generally all the distributees are requisite parties; but in every case where distribution is sought, the administrator or executor has been held a necessary party. *Porter v. Porter*, 8 Miss. 111, 40 Am. Dec. 57. See *Pritthead v. Hicks*, 1 Paige, 270, 2 N. Y. Ch. L. ed. 643; *Myers v. Wade*, 6 Rand. 443; *Bradford v. Felder*, 2 McCord, Ch. 163; *Fabre v. Colden*, 1 Paige, 166, 2 N. Y. Ch. L. ed. 604.

If a legatee sue for account and payment of a specific legacy, the court will decree payment if the executor admits assets sufficient, but if the answer suggests other legatees to be equally entitled, and a deficiency of assets to pay creditors and the legatees too, the bill will be either converted into the form of one suing for all, or the same thing will be substantially done by providing in the decree for an account of assets, for an account also of the legatees and creditors and the amounts respectively due them. *Southal v. Shields*, 81 N. C. 31; *Riggs v. Cragg*, 39 N. Y. 423; *Egberts v. Wood*, 3 Paige, 517, 2 N. Y. Ch. L. ed. 253; *Hallett v. Hallett*, 2 Paige, 20, 2 N. Y. Ch. L. ed. 793, denying *Brown v. Ricketts*, 3 Johns. Ch. 553, 1 N. Y. Ch. L. ed. 714. And see *Ross v. Crary*, 1 Paige, 417, 2 N. Y. Ch. L. ed. 609; *Manning v. Thesiger*, 1 Sim. & Stu. 103.

In all cases, a residuary legatee may sue on behalf of himself and all others similarly situated without making them technically parties. *Hallett v. Hallett*, 3 Paige, 15, 2 N. Y. Ch. L. ed. 795; *McCaleb v. Crichfield*, 5 Heisk. 291; *Story*, Eq. 101, note 5; *Wood v. Draper*, 24 Barb. 199; *Ross v. Crary*, 1 Paige, 416, 2 N. Y. Ch. L. ed. 608.

Where bequests were made by a will to several persons, one of them alone might file a bill against the executor for the payment of his legacy, but where a bill was for the residue, all the residuary legatees must be parties. *Dyer v. Erring*, 3 Dem. 164; *Fish v. Howland*, 1 Paige, 20, 2 N. Y. Ch. L. ed. 9 L.R. A.

545; *Ross v. Crary*, 1 Paige, 417, 2 N. Y. Ch. L. ed. 609; *Cronier v. Pinckney*, 3 Barb. Ch. 466, 5 N. Y. Ch. L. ed. 974; *McKenzie v. L'Amoureux*, 11 Barb. 512; *Towner v. Tooley*, 38 Barb. 593; *Dillon v. Bates*, 39 Mo. 209; *West v. Randall*, 3 Mason, 181; *Hallett v. Hallett*, 3 Pars. Eq. Cas. 20; *McArthur v. Scott*, 113 U. S. 395, 23 L. ed. 1032; *Dehart v. Dehart*, 3 N. J. Eq. 471; *Hawkins v. Hawkins*, 1 Hare, 543, 545, and note.

Where the parties are numerous, and only some of them with the executor and trustee under the will are made parties, the court may hear the cause, but the decree must be without prejudice to the rights of those who are not made parties and who do not come in before the decree. *Hallett v. Hallett*, 2 Paige, 15, 2 N. Y. Ch. L. ed. 793; *McArthur v. Scott*, 113 U. S. 395, 23 L. ed. 1032; *Davoue v. Fanning*, 4 Johns. Ch. 199, 1 N. Y. Ch. L. ed. 813; *Dehart v. Dehart*, 3 N. J. Eq. 471; *Hawkins v. Hawkins*, 1 Hare, 543; *Harvey v. Harvey*, 5 Beav. 139; *Willats v. Busby*, 5 Beav. 139; *Powell v. Wright*, 7 Beav. 444; *Calvert, Parties*, 49, 72, 237; *West v. Randall*, 3 Mason, 182; *Parsons v. Neville*, 3 Bro. Ch. 365; *Sheritt v. Birch*, 3 Bro. Ch. 229; *Atwood v. Hawkins*, Cas. t. Finch, 113.

Equity jurisdiction; amount in controversy.

In bills in the court of chancery for a money demand, if the amount claimed is stated at less than \$100 the bill is demurrable. *Church v. Ide*, Clarke, Ch. 494, 7 N. Y. Ch. L. ed. 132. See *Moore v. Lytle*, 4 Johns. Ch. 183, 1 N. Y. Ch. L. ed. 808; *Fullerton v. Jackson*, 5 Johns. Ch. 276, 1 N. Y. Ch. L. ed. 1081; *Vredenberg v. Johnson*, Hopk. Ch. 112, 2 N. Y. Ch. L. ed. 351; *Mitobell v. Tighe*, Hopk. Ch. 119, 3 N. Y. Ch. L. ed. 363; *Knickerbocker v. Boutwell*, 2 Sandf. Ch. 319, 7 N. Y. Ch. L. ed. 609.

A bill will be dismissed in any stage of the suit, if it appears that the value of the matter in controversy is too small to enable complainants to claim the aid of the court. *Smets v. Williams*, 4 Paige, 384, 2 N. Y. Ch. L. ed. 471.

Where the amount in controversy was under \$50 the suit was dismissed regardless of the merits. *Allen v. Demarest*, 41 N. J. Eq. 162; *Wooley v. Judd*, 4 Duer, 601; *Douw v. Sheldon*, 2 Paige, 323, 2 N. Y. Ch. L. ed. 927; *Vaughn v. Ely*, 4 Barb. 163.

This objection to the jurisdiction of the court from the small value of the thing in question may be taken at the hearing. *Heyer v. Burger*, 1 Hoffm. Ch. 17, 6 N. Y. Ch. L. ed. 1043.

legacy, and is also entitled to another legacy of \$20 given to her mother. In this part of their case the only equitable relief of which the plaintiffs think they are in need is the cancellation of the instrument of release upon which they say their signatures and the signatures of Thankful N. Thomas and Abby B. Wait were forged. But if the facts are as stated in the bill they do not need the aid of a court of equity. Pub. Stat. chap. 186, § 19.

A forged instrument would not avail against them in an action at law brought to recover their legacies. Their remedy at law is complete and adequate. Moreover, they are not the proper parties to sue for the legacies of Thankful N. Thomas and Abby B. Wait. Actions to recover these should be brought by administrators. Indeed, the bill alleges that

a suit has already been brought by the administrator of the estate of Thankful N. Thomas to recover her legacy, which so far as appears may still be pending. The legacy of \$20 to Sarah T. Crowell is the only one for which either of the plaintiffs can sue in her own name, and that is too small to justify the interposition of a court of equity to grant the relief prayed for. *Smith v. Williams*, 116 Mass. 510; *Chapman v. Banker & Tradesman Publishing Co.* 128 Mass. 478.

The Statute of 1884, chap. 285, § 1, is not applicable to an action of this kind.

The defendants rely upon other grounds of demurrer which it is unnecessary to consider. Without intimating that they are insufficient we must order the *decree affirmed*.

UNITED STATES CIRCUIT COURT, DISTRICT OF OREGON.

Re CHUNG TOY HO.

Re WONG CHOY SIN.

(....Sawy.....Fed. Rep.....)

***The wife and children of a Chinese merchant, who is entitled under article 2 of the Treaty of 1880, and § 6 of the Act of 1884 to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate prescribed in said § 6.**

(May 23, 1890.)

HABEAS CORPUS to compel the master of the bark Coloma to release petitioners from custody on his bark and to permit them to land. *Petitioners discharged.*

The facts are fully stated in the opinion.

Mr. Paul R. Deady for petitioners.

Mr. Franklin P. Mayo for the United States.

Deady, J., delivered the following opinion:

These two cases were heard together. The petitioners are the wife and child of Wong Ham, a well-known Chinese merchant, resident in Portland, Or., for some years past.

A short time since he visited China and returned here on the American bark Coloma, bringing with him the petitioners, who had never been in the United States. Here Wong Ham, being provided with the certificate required by section 6 of the Act of July 5, 1884 (23 Stat. 116), was allowed to land. But the petitioners, having no such certificate, their right to land was denied by the collector.

They then sued out writs of habeas corpus directed to the master of the Coloma, who made return, admitting the facts stated in the petition and the detention, and stating the cause thereof to be the refusal of the collector to allow the petitioners to land.

The district attorney was allowed to inter-

vene on behalf of the United States, and the cases were heard on the facts stated in the respective petitions.

The action of the collector in refusing to allow the petitioners to land was based on a decision of the Treasury Department of August 19, 1889 (Treas. Doc. 409), in which it was said that the wife of a Chinese merchant, who has never been in the United States cannot be allowed to enter the United States, with or without her husband, otherwise than upon the production of the certificate required by § 6 of the Act of July 5, 1884.

By the Treaty with China of November 17, 1880 (22 Stat. 287), it is provided that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to come and go of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations."

By § 6 of the Act of July 5, 1884 (23 Stat. 116), professedly passed "to execute" the stipulations of this Treaty, a certain certificate is required for the admission into the United States of "every Chinese person," other than a laborer, who may be entitled by said Treaty to such admission.

Then came the Act of October 1, 1888 (25 Stat. 504), by which the coming or return of Chinese laborers to the United States is absolutely forbidden.

The manifest purpose of this legislation is to exclude Chinese laborers from coming or returning to the United States. The other classes—"teacher, student and merchant"—are not required to have certificates before they can be admitted into the country because their admission is intended to be restrained or limited, but to prevent laborers from being admitted under the guise or in the character of such classes.

There is no limitation on the right of these classes to come within and dwell in the United States. The Statute only requires that

such a person shall furnish the prescribed evidence that he belongs to one of these favored classes, when he may come and go at pleasure.

The admission of the petitioners is not within the mischief that the Exclusion Act was intended to remedy. They are both females, the child being about eight years of age. It is common knowledge that Chinese women are not laborers. The station in life of the petitioners, being the wife and child of a merchant, also shows they do not belong to the laboring class.

The petitioners are not within the purview of the Exclusion Act of 1888, which is confined to laborers. Do they come within that of § 6 of the Act of 1884, which requires "every Chinese person," other than a laborer, to procure from his own government the certificate required by said section, before he can be admitted into the United States?

Confessedly the petitioners are "Chinese persons," and are therefore within the letter of the Statute. But in my judgment they are not the "persons" contemplated by Congress in the passage of the Act.

Chinese women are not teachers, students or merchants, and therefore they cannot as such obtain the certificate necessary to show they belong to the favored class. But as the wives and children of "teachers, students and merchants," they do in fact belong to such class; and the proof of such relation with a person of this class, entitled to admissions, is plenary evidence of such fact.

It ought not to be lightly, or without cogent reason, concluded that Congress, in the passage of the Act of 1884, professedly "to execute" the Treaty of 1880, really intended to limit or restrain its operation in this respect. The Treaty (art. 2) declares that a Chinese merchant may bring his "body and household servants" with him into the country, and they "shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nations."

It is impossible to believe that parties to this Treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned as entitled to such admission is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United

States and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that in such entry and sojourn in the country he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France.

There is nothing in the Act of 1884 that indicates an intention on the part of Congress to limit or restrain the privileges conceded to Chinese merchants by this article of the Treaty. It only adds a rule or measure of evidence by which the fact of being such merchants may be conclusively established.

In *Re Tung Yeong*, 9 Sawy. 620, Judge Hoffman held that the minor children of Chinese merchants were entitled to admission into the country, either with the father or on being sent for by him, on the ground that they were not laborers, and said: "It was not without satisfaction that I found there was no requirement of the law which would oblige me to deny to a parent the custody of his child, and to send the latter back across the ocean from which he came."

It is true, this decision was made in February, 1884, while the Act requiring the production of a certificate from "every Chinese person" seeking to enter the United States was not passed until July 5, 1884, and therefore it is not authority on the question of whether the words "every Chinese person" in section 6 of the Act are limited to teachers, students and merchants, and do not include their wives and children. But it is direct authority in favor of the conclusion that the children of a Chinese merchant, under article 2 of the Treaty of 1880, are entitled to admission into the United States with their father or after him; and if a child, why not his wife?

My conclusion is that, under the Treaty and Statute taken together, a Chinese merchant who is entitled to come into and dwell in the United States, is thereby entitled to bring with him and have with him his wife and children. The company of the one and the care and custody of the other are his by natural right, and he ought not to be deprived of either unless the intention of Congress to do so is clear and unmistakable.

The petitioners are illegally restrained of their liberty and are entitled to be discharged from custody—and it is so ordered.

MAINE SUPREME JUDICIAL COURT.

Alfred G. BULGER

v.

INHABITANTS OF EDEN.

(33 Me. 352.)

1. Authority to lay out and construct public drains and sewers cannot properly

NOTE.—*Drains and sewers: statutory regulations.* The California Act, which does not designate the locality where drainage is necessary, nor establish the boundaries of the drainage district, but del-
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be claimed by a town as necessarily incident to the exercise of its corporate powers or the performance of its corporate duties, if ample provision for them is made by general statutes.

2. Where general laws place the duty of constructing drains and sewers on municipal officers, such officers in the performance of such duty act as public officers and

legates this duty to the local board, is unconstitutional. *People v. Parks*, 58 Cal. 624; *Doane v. Weil*, Id. 384.

Under the Colorado Constitution and Statutes, a

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not as agents of the municipality, and the municipality cannot be held liable for injuries resulting from their negligence.

(February 17, 1890.)

REPORT from the Supreme Judicial Court for Hancock County for the opinion of the full bench of an action brought to recover damages for injuries alleged to have resulted from negligence in the construction of a sewer. *Plaintiff nonsuit.*

The case sufficiently appears in the opinion. *Messrs. Wiswell, King & Peters*, for plaintiff:

The use of the street shown in this case was a nuisance.

Rev. Stat. chap. 17, § 5.

Damages to an abutter are peculiar, direct and substantial.

Dillon, Mun. Corp. § 780, and cases cited in *note*; Angell, Highways, p. 265.

A town is liable for a nuisance done within the scope of its municipal powers.

Seels v. Deering, 4 New Eng. Rep. 550, 79 Me. 446; *Roue v. Portsmouth*, 56 N. H. 291; *Pennoyer v. Saginaw*, 8 Mich. 534.

municipal council has power to order a special assessment for a sewer, to authorize the county treasurer to sell the property assessed, to prescribe the rule of apportionment of the assessment and to exempt lands therefrom which are so situated as to get no benefit. *Pueblo v. Robinson*, 13 Colo. 593.

The municipality is liable only for failure in the exercise of its duty in construction and in keeping the sewers in repair. *Denver v. Capelli*, 4 Colo. 26.

The Legislature is not restricted, in its exercise of the power conferred upon it by the Constitutional Amendment of 1878, to the mode prescribed by the Drainage Acts of 1879, or to the agencies and instrumentalities specially designated in those Acts. *Hyde Park v. Spencer*, 6 West. Rep. 517, 118 Ill. 446.

The Act of 1886, which leaves to the city or village authorities to declare, by ordinance or otherwise, what portion of their territory shall be a drainage district, is not unconstitutional, as an assumption of an appointing power by the Legislature. *Ibid.*

The system of sewerage adopted need not extend to all parts of a city; the question of what sewerage is necessary is for the council. *St. Louis Bridge Co. v. People*, 15 West. Rep. 155, 125 Ill. 228.

The city council of Peoria has power to construct sewers in streets, and cause the expenses to be defrayed by special assessment. *Murphy v. Peoria*, 8 West. Rep. 333, 119 Ill. 509.

If a municipal corporation, by its system of constructing sewers, renders an outlet necessary, it must provide one. *Fort Wayne v. Coombs*, 5 West. Rep. 233, 107 Ind. 75.

The Drainage Act of March 11, 1887, superseded the Drainage Act of March 7, 1883, and proceedings instituted in September, 1883, in conformity to the latter Act, but which did not comply with the requirements of the Act of 1887, were void. *Phillips v. Lewis*, 6 West. Rep. 907, 109 Ind. 62.

Section 10 of the Drainage Act of April 6, 1885, is not unconstitutional, as an attempt to confer judicial power upon the county surveyor, or by reason of a method by which money is authorized to be drawn from the county treasury, or in denying opportunity to owners of land assessed to appeal upon all questions affecting their interests. *State v. Johnson*, 3 West. Rep. 682, 105 Ind. 463.

The fact that a drainage statute (Act of April 8, 1881) denies a trial by jury does not make it unconstitutional, as discriminating in the grants to cit-

Laying out sewers and drains is a corporate right within the general powers conferred on towns.

State v. Portland, 74 Me. 272.

The towns are liable where public officers intrusted with care of streets violate the law in carrying out the directions of the corporation.

Woodcock v. Calais, 66 Me. 234; *Thayer v. Boston*, 19 Pick. 511.

Messrs. Deasy & Higgins for defendant.

Foster, J., delivered the opinion of the court:

The facts stated in the plaintiff's declaration presented an action on the case against the defendant Town for damages caused by the negligent construction of a public sewer in a public street. The alleged negligence consists in the great length of time during which the street was dug up, and in filling the excavation with farm dressing, thereby creating a nuisance by which the plaintiff suffered special damages in his business, comfort, property and the enjoyment of his estate and for which he claims to be entitled to recover of the defend-

izens of "privileges and immunities." *Lipes v. Hand*, 2 West. Rep. 314, 104 Ind. 503.

The Act of April 8, 1881, is not repealed by the Act of April 21, 1881. *Ibid.*

The Act of 1888, § 7, vesting discretionary authority in township trustees to determine when drainage repairs are necessary, is constitutional. Where the trustees, instead of repairing, improved a ditch by widening it, making it cost much more than the original estimate, their assessment cannot be enforced. *Weaver v. Templin*, 12 West. Rep. 274, 119 Ind. 296.

As long as the corporate authorities keep within the discretion conferred upon them, they are the exclusive judges of the method of constructing drains and sewers. *Sullivan v. Phillips*, 9 West. Rep. 50, 110 Ind. 320.

Under the guise of keeping a ditch in repair, it is not competent for the county surveyor to enter upon a scheme of widening and deepening the drain, except such as is necessary to restore or repair its disturbed sides. *Fries v. Brier*, 9 West. Rep. 200, 111 Ind. 65.

The power to construct sewers being expressly conferred on the city, the easement of a street railway is subject to such paramount right, and the consequent removal of the track is *damnum absque injuria*. *Kirby v. Citizens R. Co.* 45 Md. 163.

The Michigan Statute authorizing the establishment of drains, to be paid for by the persons to be benefited thereby, does not violate Mich. Const., art. 14, § 9, relating to the State engaging in works of internal improvement. *Gillet v. McLaughlin*, 14 West. Rep. 53, 60 Mich. 547. See *Willsheek v. Edwards*, 43 Mich. 105.

The statutes provide that if a special commissioner finds no sufficient cause for the application for a drain the applicants shall be liable for the costs of the proceedings, except where the commissioner submitted to the special commissioner a drain different from the one asked for. *Hall v. Palmer*, 54 Mich. 370.

The town system and the county system of drainage are independent systems, and a change in the regulation of one does not necessarily interfere with the other. *Davison v. Otis*, 24 Mich. 23.

Under the charter of Detroit, the authority to make a connection between private property and a public sewer is to be given by the common council, and the manner of making the connection is to

ant Town. If the Town is liable upon the facts set out in the declaration, the action is to stand for trial; otherwise the plaintiff is to become nonsuit.

It is not denied that whatever was done, and for which it was claimed that the Town should be held liable, was done by the municipal officers. The allegation in the writ is that the "Town, while in the course of constructing a public sewer in the middle and throughout the length of said Cottage Street, under and by virtue of the Statutes of this State, unlawfully, unjustifiably and without sufficient cause entered upon said street, and dug up, destroyed and ploughed the same," etc.

While admitting the general doctrine that no private action can be maintained against a town or quasi public corporation for a neglect of corporate duty, unless such right of action be given by Statute, the plaintiff's contention is that if a town, while acting within the scope of its municipal power, creates a nuisance to the injury of an individual, it is liable in damages therefor.

If we concede the correctness of the plaintiff's proposition, then the difficulty of main-

taining this action is by no means removed, inasmuch as the allegations contained in the declaration do not bring the acts complained of within the scope of the corporate powers of the Town; nor is there any allegation that such acts were performed by its officers in the discharge of any corporate duty imposed by law upon the Town. *Seele v. Deering*, 79 Me. 347, 4 New Eng. Rep. 550; *Anthony v. Adams*, 1 Met. 284.

The Town has no duty whatever in relation to the construction of public drains or sewers, which renders it liable in an action like the present. The municipal officers of towns are constituted a tribunal by the Statutes of this State, whose duty it is, whenever they deem it necessary for public convenience or health, to construct public drains or sewers along or across any public way at the expense of the Town, and to have control of the same. Rev. Stat. chap. 16, § 2; Laws 1844, chap. 94; Laws 1860, chap. 158; *Estes v. China*, 56 Me. 410.

The earlier enactments, of which the present Statute is only a condensation, upon examination will be found to contain directions to the municipal officers as to the manner in which they shall construct such drains. There is no

be under the direction of the board of public works. *Zube v. Weber*, 10 West. Rep. 681, 67 Mich. 52.

Where the grade of a street is altered for sewerage purposes, it is not necessary to obtain the consent of the property owners. *State Provident Sav. Inst. v. Jersey City* (N. J. June 17, 1890).

A mere license from land owners will not authorize the drainage commissioners to construct a drain. They cannot collect an assessment therefor until they acquire title to the required lands. *Olmsted v. Dennis*, 77 N. Y. 373.

The power of the City of Portland, Oregon, to lay necessary sewers and drains is limited to cases where the benefits to the property accommodated thereby will be equal to or in excess of the cost of their construction. *Paulson v. Portland*, 1 L. R. A. 673, 16 Or. 460. See *Stowbridge v. Portland*, 8 Or. 67.

When in joint session the commissioners of two counties find that the proposed ditch is necessary to public health, convenience or welfare, their decision is final. *Engle v. Defiance County Commrs.* 25 Ohio St. 425.

Under Rhode Island Digest of 1892, relating to what English statutes shall be in force in Rhode Island, the Statute of 28 Hen. VIII., in reference to sewers, never became a part of its laws. *Bishop v. Tripp*, 6 New Eng. Rep. 237, 16 R. I. —.

A village charter empowering the building and maintaining of sewers does not impose their construction as a duty, but permits it as a privilege, and the village is liable for damages from a sewer negligently constructed. *Winn v. Rutland*, 63 Vt. 481.

Wis. Laws 1885, chap. 442, specifying a special system for the drainage and reclamation of lands in Dane County, and for the appointment of commissioners for that purpose, is a valid exercise of the police power, and does not violate Wis. Const., art. 14, § 23, requiring uniformity in town or county government, or delegate to the court the power of taxation or making assessments. *Bryant v. Robbins*, 70 Wis. 253.

Municipal corporation; when not liable for acts or omissions of its officers or agents.

It has long been the settled law in California that a municipal corporation is not liable for personal injuries to individuals, by falling into an unguarded
9 L. R. A.

ed sewer on a dark night, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the question in other States, although it is to be observed that in the New England and some other States there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted, and, if any change in the law is desirable, that change must be made by the Legislature. *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 275; *Barnett v. Contra Costa County*, 67 Cal. 77; *Crowell v. Sonoma County*, 26 Cal. 815; *Huffman v. San Joaquin County*, 21 Cal. 480.

A municipal corporation does not insure its citizens against damage from works of its construction, its obligation and duty in such respect requiring only the exercise of reasonable care and vigilance. Liability can only be predicated upon its neglect or misconduct. *Jenney v. Brooklyn*, 120 N. Y. 164.

The rule that there is no implied liability for damages necessarily occasioned by the construction of a municipal improvement is subject to the qualification that a liability arises for all damages not necessarily incident to the work, and which are chargeable to the improper or unskillful manner of executing it. *Denver v. Rhodes*, 9 Colo. 554.

To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the city. *Pettengill v. Yonkers*, 116 N. Y. 558.

A municipal corporation is not liable for omissions of duty imposed upon an officer by law, however injurious they may be to others. *Vigo Twp. v. Knox County*, 9 West. Rep. 650, 111 Ind. 170.

An unincorporated town is not liable, even where a city *prima facie* would be, for the unauthorized and illegal acts of its officers, even when acting within the scope of their duties. *Seele v. Deering*, 4 New Eng. Rep. 551, 79 Me. 343; *Brown v. Vinhaven*, 65 Me. 402; *Small v. Danville*, 51 Me. 369.

But an unincorporated town may become liable when the acts complained of were illegal, but done under direct authority previously conferred or subsequently ratified. *Seele v. Deering*, *supra*;

general statute authorizing towns in their corporate capacity to lay out or construct drains or sewers, as there is respecting ways. It is only when such drains have been constructed, and persons have paid for connecting with them, as provided in section 9, that the Town becomes responsible in regard to maintaining and keeping the same in repair, and assumes responsibilities in reference thereto. *Blood v. Bangor*, 66 Me. 154; *Darling v. Bangor*, 68 Me. 110.

Provision being made by General Statute Law for the laying out and construction of public drains and sewers by the municipal officers, no such authority can properly be claimed as necessarily incident to the Town in the exercise of its corporate powers, or the performance of its corporate duties. The municipal officers in the performance of these duties, and in the exercise of the authority with which they are invested by general law, act, not as agents of the Town, but as public officers, deriving their power from the sovereign authority. They act upon their own responsibility, and are not subject either to the control or direction of the Inhabitants of the Town, but are an independent board of public officers, vested by law with the

control of all matters within their jurisdiction, and performing duties imposed by general laws." *Brimmer v. Boston*, 102 Mass. 23; *Burrill v. Augusta*, 78 Me. 118, 1 New Eng. Rep. 697; *Woodcock v. Calais*, 66 Me. 235; *Estes v. China*, *supra*; *Lemon v. Newton*, 134 Mass. 479; *Child v. Boston*, 4 Allen, 41; *Tindley v. Salem*, 137 Mass. 173, 174; *Cushing v. Bedford*, 125 Mass. 528.

Though chosen and paid by the Town, and for many purposes its agents (as in making contracts within the scope of their authority about the affairs of the Town, or acting under the direction of the Town in matters pertaining to its corporate duties (*Deane v. Randolph*, 132 Mass. 475), yet these officers do not sustain this relation in reference to these particular duties in question. In this respect they are a part of the municipal government in the performance of their public duties, and are not servants or agents of the municipality by whom they are chosen and paid, rendering their principals liable for their acts, any more than are officers of a fire department (*Burrill v. Augusta*, 78 Me. 118, 1 New Eng. Rep. 697; *Haf-ford v. New Bedford*, 16 Gray, 297); or surveyors of highways and street commissioners when

Woodcock v. Calais, 66 Me. 234, and cases there cited.

A city is not responsible for the negligence of its police. *Boyd v. Philadelphia Ins. Patrol*, 5 Cent. Rep. 236, 118 Pa. 269.

A municipal corporation is not liable for the wrongful or negligent acts of its police or other officers in the execution of powers conferred upon the corporation or officers for the public good, and not for private corporate advantage, unless made liable by statute law, expressly or by implication. *Carrington v. St. Louis*, 4 West. Rep. 681, 89 Mo. 208.

Ky. Gen. Stat., chap. 1, § 5, making a city liable for damages done to property therein by riotous and tumultuous assemblages of people, does not authorize a recovery against a city for personal injury resulting from the malfeasance or negligence of police officers. *Jolly v. Hawesville (Ky.)* 11 Ky. L. Rep. 477.

Since police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public, the city is not liable for the acts of its officers in attempting to enforce such regulations. *Culver v. Streater*, 6 L. R. A. 270, 130 Ill. 238.

A city is not liable for the acts of the officers of the fire department, unless by statute, or unless the city government expressly ordered the act. *Burrill v. Augusta*, 1 New Eng. Rep. 697, 78 Me. 118; *Grube v. St. Paul*, 34 Minn. 403.

A city is not liable for injuries caused by the negligent driving of a fire engine by an employé of the fire department. *Boyd v. Philadelphia Ins. Patrol*, 5 Cent. Rep. 236, 118 Pa. 269.

A city is not liable for the negligence or want of skill of its civil engineer in the performance of a duty, the benefit of which is to accrue solely to an individual, and not to the city in its corporate capacity; and so the defendant city is not liable for the mistake of its engineer in incorrectly informing the plaintiff as to the established grade of the street adjacent to his lot, though an ordinance of the city made it his duty to give such information, for a named fee to be paid by the person desiring it. *Waller v. Dubuque*, 69 Iowa, 541.

A city is not liable for the negligence of a district surveyor in locating the line of lots, by reason of which a lot holder was compelled to rebuild his house. *Boyd v. Philadelphia Ins. Patrol*, *supra*. 9 L. R. A.

A municipality employing a competent engineer to plan a change of the channel of a river is not liable for his oversights or misjudgments. *Diamond Match Co. v. New Haven*, 6 New Eng. Rep. 174, 55 Conn. 510.

Where ample provision was made for ordinary floods in such work, a municipality is not liable for damages by an extraordinary flood. An extraordinary flood may be one that happens so rarely that it is not to be expected. *Ibid.*

A city is not liable for injuries resulting to a traveler upon its highway while attempting to cross a drawbridge, from the momentary negligence of the gateman, where it has supplied a sufficient draw and suitable gates, and has employed suitable persons to manage them. *Butterfield v. Boston*, 3 L. R. A. 447, 148 Mass. 544.

A municipal corporation is not liable for the errors or negligence of its officers in levying assessments for street improvements. *Montgomery County v. Fuller*, 9 West. Rep. 656, 111 Ind. 410.

The city is not liable for the acts of a constable who has unlawfully seized and sold real property for city taxes, and paid the proceeds into the city treasury, without notice of the circumstances to the municipal authorities, unless the municipal authorities authorized the sale or afterwards ratified it. *Everson v. Syracuse*, 1 Cent. Rep. 753, 100 N. Y. 577.

Under the North Carolina Constitution and statutes, a city which has built a city jail or prison under authority of the law, and has furnished the necessary and comfortable supplies, is not liable to a prisoner for injuries caused by neglect of the jailer to furnish sufficient fires or bedclothing, the city having no notice of such neglect. *Moffit v. Asheville*, 108 N. C. 237.

Other instances of non-liability.

A municipality is not liable for legislative or judicial acts. *Dooley v. Sullivan*, 11 West. Rep. 318, 113 Ind. 451.

A municipal corporation is not liable, in the absence of statute, for negligence of the officer of a private corporation over which its control is purely legislative or public. *Goets v. Butler (Pa.)* 1 Cent. Rep. 633.

Nor for the non-exercise of discretionary powers

making, repairing or otherwise performing their official duties upon highways or streets (*Small v. Danville*, 51 Me. 859; *Woodcock v. Calais*, 66 Me. 285; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570); or health officers, or municipal officers, in the discharge of their duties in relation to contagious diseases (*Mitchell v. Rockland*, 53 Me. 118; *Brown v. Vinahaven*, 65 Me. 402; *Barbour v. Ellsworth*, 67 Me. 294); or police officers (*Cobb v. Portland*, 55 Me. 881; *Buttrick v. Lowell*, 1 Allen, 172); or overseers of the poor (*Farrington v. Anson*, 77 Me. 406; *New Bedford v. Taunton*, 9 Allen, 207).—in all of which there is an absence of corporate liability; nor can third persons, injured either by the negligence, carelessness or unskillfulness of such officers while in the performance of duties imposed upon them by the statutes in such cases, invoke against their municipality the rule of *respondent superior*.

The liabilities of municipal corporations for the torts or negligent acts of their officers are fixed by statute. They are to be held liable for the negligence or misconduct of their officers only when made so by express statute, or the act out of which the claim originates was

within the scope of their corporate powers, and was directly and expressly ordered by the corporation. *Burrill v. Augusta*, *Woodcock v. Calais* and *Anthony v. Adams*, *supra*; *Deane v. Randolph*, 182 Mass. 475; *Seels v. Dearing*, *supra*.

A case very analogous to this in principle is *Cushing v. Bedford*, 125 Mass. 526. There, by statute, the selectmen of towns were authorized to establish and maintain such public drinking troughs and fountains, within the public highways of their towns, "as in their judgment the public necessity and convenience may require;" and the towns were authorized to raise and appropriate money to pay the expense thereof. "These provisions," says the court, "make the selectmen a board of public officers charged with this duty; they are not agents of the town, but they represent the general public."

And the court further held that the towns, in their corporate capacity, had not been given the right by statute to construct drinking troughs in the public highways, and that the "town cannot, therefore, be charged with having created a nuisance from which the plaintiff suffered special injury."

of a public character. *McDade v. Chester*, 10 Cent. Rep. 779, 117 Pa. 414.

A city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the Legislature. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 338.

Many of the powers conferred on municipal corporations are of a public character, for the non-execution of which the corporation is not liable in damages. *Kiley v. Kansas City*, 3 West. Rep. 208, 87 Mo. 103.

Legal negligence cannot be predicated of an omission by a municipal corporation to do what it had no legal right to do. *Veeder v. Little Falls*, 1 Cent. Rep. 622, 100 N. Y. 343.

A recovery can be had against a municipal corporation only where it negligently performs, or negligently fails to perform, a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. *Anderson v. East*, 3 L. R. A. 712, 117 Ind. 126.

A city is not liable for damages caused by the falling of a wall left standing after a building was burned which belonged to a private owner, although it had been notified of the fact that the wall was dangerous. *Ibid*.

A municipal corporation is not liable for injuries received by an individual who falls into a sewer which is in process of construction by the municipal authorities, and is left by them unguarded, in the absence of any statutory provision making it liable for the neglect of its officers. *Chope v. Eureka*, 4 L. R. A. 325, 78 Cal. 583.

A city is not liable for damages for the loss of property by fire resulting from the supply pipes of the city waterworks becoming filled with mud, through the negligence of the city officers, so that water for extinguishing the fire could not be obtained. *Mendel v. Wheeling*, 28 W. Va. 233.

Nor is it liable for loss by fire which resulted from the neglect and refusal of the municipal authorities, after having full knowledge of the facts, to prevent the erection of a wooden building within the limits fixed by the ordinances of the city, under power given by its charter. *Hines v. Charlotte*, 1 L. R. A. 844, 72 Mich. 278.

A city is not liable for the negligence of its licensee
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in the use of a street railroad. *Michigan City v. Boeckling*, 122 Ind. 39.

Nor for the breaking of plate-glass doors in a building, caused by the firing of an anvil on the Fourth of July, with the permission of the mayor, in violation of an ordinance. *Wheeler v. Plymouth*, 116 Ind. 158.

Nor for damages sustained by an individual from the firing of a cannon on Boston Common, which is held by the city for the public benefit, and not for its emolument or a source of revenue, although such firing was under a license from the city authorities, whatever might be the liability of a private land owner who gave a license for the firing of cannon upon his premises. *Lincoln v. Boston*, 3 L. R. A. 267, and note, 148 Mass. 578.

The city is not liable for damages for personal injuries suffered by a minor running against a barbed wire stretched across a portion of one of its streets by the street commissioner, even with the sanction of the mayor, where no ordinance authorized them to stretch it. *Thrush v. Cameron*, 4 West. Rep. 770, 21 Mo. App. 394.

Granting a right of way on a street for a railway by a municipality does not create a liability against it for damages occasioned by a corporation exercising the rights so granted. The liability in such cases is against such corporation. *Sorensen v. Greeley*, 10 Colo. 360.

Municipalities may, in certain cases, cast the responsibility upon independent contractors who negligently cause the injury. *Lancaster Ave. Imp. Co. v. Rhoads*, 8 Cent. Rep. 214, 118 Pa. 377; *Herrington v. Lansingburgh*, 110 N. Y. 145.

Injuries resulting from accident.

A city is not liable for personal injuries or death caused by the falling of a wall standing on private property, in the absence of any statutory provision making it the imperative duty of the city to cause its removal. *Kiley v. Kansas City*, 3 West. Rep. 201, 87 Mo. 103.

A municipality is not liable for the death of a child who, having climbed upon barrels upon a sidewalk to slide down an awning post, misses his hold, falls to the ground with the topmost barrel, and is killed. *Gaughan v. Philadelphia*, 12 Cent. Rep. 143, 119 Pa. 503.

The City of Los Angeles is not liable for damages

Of course, the rule we have been considering has no application and does not exempt municipal corporations from liability to which other corporations are subject, for negligence in managing or dealing with property held by them for their own advantage or emolument, and not in the discharge of public duty, nor for the direct and immediate use of the public. *Moulton v. Scarborough*, 71 Me. 269, and cases there cited. *Thayer v. Boston*, 19 Pick. 511; *Hand v. Brookline*, 126 Mass. 824.

Nor is this case governed by the principles enunciated in another class of decisions, where cities and other municipalities have been held chargeable for negligence in the construction of sewers, or other particular works, on account of some provision in their charter or ordinances; or where authorized by some special statute to construct such works, and from which to receive profits as a private corporation might; and when they have, therefore, assumed duties and liabilities by the acceptance of obligations not imposed by general law, as in the cases of *Murphy v. Lowell*, 124 Mass. 564; *Emery v. Lowell*, 104 Mass. 15; *Child v. Boston*, 4 Allen, 41, 52; *Merrifield v. Worcester*, 110 Mass. 218; *Oliver v. Worcester*, 102 Mass. 500.

caused to private property situated within its corporate limits, through a sudden overflow of the waters of the Los Angeles River. *Moore v. Los Angeles*, 72 Cal. 287.

A city is not liable for an injury to a boy from the fall of a liberty pole caused by an extraordinary wind. *Allegheny v. Zimmerman*, 95 Pa. 287.

Municipality liable only for its own negligence.

A municipal corporation is required to execute the work of constructing a public improvement, such as a sewer, in a careful and skillful manner; and if, by reason of the neglect or want of skill of the persons engaged in the work, property of a citizen, built with reference to an established grade, is injured by surface water, the proper channels for the flow of which are obstructed, the city is liable. *Denver v. Rhodes*, 9 Colo. 554.

Where a city constructs a sewer negligently, it is liable for injuries resulting therefrom, without proof that it had notice of the defects. *Fort Wayne v. Coombe*, 5 West. Rep. 229, 107 Ind. 75.

It is liable for injuries resulting from a sewer suffered to remain out of repair, and two years out of repair is sufficient to charge it with notice. *Ibid.*

The construction and repair of sewers according to the general plan adopted are simply ministerial duties, for negligence in which the municipality may be sued by a person whose property is thereby injured. *Johnston v. Dist. of Columbia*, 118 U. S. 19, 30 L. ed. 75.

Where a municipality puts into execution a scheme of improvement by which surface water collected from a large area is prevented from following the grades of the streets, and is carried by artificial means from where it would otherwise be discharged, and made to flow onto the land of one person in case of the lands of others, there an actionable wrong is committed. *Miller v. Morristown* (N. J.) June 30, 1890.

It has no right by artificial drains to divert surface water from its natural course, and throw it in a body large enough to do substantial injury on land where it would not go except for such artificial drains, although the work is done for the improvement or construction of a highway. *Field v. West Orange*, 46 N. J. Eq. 183.

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And see also *Hill v. Boston*, 122 Mass. 358, 359; *Tindley v. Salem*, 187 Mass. 172; *Bigelow v. Randolph*, 14 Gray, 543.

In such cases, the work is not purely for the direct and immediate use of the public alone, but partly commercial in its character, in which some benefit accrues to the municipality by way of consideration for the conveniences afforded to those who are willing to pay for them.

Thus in *Emery v. Lowell*, *supra*, Gray, J., says: "A municipal corporation, voluntarily accepting a statute which authorizes it to make common sewers, and to assess the expense thereof on lands benefited thereby, is not exempt from liability to private actions by persons injured by its negligence in exercising the power so granted and accepted, to the same extent as it is in the performance of duties imposed upon it by general law, exclusively for public purposes, and without its corporate assent."

It is there held, as also in *Child v. Boston*, *supra*, that after a common sewer has been constructed, and become the property of the municipality under special authority conferred and accepted, it then becomes the duty of such municipality to maintain and keep the same

Municipality; when liable for neglect of its officers or agents.

Where it has under its charter the care and control of the public streets with general authority to make improvements therein, it is liable for injuries resulting from the negligence of its officers and agents, although by its charter the work was required to be done by contract. *Welter v. St. Paul*, 40 Minn. 420; *Cline v. Crescent City R. Co.* 41 La. Ann. 1061.

A corporation is responsible for the tortious acts of its agent done in the line of his employment and in the execution of the authority conferred, although such corporation did not directly authorize the wrong action or subsequently ratify it. *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 380.

The Board of Public Works of the District of Columbia is a part of and an agency of that municipal corporation. The corporation is liable for its acts or omissions. *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. ed. 445.

What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds it that he ought to do. *Mason v. Fearson*, 50 U. S. 9 How. 243, 13 L. ed. 125.

A city is liable for the negligence of its agents in the performance of a public duty, if they are specially employed by the city for the particular work, and are not acting as public officers. *Mulcairns v. Janesville*, 67 Wis. 24.

A supervisory control over the work, and the discretionary power of the contract itself, establish the relation of principal and agent between the city and its contractor. In such case the rule is that the employer is liable for the negligence or misconduct of the contractor. *Denver v. Rhodes*, 9 Colo. 554.

Liability of municipalities. See notes to *Robinson v. Rohr* (Wis.) 2 L. R. A. 306; *Neff v. Wellesley* (Mass.) 2 L. R. A. 500; *Protestant Episcopal Church v. Anamosa* (Iowa) 2 L. R. A. 606; *Anderson v. East* (Ind.) 2 L. R. A. 712; *Lincoln v. Boston* (Mass.) 3 L. R. A. 267; *Chope v. Eureka* (Cal.) 4 L. R. A. 323; *Goshen v. England* (Ind.) 5 L. R. A. 258; *Culver v. Streator* (Ill.) 6 L. R. A. 270; *Bates v. Westborough* (Mass.) 7 L. R. A. 154.

in repair, and for any neglect of which it would be liable to any person injured.

And such have been the decisions of our own court in *Blood v. Bangor*, 68 Me. 154; *Darling v. Bangor*, 68 Me. 110; and *Estes v. China*, 58 Me. 407,—in reference to the liability of towns in maintaining and keeping in repair public drains and sewers after the same have been constructed by the municipal officers, and the town has received compensation from persons for connecting with the same, under § 9, chap. 16, Rev. Stat., which provides that, "after a public drain is constructed, and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town," etc.

The allegations in the plaintiff's declaration have reference only to the acts of the "Town while in the course of constructing a public sewer, . . . under and by virtue of the statutes of this State," and not by any dereliction of duty, on the part of the Town, in maintaining or keeping the same in repair after its construction by the tribunal authorized by the general statute to construct it.

The Town is not liable in tort for damages resulting to the plaintiff from the work done by its officers in the discharge of a public duty imposed upon them by a general law.

Plaintiff nonsuit.

Peters, Ch. J., and Virgin, Libbey and Emery, JJ., concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Edwin A. HILLS, Trustee, etc., of Benjamin Gorham, Deceased,
v.

Ellen Hooper BARNARD *et al.*

(.....Mass.....)

1. If a will gives a portion of whatever of testator's estate remains at the death of a person named to certain persons in fee, and the

remainder to such as may be living of the children of certain other persons, "the issue of any deceased legatee to take its parent's legacy," the latter clause will be confined in its operation to the second class named and will not be extended to the first class, who, at the death of the testator, will take vested interests in the shares given them.

2. Where a testator gives a portion of whatever of his estate remains at the death of a

NOTE—Vested and contingent remainders distinguished.

A vested remainder in land is a fixed interest in one person to take effect in possession after a preceding estate of another person therein is determined. *Paul v. Frierson*, 21 Fla. 529.

When the right to the remainder interest in an estate depends upon some future event which may or may not happen, it is a contingent remainder. *Ibid.*

The general policy of the law and the rules of interpretation require that legacies in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested rather than contingent. *Neilson v. Bishop*, 45 N. J. Eq. 473.

Whether a devise is vested or contingent depends upon whether the condition of its taking effect must happen sometime or may never happen. *Farnam v. Farnam*, 1 New Eng. Rep. 814, 53 Conn. 231.

The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested remainder from one that is contingent. *Mercantile Bank of N. Y. v. Ballard*, 33 Ky. 431.

It is the present right of future enjoyment whenever the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, which distinguishes a vested from a contingent remainder. *Kennard v. Kennard*, 1 New Eng. Rep. 163, 68 N. H. 303; *Scotfield v. Olcott*, 9 West. Rep. 133, 120 Ill. 363; 4 Kent. Com. 203. See note to *Pennington v. Pennington* (Md.) 3 L. R. A. 816.

It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which makes the difference between a vested and a contingent interest. *Wiggin v. Perkins*, 2 New Eng. Rep. 393, 64 N. H. 33; 4 Kent. Com. 203; *Kennard v. Kennard*, 1 New Eng. Rep. 163, 68 N. H. 303; *Vandewalker v. Rollins*, 1 New Eng. Rep. 338, 68 N. H. 430; *Brown v. Brown*, 44 N. H. 231; *Felton v. Sawyer*, 41 N. H. 202; *Ladd v. Harvey*, 21 N. H. 514. 9 L. R. A.

A legacy given to one to be paid at a future time vests immediately; but where not given until a certain future time, it does not vest till that time. *Reed's App.* 10 Cent. Rep. 323, 118 Pa. 215.

If the reason for the postponement is the position of the fund, the bequest in remainder vests at once; but if it is in the position of the legatee, the remainder is contingent. *Scotfield v. Olcott*, 9 West. Rep. 133, 120 Ill. 363.

So where testator directed that his land should be sold, and the proceeds divided and invested, and the interest be paid to his grandchildren, and at the end of twelve years the principal be paid over to them, and provided that neither interest nor principal should be attachable, the legacies are vested and not contingent. *Reed's App.* 10 Cent. Rep. 323, 118 Pa. 215.

If futurity is annexed to the substance of a gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instantaneously. *Scotfield v. Olcott*, *supra*.

The fact that the interest of the remainderman may be devested by his death before the death of the life tenant does not make the remainder a contingent one. *Mercantile Bank of N. Y. v. Ballard*, 33 N. Y. 431.

A gift when the legatee arrives at the age of twenty-one is contingent because the event is uncertain, but a gift at the death of the testator is vested because the event is certain to happen. *Thomas v. Anderson*, 31 N. J. Eq. 22; *Beatty v. Montgomery*, Id. 324; *Van Dyke v. Vanderpool*, 14 N. J. Eq. 206.

The time of payment of legacies payable at a future time out of personality does not in general affect the vesting, while legacies payable at a future time out of real estate do not vest before the time appointed for payment unless the contrary intention appears. *Hawkins, Wills*, 234; *Poulet v. Poulet*, 1 Vern. 204; *Duke of Chandos v. Talbot*, 2 F. Wms. 601; *Remnant v. Hood*, 2 De G. F. & J. 393; *Lyman v. Vanderspiegel*, 1 Aik. (Vt.) 230; *Birdsall v. Hewlett*, 1 Paige, 84, 2 N. Y. Ch. L. ed. 551; *Stone v. Massey*, 3 Yeates, 363; *Spence v. Rob-*

certain person to such as may be living of the children of four other persons, "the issue of any deceased legatee to take its parent's share" at such person's death, the estate given will be divided into as many parts as there are children of the four persons who are living and who have deceased, leaving issue who are still living; and each living child will take one part, and the part representing each deceased child will be divided among his issue, excluding issue of living issue.

3. The words "deceased legatee," in a will giving property to such of a class of persons as may be living at the death of a certain person, "the issue of any deceased legatee to take its parent's legacy," mean a person who was within the class and who would have been a legatee if he had not deceased.

4. There may be interests in a contingent remainder which are vested, subject to the happening of the contingency.

5. The word "issue" in a clause in a will providing that issue of a deceased legatee shall take its parent's share will not be restricted to mean simply "children," but will be extended to mean "grandchildren" whose parents are deceased, also, unless the testator's intention was clearly otherwise.

6. No interest in a contingent remainder will be held to vest before the contingency has terminated, if there is a contingency affecting the estate as well as one affecting the persons who are to take it, unless the testator plainly intended that it should.

7. Where the persons interested in a will are exceedingly numerous, all need not be made parties to a bill for the construction thereof, provided all possible interests are represented.

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bins, 6 Gill & J. 511; Roberts v. Malin, 5 Ind. 18. And see Willis v. Roberts, 48 Me. 267, which ignores the foregoing distinction.

The rule is the same although interest be given in the meantime, as in case of a legacy charged on land payable to the legatee at twenty-one with interest from testator's death to be applied for his maintenance. Such a legacy is contingent. Hawkins, Willis, 284; Pearce v. Loman, 8 Ves. Jr. 125; Parker v. Hodgson, 1 Drew & Sm. 568; Smith v. Wiseman, 6 Ired. Eq. 540.

But the foregoing rule will yield to the manifest intention of the testator. Stone v. Massey, 2 Yeates, 363; Brown v. Wooler, 2 Younge & C. Ch. 124; Watkins v. Cheek, 2 Sim. & Stu. 199; Murkin v. Phillipson, 8 Myl. & K. 267.

The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift, as a condition precedent. Where there is an antecedent absolute gift, independent of the direction and time of payment, the legacy is vested; but where there is no substantial gift, and it is only implied from the direction to pay, the legacy is contingent, unless from particular circumstances or the whole face of the will a contrary intention is to be collected. McClure's App. 72 Pa. 413; Reed's App. 10 Cent. Rep. 823, 118 Pa. 215.

The rule that where there is no gift but by direction to executors or trustees to pay or divide upon the happening of the event upon the future time the legacy will not vest until such time (Warner v. Durant, 76 N. Y. 123), does not control where the language of the will, although not expressly saying "I give and bequeath," did plainly import a vested gift intended to vest immediately without reference to the clause of distribution. Smith v. Edwards, 38 N. Y. 92; Coit v. Rolston, 44 Hun. 550.

Legacy or gift vested and contingent, distinguished. See note to Bishop v. McClelland (N. J.) 1 L. R. A. 551; Myers v. Adler (D. C.) 1 L. R. A. 432.

Estate, when vested and when contingent. See note to Culbreth v. Smith (Md.) 1 L. R. A. 538.

Vested remainder.

A vested remainder is a fixed interest to take effect in possession after a particular estate is spent, and is thereafter invariably fixed to a determinate person. Soofield v. Olcott, 9 West. Rep. 133, 120 Ill. 362.

Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of the particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is in case and ascertained, provided nothing but his own 9 L. R. A.

death before the determination of the particular estate will prevent such remainder from vesting in possession. McArthur v. Scott, 118 U. S. 840, 23 L. ed. 1015; Sager v. Galloway, 4 Cent. Rep. 685, 113 Pa. 500; Myers v. Adler, 1 L. R. A. 432, 6 Mackey, 513.

When there is no moment that the remainderman in fee would not have an immediate right to the estate on the death of the life tenant, it is a vested remainder. Thaw v. Ritchie, 4 Cent. Rep. 597, 5 Mackey, 300.

Since it may be presumed that a testator did not intend that any interest bequeathed in his will should lie dormant or undisposed of after his death, or should ever lapse, a slight circumstance may be sufficient to show that a legacy is vested, and not contingent. Willett v. Rutter, 84 Ky. 317.

Where a devise was "to my son D. and his heirs, and in case my son D. should die without lawful issue, I give the estate to my remaining children," it was held that the latter words related to the death of testator, and, that event occurring during the lifetime of D., D. took a vested absolute estate. Quackenbos v. Kingsland, 3 Cent. Rep. 913, 102 N. Y. 123.

Legacies payable at a future time certain to arrive, and not subject to condition precedent, are deemed vested when there is a person in case at the time of the testator's death capable of taking when the time arrives, although his interest is liable to be defeated altogether by his own death or to be diminished by future births. In such cases the legacy or bequest takes effect on the death of the testator. Scott v. West, 63 Wis. 371; Devisme v. Mello, 1 Bro. Ch. 537; Middleton v. Messenger, 5 Ves. Jr. 123; Halifax v. Wilson, 16 Ves. Jr. 163; Cooke v. Bowen, 4 Younge & C. Exch. 244; Scott v. Earl of Scarborough, 1 Beav. 154; Locker v. Bradley, 5 Beav. 593; Timins v. Stackhouse, 27 Beav. 434; McDonald v. Bryces, 2 Keen, 234; Eyre v. Marsden, 4 Myl. & Cr. 238; Oppenheim v. Henry, 10 Hare, 441; Williams v. Clark, 4 De G. & B. 472; Tucker v. Bishop, 16 N. Y. 402; Teed v. Morton, 60 N. Y. 502; Annable v. Patch, 3 Pick. 360; Verrill v. Weymouth, 68 Me. 313; Brown v. Brown, 44 N. H. 231; Teele v. Hathaway, 129 Mass. 164; Dale v. White, 33 Conn. 294; Newberry v. Hinman, 49 Conn. 130.

A devise for life, with remainder to the children of the life tenant, creates a vested remainder in the children, whether or not they are born when the will takes effect. The use of the word "children" makes the persons to take as certain as if the names of the remaindermen had been given. It is otherwise where the word "heirs" is used, unless it can properly be construed to mean children. Mercantile Bank of N. Y. v. Ballard, 33 Ky. 431.

The share coming to any child on the death of another without issue becomes vested at once in

PRESERVATION for the opinion of the full court from the Supreme Judicial Court for Suffolk County (Field, J.) of a suit brought for the construction of a clause in the will of Benjamin Gorham, deceased.

After making several specific bequests, the testator gave all the rest and residue of his estate in trust for his son, Benjamin Lowell Gorham, any income or principal necessary from time to time for his wants to be paid over to him, and upon his death the whole estate to be paid to his issue, if he should leave any, in fee simple discharged from all trusts.

He then provided as follows:

"If my son Benjamin should die without leaving issue, then whatever may remain of what I have given in trust for him and which may be remaining in trust, and whatever I may acquire in case he should die before me,

leaving no issue, I give and distribute in fee as follows: I give to Mrs. Elizabeth C. Dutton one twelfth part, and to her brother, the Rev. Mr. Lowell, one twelfth part, and to Mr. Francis C. Lowell one twelfth part, and the children of his sister Susan one twelfth part; the remaining eight twelfths I give in fee to such as may be living of the children of my brother Nathaniel Gorham, the children of my sister Mrs. Rebecca Parks, the children of my sister Mrs. Mary Bartlett, and the children of my sister Mrs. Lydia Phillips, each individual nephew and niece to take an equal share, the issue of any deceased legatee to take its parent's legacy."

Benjamin Lowell Gorham died without issue with a large portion of the estate unexpended, and the trustee under the will of Benjamin Gorham thereupon brought this suit for

him, and is alienable, and therefore not affected by the provision as to survivorship. *Vanderpoel v. Loew*, 112 N. Y. 167.

A limitation in a will to children of testator's children creates a vested remainder which opens and lets in those born after testator's death; and the inartificial use of the word "revert" will not obscure the plain meaning that the children are to take as purchasers. *Dole v. Keyes*, 8 New Eng. Rep. 227, 143 Mass. 237.

A devise to a child for life, with remainder to her children, the survivors or survivor of them living at her death, vests the estate in remainder in the children living at the death of the testator as a class; which estate will open and let in afterborn children, and will be defeated as to any child or children dying in the lifetime of the mother. *Kansas City Land Co. v. Hill*, 5 L. R. A. 45, 87 Tenn. 529.

A devise to testator's daughter for life, in one clause of his will, provided she shall survive him, with remainder to her surviving child in fee; followed by another clause devising the same land to his wife, with remainder to his own heirs in fee,—gives to the daughter's son a vested remainder in fee, upon her death leaving a son surviving her. *Bruce v. Bissell*, 119 Ind. 525.

Under a will giving certain land to testator's son, if living at the death of a life tenant, and if not, then to his widow until her death or remarriage, and then to his heirs, and if there be none, to the heirs of another person,—the interest of the son is vested immediately upon the death of his father. *Hoover v. Hoover*, 116 Ind. 498.

A bequest of a sum of money to the children of the testator's brother after the decease of the testator's sister, to whom the use and income are given during life, vests at once on the death of the testator; and if the children die before the sister, the money goes to their representatives. *Crosby v. Crosby*, 2 New Eng. Rep. 903, 64 N. H. 77.

A legacy payable after the death of the testator's wife, in case the legatee is living or has left issue, is vested, and passes to his assignee in bankruptcy under a voluntary assignment made during the widow's life. *Churchman's App.* (Pa.) 11 Cent. Rep. 660.

A devise that: "After the decease of my husband, I give, etc., the remainder of said third to my step-children," naming them, gives a vested interest; and the subsequent words: "And in case of the death of both said step-children, without issue surviving them and me, I give, etc., the said remainder," do not convert the gift into a contingent remainder, but leave it vested, subject to be devested upon a future contingency. *Pennsylvania Ins. Co's App.* 1 Cent. Rep. 551, 109 Pa. 499. 9 L. R. A.

A clause devising lands to testator's daughter during her life, and then to her children and their lawful heirs forever, and in case of the death of any of her children, leaving a lawful child surviving, such child to take the share which its parent would have been entitled to if living, devises a remainder in fee to the children of testator's daughter, subject to open and let in children born after his death, who would each become entitled to a share of the remainder. *Byrnes v. Stillwell*, 5 Cent. Rep. 402, 108 N. Y. 453; *Ballentine v. Wood*, 7 Cent. Rep. 465, 42 N. J. Eq. 552; *Gibbens v. Gibbens*, 1 New Eng. Rep. 198, 140 Mass. 102.

Where the testator gave his real and personal estate to his wife and son during her life, upon condition that they give each daughter, upon leaving home, a certain outfit, and providing for the disposition of the realty, it is an absolute gift of the personality to them. *Dreannan's App.* 10 Cent. Rep. 646, 118 Pa. 176.

The addition at the end of the clause, "the devise over to my husband, sister and brothers to depend upon the contingency of my daughter dying without issue," indicated an intention by the testatrix that in the event of her daughter's dying without issue her husband, sister and brothers should enjoy the property, without reference to any other contingency. *Re New York, L. & W. R. Co.* 7 Cent. Rep. 259, 105 N. Y. 89.

Where there is a devise to one person in fee, and, in case of his death, to another, the contingency referred to is the death of the first-named devisee during testator's lifetime; and if such devisee survive testator he takes an absolute fee. *Ibid.*

The same rule of construction is to be applied where the alternative devise is made to depend upon the death of the first-named devisee "without issue" or "without children," etc. But the tendency is to lay hold of slight circumstances in the will to vary such construction, and give effect to the language according to its natural import. *Ibid.*

Where the enjoyment of an anterior fund is given in fractional parts at successive periods which must eventually arise, the extinguishment between time annexed to payment and time annexed to the gift is impossible, and in such cases all the interest vests together. *King v. King*, 1 Watts & S. 205.

A bequest of four parts out of twenty, of the residue of the testator's estate, after conversion into money and payment of debts, "to A and his heirs; that is, the four parts to be paid to A during life and thereafter to his heirs,"—is not contingent. *Little's App.* 9 Cent. Rep. 309, 117 Pa. 14.

The word "heirs," in the above clause, is a word of limitation. *Ibid.*

Other provisions in the will, as to distributees claiming their shares within two years; or accept-

instructions as to the distribution of the estate remaining in his hands under the above clause of the will.

Sundry answers were filed to the bill on behalf of a large number of parties defendant, representing all possible interests, and, the persons interested being exceedingly numerous, the single justice ruled that it was not necessary to make other persons parties defendant.

Messrs. William Caleb Loring and Robert S. Gorham for the executor of Elizabeth O. Dutton, deceased.

Mr. John C. Bopes for Henry R. Dalton, Jr.

Mr. Charles P. Curtis, Jr., for the administrator of Francis Vose, deceased, a descendant of Mrs. Mary Bartlett.

Messrs. Hutchins & Wheeler for the living issue of Mrs. Rebecca Parks.

Mr. Charles P. Greenough for Rebecca G. Kettell *et al.*

Mr. William L. Putnam for Sarah L. Barnard *et al.*

Field, J., delivered the opinion of the court:

The two clauses of the paragraph of the will which we are called upon to consider, as we construe them, differ in this: in the first, the four twelfths of the trust property which may remain if Benjamin L. Gorham die without leaving issue were given absolutely to persons named or designated, and there is no provision that these persons must be living when Benjamin L. Gorham dies; in the second, the remaining eight twelfths were given to such of certain persons designated as may be living when Benjamin L. Gorham dies. It is only in the latter clause, therefore, that the testator

ing shares in full satisfaction of all claims against the estate; or of giving the share of an heir contesting the will to another heir,—do not change the character of the bequest. *Ibid.*

A devise to a person after the payment of debts and legacies confers an immediately vested estate. *Little's App.* 9 Cent. Rep. 319, 117 Pa. 14.

A devise of lands to be sold after the termination of the life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator. *Cropley v. Cooper*, 86 U. S. 19 Wall. 175, 23 L. ed. 118; *Fairly v. Kline*, 3 N. J. L. 324; *Reading v. Blackwell*, *Baldw.* 106; *Rinehart v. Harrison*, *Id.* 177; *Lottis v. Glass*, 15 Ark. 680; *Muhlenberg's App.* 108 Pa. 587.

The courts lean in favor of vesting, in the bequest of a residue. *Booth v. Booth*, 4 Ves. 890; *West v. West*, 4 Swabey & T. 22; *Pearman v. Pearman*, 38 Beav. 396; *Taylor v. Mosher*, 29 Md. 451.

An unconditional legacy once vested cannot be divested and cannot revert. *Vance's Succession*, 30 La. Ann. 371.

An estate or interest vested cannot be divested unless all the events upon which the property is given over happen; and this rule will be adhered to even if an absurd and whimsical intention be thereby imputed to the testator. *Nellson v. Bishop*, 45 N. J. Eq. 473.

For other examples of vested remainders, see *notes* to *Pennington v. Pennington* (Md.) 3 L. R. A. 816; *Bunting v. Speaks* (Kan.) 8 L. R. A. 690.

Contingent remainders.

It is the uncertainty of the right of enjoyment which renders a remainder contingent, not the uncertainty of its actual enjoyment. *Lehndorf v. Cope*, 11 West. Rep. 622, 122 Ill. 317.

The law favors vested estates; and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. *Harris v. Carpenter*, 7 West. Rep. 907, 109 Ind. 540; *Byrnes v. Stillwell*, 5 Cent. Rep. 406, 108 N. Y. 453; *Knowlton v. Sanderson*, 2 New Eng. Rep. 100, 141 Mass. 323.

The validity of a contingent estate is to be determined by considering the terms of the will alone, and not by what might have happened or what did actually happen. *Bailey v. Sanger*, 6 West. Rep. 558, 106 Ind. 264.

In a devise to two grandsons, providing that if they die without issue their portion shall go to the grandchildren generally, or if either shall die without issue, his share shall go to the survivor, subject to legacies, the intention is not to give the grandsons a fee simple absolute but contingent, and liable to be reduced to life estate. The nature of the

estate is not affected by payment by either grandson, of legacies charged on lands. *Nellis v. Nellis*, 1 Cent. Rep. 296, 98 N. Y. 505.

Wherever the remainder is limited to a person not *in esse* or not ascertained, or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is contingent. *Sager v. Cobham* (Pa.) 4 Cent. Rep. 685; *Sager v. Galloway*, 4 Cent. Rep. 685, 118 Pa. 500; *Fearne, Rem.* 216, 217.

Where a will reserves bequests and devises, subject to the approbation or rejection of testator's wife, an interest under such a devise is a mere possibility of a contingent remainder, and is not sufficient to give a right to be made a party to an action of partition. *Fales v. Fales*, 148 Mass. 2.

Where a will devised shares of the estate to nephews, and provided that if any should die during the life of their mother, leaving issue, such issue should be entitled to one share of the estate by representation, the nephew's interests became vested on the testator's death, although subject to be divested by the contingency of the death of either during the mother's life, leaving issue. *Lens v. Prescott*, 4 New Eng. Rep. 419, 144 Mass. 505.

A conveyance to the mother and upon her death the remainder to her children who survive her and the children of such of her children as are dead at her decease is a contingent remainder. *Emison v. Whittlesey*, 55 Mo. 259; *Blanchard v. Blanchard*, 1 Allen, 228; *Jones v. Waters*, 17 Mo. 589.

Where an interest is given to one for life, and after his death to his surviving children, they only can take who are alive at the time of the distribution, and the estate is therefore contingent. *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32; *Teets v. Weiss*, 47 N. J. L. 156; *Darnell v. Barton*, 75 Ga. 377.

In a will devising testator's estate for the use, benefit and behoof of his daughter during her natural life, and for the use of her heirs after her death, the remainders provided therein for the use of the heirs are contingent upon the death of the daughter. *Wallace v. Minor* (Va.) Dec. 12, 1899.

Where a will gives money to a legatee if he survives probate, a codicil, declaring that if he dies before payment the sum shall form part of the residuary estate, makes the right to the legacy contingent upon surviving until payment. *Re Spencer*, 5 New Eng. Rep. 326, 16 R. L. —.

A legacy to A, directed to be paid immediately after the decease of testator's daughters, if his wife was also then deceased, is contingent; and on the death of the legatee before the happening of the contingency, her representatives are not enti-

would feel the need of providing for the issue of a legatee dying after his death and before that of his son, and we think that the provision for the issue of a deceased legatee must be confined to that clause.

The construction, therefore, which we give to this paragraph of the will is as follows: The persons to whom the first four twelfths were given, all having survived Benjamin Gorham, took, on his death, vested interests in the shares given them, subject to the contingency that Benjamin L. Gorham might die leaving issue, and to the further contingency that the whole trust fund might be expended for the use of Benjamin L. Gorham during his life. One twelfth part of the whole trust fund, therefore, should be paid to an executor of the will or to an administrator of the estate of Elizabeth C. Dutton to be appointed; one twelfth to the ex-

ecutors of the will of Rev. Charles Lowell; one twelfth to the executor of the will of Francis C. Lowell; one twenty-fourth to John Lowell and one twenty-fourth to John Lowell, executor of Susan Cabot Sohler. As to the remaining eight twelfths, only those persons take who were living when Benjamin L. Gorham died. They are of two classes: first the children then living of the four persons named, and secondly, the issue then living of deceased children of these four persons. All take as of the death of Benjamin L. Gorham, the former *per capita*, the latter by right of representation. These eight twelfths of the trust fund, therefore, must be divided into as many parts as there were children of these four persons living when Benjamin L. Gorham died, and as there were children of these four persons who had previously died, but who had issue living when

tied to the legacy. *Gorgas' App. (Pa.) 11 Cent. Rep. 196.*

A devise in trust to pay income to testator's daughter during life, and after her death to her descendants as they become respectively of the age of twenty-one years, although revoked as to the daughter, is as to the remaindermen contingent, and not payable before the death of the daughter. *Holmes' App. 8 Cent. Rep. 336, 116 Pa. 222.*

Where a contingent remainder is created, the tenant in possession and those in remainder *in esse* cannot have a decree for a sale of the land, unless some one of each class of contingent remaindermen are *in esse* and before the court. *Young v. Young, 97 N. C. 132.*

For other examples of contingent remainders, see note to *Pennington v. Pennington (Md.) 3 L. R. A. 814.*

The intervention of trustees does not vary the rule.

The intervention of trustees does not alter the rule as to the vesting of estates. *Mercantile Bank of N. Y. v. Ballard, 58 Ky. 431.*

Where a trust fund created by a will is to become part of residuum on the death of the beneficiary, a contingent interest therein is at once vested in the residuary devisee, and passes by an assignment of his rights under the will. *Wickersham's App. (Pa.) 1 Cent. Rep. 425.*

A by his will gave \$10,000 to B in trust for C, the income to be paid to C for life, with remainder to the children of C, if she had any, and if she had none then to D. C had no children. D died in the lifetime of C, leaving one child. It was held that the remainder became vested in D immediately on the death of the testator, subject to be devested by the birth of a child to C; and that on the death of C without children the fund passed to the heir-at-law of D. *Vandewalker v. Rollins, 1 New Eng. Rep. 556, note, 68 N. H. 460.*

A will giving trustees the property of the testator, real and personal, for the use and benefit of his daughter during her natural life, and upon her death the same to go "to all and every, the child or children she . . . may hereafter have, their heirs, executors, administrators and assigns, in equal proportions, share and share alike,"—gives the children vested remainders on the testator's death. *Cox v. Cox (Md.) Dec. 18, 1890.*

A devise of the testator's property in trust for the use of his daughter during her life, and on her death to her children, their heirs, executors, etc., in equal proportions, share and share alike, creates a vested remainder in each child from the moment of its birth. *Brewer v. Cox (Md.) Dec. 18, 1890.*

A bequest to two daughters jointly or to the sur-

vivor, "to remain in the hands of the executor until they become of age," vests a present interest in the entire legacy, subject to the right of the survivor to take the whole; and the trust cannot be defeated by paying the money to a guardian. *Silvers v. Canary, 13 West. Rep. 310, 114 Ind. 129.*

A testator gave his whole estate to trustees: (1), to pay an annuity to his son during life; (2), to pay the rest of the income to the son's wife and children, so far as needed for their support; (3), to distribute the capital after the son's death to the widow and children of the son in equal shares; (4), and if no wife or child, to hold for the benefit of a church. The son died leaving a widow, but no children. His widow was entitled to a conveyance of the whole estate in the hands of the trustee. *Morse v. Church, 2 New Eng. Rep. 363, 15 B. I. 334.*

B bequeathed \$12,000 to E and F in trust to pay the income to C for life, remainder to her children, if she had any, and if she had none, to such person or persons as she might appoint, and made E and F general residuary legatees. C died, leaving no child and without making any appointment of the fund. E and F both died before C. Held, that upon the death of B the remainder became vested in E and F, subject to be devested by the birth of a child to C; and that upon the death of C without children the fund passed to the legal representatives of E and F. *Vandewalker v. Rollins, 1 New Eng. Rep. 556, 68 N. H. 460.*

Where there is a devise to one for life, with remainder over to testator's children then living or surviving, children living at testator's death are meant, and the remainders are vested. *Barker's App. and Hyndman's App. (Pa.) 2 Cent. Rep. 232.*

Thus under a bequest to trustees in trust for one during his life, and after his death to pay and divide among his children, the shares of children dying in his lifetime are vested and pass to their representatives. *Hawkins, Wills, 220; Halifax v. Wilson, 16 Ves. Jr. 171; Leeming v. Sherratt, 2 Hare, 14; Paokham v. Gregory, 4 Hare, 364.*

Although the interest be not given to the legatee until he attains a certain age, if the subject matter of the bequest be at once severed from the list of the testator's property and given to trustees for the legatee in trust to accumulate until such legatee attains the specified age, this raises an inference of immediate vesting. *Hawkins, Wills, 220; Saunders v. Vautier, Cr. & Ph. 240; Oddie v. Brown, 4 DeG. & J. 179; Dundas v. Murray, 1 Hem. & M. 425; Weyman v. Ringold, 1 Bradf. 40; Van Dyke v. Vanderpool, 14 N. J. Eq. 206; Roberts' App. 59 Pa. 72.*

Suspending time of vesting of estate.

Any devise or bequest in favor of a person or persons *in esse*, whether such persons be individual-

Benjamin L. Gorham died, children of these four persons who died without leaving issue who survived Benjamin L. Gorham are not to be reckoned, because neither they nor their issue survived him. We do not find that any of the children of these four persons who died before the death of Benjamin Gorham, the testator, left issue who were living when Benjamin L. Gorham died, and the question does not arise whether such issue if then living would have taken or not. The words "deceased legatee" mean any child of any of the four persons named who had deceased before Benjamin L. Gorham's death, but who would have been a legatee if he or she had not deceased, and the clause should be construed as if it read, "The remaining eight twelfths I give in equal shares

to each of the children of," etc., "who may be living when my son Benjamin L. Gorham dies, and to the issue who may then be living of any deceased child of," etc., "the issue taking by right of representation." Although the issue do not take from or through the nephew or niece whose issue they are, but directly under the will, yet they take in the same manner as if their shares had come to them from or through their parents. The issue of living issue of a deceased nephew or niece do not take, because all the issue take by way of representation. *Gardner v. Hooper*, 3 Gray, 398; *Seare v. Russell*, 8 Gray, 86; *Childs v. Russell*, 11 Met. 16; *Winslow v. Goodwin*, 7 Met. 363; *Lombard v. Willis*, 147 Mass. 18; *Denny v. Kettell*, 185 Mass. 188; *Coveny v. McLaughlin*,

ised or treated as a class, unless there be some clearly expressed desire or manifest reason for suspending the time of vesting such devise or bequest, confers an immediately vested interest, though the time of possession or enjoyment may be postponed. *Dulany v. Middleton* (Md.) Feb. 6, 1890.

Where there is no gift, and a direction to the executors or administrators to pay at a future time, the vesting will not take place until that time arrives. *Palms v. Palms*, 13 West. Rep. 142, 68 Mich. 365.

Where the enjoyment of the entire fund is given in fractional parts, at successive periods which must eventually arrive, the distinction between time annexed to payment and time annexed to gift becomes unimportant, and all the interest vests together. *Little's App.* 9 Cent. Rep. 309, 117 Pa. 14.

The interest created by a bequest, in a will, of a sum of money absolutely, with directions that it be distributed to the legatee upon the expiration of a specified time after the death of the testator, being a vested interest in fee in the legatee, postponed merely in enjoyment, a further provision indefinitely restraining the right of the legatee to alienate the subject matter of the bequest is void. *Williams v. Williams*, 73 Cal. 93.

Under a devise to testator's granddaughter of a certain sum, to be paid to her when she attains the age of twenty-one years, the residue to go to testator's wife for her life, the legacy to the granddaughter is vested, only the time of payment being deferred. *Re Goble's Estate* (Surr. Ct.) 30 N. Y. S. R. 944.

Although as a general rule the period appointed for actual payment does not influence the vesting, it has that effect in case of a bequest to children when the youngest child attains twenty-one; and in such case it vests in all the children on attaining twenty-one to the exclusion prima facie of those dying under that age. *Hawkins, Wills*, 233; *Leeming v. Sherratt*, 2 Hare, 14; *Parker v. Sowerby*, 1 Drew. 488; *Lloyd v. Lloyd*, 3 Kay & J. 20; *Cooper v. Cooper*, 29 Beav. 229.

In a gift to children when and as they shall attain a given age, with a gift over of the shares of those dying under that age without leaving issue, the children take vested interests. *Bland v. Williams*, 8 Myl. & K. 411; *Kimball v. Crooker*, 53 Me. 263; *Chew's App.* 37 Pa. 28.

Instances of the foregoing rule are a "bequest in trust to pay the children of A as they shall respectively attain twenty-one, with a gift over in case of the death of A without leaving children, in which case the gift over shows an intention that the children, if any, should take although not attaining twenty-one years. *Walker v. Mower*, 16 Beav. 365; *Bree v. Perfect*, 1 Coll. 123; *King v. Isaacson*, 1 Smeal & G. 371.

But in the case of *Seibert's App.*, 13 Pa. 501, this rule was not observed, and it was there held that such a legacy was contingent.

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Where nothing is interposed between the minor and his enjoyment of the estate except his own minority, the estate is vested. *Van Brunt v. Van Brunt*, 111 N. Y. 173.

Where the testator directs his whole estate to be kept together for the benefit of his wife and children, and that it shall be divided when the youngest child attains twenty-one, the postponement is presumed to be rather for the purpose of providing a home for the family than of postponing the vesting of the shares, and hence all the interests will vest at death. *Hawkins, Wills*, 233; *Devane v. Larkins*, 3 Jones, Eq. 377; *Smith v. Wiseman*, 6 Ired. Eq. 540; *Everett v. Mount*, 22 Ga. 333; *McLemore v. McLemore*, 8 Ala. 687; *Scott v. James*, 3 How. (Miss.) 307; *Harcock v. Titus*, 30 Miss. 233; *Collier's Will*, 40 Mo. 323. See *Thackston v. Watson*, 84 Ky. 206.

Postponement of payment of devise is a question of intention. *Borden v. Jenks*, 1 New Eng. Rep. 705, 140 Mass. 562.

Wherever property is given to another until one or some of the ultimate legatees shall attain a certain age, such legatees take vested interests, it being presumed that the postponement of the payment was for the purpose of the prior bequest. *Watkins v. Quarles*, 23 Ark. 173; *Roberts v. Brinker*, 4 Dana, 573.

The law not only favors the vesting of remainders, but it also presumes that words postponing an estate relate to the beginning of the enjoyment of the remainder, and not to the vesting of that estate. *Amos v. Amos*, 117 Ind. 37; *Thackston v. Watson*, 84 Ky. 216.

Where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but one in which time is of the essence of the gift. *McCartney v. Osburn*, 6 West. Rep. 303, 115 Ill. 403.

Under a will devising land to testator's three children equally for their lives, and after the death of either of them his share to be equally divided among his children or their descendants, giving to the descendants of each child one share, the vesting of the remainder in interest is postponed until the termination of the intermediate estate, and hence a child of one of the three life tenants who died before its parent took no interest in the land. *Bates v. Gillett*, 132 Ill. 237.

Where a testator creates a particular estate, and then disposes of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event, in the latter devise, refer merely to the period of the determination of the possession or enjoyment under the prior gift, and do not postpone the vesting. *Cox v. Cox* (Md.) Dec. 18, 1889.

The vesting of personal legacies the payment of which is postponed to a period subsequent to the

148 Mass. 576; *Dexter v. Inches*, 147 Mass. 324; *Fargo v. Miller*, 150 Mass. 226, 5 L. R. A. 690; *Thomson v. Ludington*, 104 Mass. 198.

The questions upon which we have felt the more doubt are whether the words "the issue of any deceased legatee" must not be held to mean "children of a deceased" nephew or niece of the testator, and whether such children did not take vested interests immediately on the death of their father or mother. It is difficult to distinguish this case from *Martin v. Holgate*, L. R. 1 H. L. 175, which was followed in *Austin v. Bristol*, 40 Conn. 120. See also *Re*

Smith's Trusts, L. R. 7 Ch. Div. 665; *Re Orton's Trust*, L. R. 8 Eq. 875.

In *Martin v. Holgate* the residue of the estate was given in trust to pay the income to the widow of the testator during her life, and after her decease to distribute it "among such of my said four nephews and two nieces (naming them) as shall be living at the time of her decease, in equal shares and proportions as tenants in common and not as joint tenants; but if any or either of them should then be dead leaving issue, then it is my will and meaning that such issue shall be entitled to their father's or

decease of the testator is suspended if futurity is annexed to the substance of the gift; but if the futurity appears to relate to the time of payment, the legacy vests instantan. *Willett v. Rutter*, 84 Ky. 317.

When estates vest; rule which governs.

Estates legal or equitable given by will should be regarded as vested immediately unless there is a manifest intention to the contrary. *Scott v. West*, 63 Wis. 522.

The law favors the vesting of estates, and where there is doubt as to the point of time at which it was intended the estate should vest, the earliest will be taken. *Sager v. Galloway*, 4 Cent. Rep. 681, 113 Pa. 500.

But it does not favor the vesting of estates to the extent of defeating the testator's intention, which must govern unless some fixed rule of law prevents. *Bailey v. Love*, 10 Cent. Rep. 121, 67 Md. 592.

The intent to make an estate contingent instead of vested must be expressed in terms so plain as to leave no room for construction. *Straus v. Rost*, 8 Cent. Rep. 893, 67 Md. 465.

But remainder will never be held contingent where it can be held vested, in harmony with the intention of the testator. *Davidson v. Bates*, 10 West. Rep. 223, 111 Ind. 391; *Davidson v. Hutchins*, 10 West. Rep. 82, 112 Ind. 323; *Scofield v. Oleott*, 9 West. Rep. 139, 120 Ill. 393; *Straus v. Rost*, 8 Cent. Rep. 893, 67 Md. 465.

Construction can assign no period for the absolute vesting of interests under a will in opposition to its plain and unambiguous terms, nor can it enlarge a right or an interest beyond what the clearly expressed intention of the testator has intended. As regards any other person to whom a share in the remainder was given, his or her heirs take the share which the person so dying would have taken if living at the time limited by the will. *Tillman v. Sullivan*, 63 How. Pr. 360; *Williamson v. Field*, 2 Sandf. Ch. 533, 7 N. Y. Ch. L. ed. 628; *Moore v. Lyons*, 25 Wend. 144; *Drake v. Fall*, 3 Edw. Ch. 261, 6 N. Y. Ch. L. ed. 646.

In case of a legacy payable out of both real and personal estate, the time of vesting, as to the personal estate, is governed by the rules relating to the vesting of bequests of personal estates, and, as to the real estate, by the same rules as if the legacy had been payable out of the real estate only. *Hawkins, Wills*, 236; *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Prowse v. Abington*, 1 Atk. 438; *Fuller v. Winthrop*, 8 Allen, 61; *Patterson v. Hawthorn*, 12 Serg. & R. 112.

In a devise of land to testator's wife for life, "and at her death the same shall be the property of and pass to my daughter L. in fee, and if she, said L., be not living, then to her heirs forever," the survivorship has reference to time of death of testator; and upon his death L. becomes seised of a vested remainder in fee in such land. *Harris v. Carpenter*, 7 West. Rep. 908, 109 Ind. 540.

Where testator gave the interest of a fund to his 9 L. R. A.

son for life, and then provided that at latter's decease the principal sum be paid to his lawful heirs, share and share alike, the son took a life interest in the fund, and his children took a remainder which vested at once on the death of the testator. *Eldridge v. Eldridge*, 8 Cent. Rep. 344, 41 N. J. Eq. 89.

A will giving portions of the estate to the widow for life and balance to children in fee, construed; and held that the interest of children vested at death of testator, not at distribution. *Konvalnika v. Geibel*, 2 Cent. Rep. 188, 40 N. J. Eq. 443.

Where there is nothing to indicate to the contrary, a bequest or devise to a class of persons takes effect in favor of those constituting the class at the time of the testator's death. *Hoffen's Estate*, 70 Wis. 524.

Where there is no gift, but a direction to executors or trustees to pay, or to divide and pay at a future time, the vesting will not take place until that time arrives. *Delafield v. Shipman*, 5 Cent. Rep. 394, 108 N. Y. 468.

Where the bequest is to take effect in possession after a life estate or at any period subsequent to the testator's death, the words may be considered as extending to the event of the legatee dying in the interval between the testator's death and the period of vesting in possession, or the time of actual distribution, as will best promote the intention of the testator, to be gathered from the context of the will. *Engel v. State*, 3 Cent. Rep. 845, 65 Md. 589.

Where the will authorizes executors to sell and convey all such real and personal property, and from the proceeds thereof pay the portion or share to each one named, the legatees do not take a vested interest upon the death of the testator, but at the date of distribution. *Banta v. Boyd*, 6 West. Rep. 87, 118 Ill. 188.

A bequest of money to be divided equally among the widow's legal heirs, after her death, does not vest until her death. *Anthony v. Anthony*, 5 New Eng. Rep. 41, 55 Conn. 256.

A will giving the share of any daughter dying "to be equally divided among the surviving brothers and sisters and the lawful issue of such as may be dead; if any. . . provided, however, that if my said daughters or either of them should die leaving lawful issue, the share of such daughters so dying shall go to and be equally divided among such issue and the lawful issue of such as may be dead," by the term "surviving brothers and sisters" has reference to the death of the daughter, not to the death of the testator. *Woelpper's App.* 126 Pa. 562.

A gift by will by a woman advanced in years to her granddaughter, to receive the income until reaching the age of twenty-one years, and then the principal, and at her decease to her descendants, or, in default thereof, to the descendants of a son of the testatrix, shows an intent that the contingent bequest should take effect at the death of the life tenant, whenever that should happen, and not merely in case of her death before that of the testatrix. *Stone v. McRekron*, 87 Conn. 194.

mother's share, but in equal proportions." It was held that "issue" meant "children;" that the gift to the issue was original and not substitutional, and that the contingency in the gift to the nephews and nieces did not affect the nature of the gift to their issue, which was an independent bequest, vesting in the issue immediately on the death of their parent in the lifetime of the widow. Before that decision the authorities in England had been conflicting, and they are all or nearly all reviewed in that case. There are some minute differences in the phraseology of the clause to be construed in the case at bar and in that of the clause construed in *Martin v. Holgate*, but it is probable that they would not be regarded in England as sufficient to take the case out of the rule established in *Martin v. Holgate*. In that case the only contingency which attached to the gift of the remainder was the uncertainty as to the particular persons, of those named or designated, who would take it. In the case at bar, it was uncertain whether any of the classes of persons designated would take anything, because it was uncertain whether Benjamin L. Gorham would die without leaving issue, and also uncertain whether any of the trust fund would remain unexpended at his death. There may be interests in a contingent remainder which are vested, subject to the happening of the contingency, as we have held in this case, in construing the first clause of the paragraph of the will under consideration; but the fact that there is a contingency affecting the estate as well as a contingency affecting the persons

who are to take it, may throw some light upon the intention of the testator as to the time when a legacy should be considered as vesting.

In the case at bar, we are not satisfied that the meaning of the word "issue" is to be restricted to that of children. Issue ordinarily means all lineal descendants. *Bigelow v. Morong*, 103 Mass. 287; *Hall v. Hall*, 140 Mass. 267, 1 New Eng. Rep. 233.

If a nephew or niece had died after the death of the testator, and before that of Benjamin L. Gorham, leaving no child, but a grandchild who survived Benjamin L. Gorham, we do not think that the testator intended that such grandchild should not take its grandparent's share. As was said in *Dexter v. Inches*, 147 Mass. 324, "We are of opinion that the word 'issue,' as here used, means descendants, taking by way of representation," and as they are to take their "parent's legacy," we think that they must take it on the same contingency as their parent would have taken it, which is that of surviving Benjamin L. Gorham; and that the testator intended that all the persons who should take the eight twelfths of what remained of the property when Benjamin L. Gorham died, if he died without leaving issue, should be ascertained as of the same time, which is that of the death of Benjamin L. Gorham. The ruling of the single justice upon the question of parties was correct.

A decree must be entered in accordance with this opinion, the details of which may be settled by a single justice.

So ordered.

IOWA SUPREME COURT.

Hugh S. GARA *et al.*, Admrs. of John S. Gable, Deceased, *Appts.*,

v.

R. E. AUSTIN, Ancillary Admr. of John S. Gable, Deceased, *et al.*

Re John S. GABLE'S ESTATE.

(79 Iowa, 178.)

The surplus proceeds of a sale of lands made in auxiliary administration after

paying the debts in that jurisdiction, instead of being distributed to the heirs and devisees in that jurisdiction, will be transmitted to the principal administrator in another State in which the assets are insufficient to pay the debts.

(January 30, 1890.)

A PPEAL by intervenors from a decree of the District Court for Tama County sitting as a court of probate ordering distribution of the estate of John S. Gable, deceased, according to the provisions of his will. *Reversed.*

NOTE.—Ancillary administration of estates.

The title of the executor or administrator derived from the grant of administration in the country of the domicile of decedent does not extend as matter of right beyond the territory of the government in which it is granted, and if acknowledged as to personal property situated elsewhere it is acknowledged only from comity, and comity yields to the local obligation of protecting domestic as against foreign rights. Schouler, *Exra.* 315; Moore v. Fields, 42 Pa. 472; Story, *Conf. L.* § 152.

As a general rule a domiciliary executor or administrator authorized to administer decedent's estate, to enable him to bring suit in relation to property in another State or country than that of decedent's domicile, must obtain ancillary letters testamentary or of administration in such State or country. *Vroom v. Van Horne*, 10 Paige, 549, 5 N. Y. Ch. L. ed. 1137.

The term "ancillary" denotes the administration here in a certain sense subordinate to the more

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general administration abroad, and for which provision is made by statute. *Coley's Estate*, 14 Abb. Pr. 444; *Lynes v. Coley*, 1 Redf. 407; 1 Story, *Eq. Jur.* 533.

Foreign administrators, incapacities of. See notes to *Schluter v. Bowery Sav. Bank* (N. Y.) 5 L. R. A. 541; *Johnston v. Wallis* (N. Y.) 2 L. R. A. 823; *Welch v. Adams*, *post*, 244.

Ancillary probate authority will be granted where principal letters testamentary or of administration have been granted elsewhere, under the rule of public convenience that property of the deceased within reach of domestic process shall be applied to the liquidation of debts in consonance with domestic policy. *Harrison v. Sterry*, 9 U. S. 5 Cranch, 299, 3 L. ed. 107; *Smith v. Union Bank of Georgetown*, 8 U. S. 5 Pet. 523, 3 L. ed. 214; *Holcomb v. Phelps*, 16 Conn. 127; *Bowdoin v. Holland*, 10 Cush. 17; *Willard v. Hammond*, 31 N. H. 383; *Doolittle v. Lewis*, 7 Johns. Ch. 45, 2 N. Y. Ch. L. ed. 215; *Sanders v. Jones*, 3 Ired. *Eq.* 242; 2 Kent, *Com.* 424; *Wms. Exra.* 322, 430.

Statement by Beck, J.:

The heirs, legatees and devisees of John S. Gable, deceased, filed their petition in the District Court of Tama County, sitting as a court of probate, praying that the executor of the estate of said deceased, appointed by said court, be ordered to make distribution of the assets in his hands, as required by the will of the testator. An order, as prayed for by the petition, was made. Administrators of the estate, appointed in proceedings in Pennsylvania, claimed to be the principal administration, intervened, claiming the assets asked to be distributed. They appeal to this court.

Messrs. C. B. Bradshaw and Charles A. Clark, for appellants:

Ancillary administration is made subservient to the rights of creditors, who are resident within the country where it is granted; and the residuum is transmissible to the foreign country when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found there.

Ancillary letters of administration. See *note to Schluter v. Bowery Sav. Bank* (N. Y.) 5 L. R. A. 541.

Power and authority.

Executors duly appointed in another State have a right to take charge of and control personal property of the testator situated in this State, where there is no conflicting grant of letters testamentary here. *Brown v. Brown*, 1 Barb. Ch. 189, 5 N. Y. Ch. L. ed. 849; *Re Trazier*, 2 Redf. 173; *Black v. Woodman*, 5 Redf. 864; *Marshall v. Brester*, 1 How. N. S. 223; *Lyman v. Parsons*, 23 Barb. 572; *Metcalf v. Clark*, 41 Barb. 48; *Pugh v. Jones*, 6 Leigh, 299; *Smith v. Webb*, 1 Barb. 280.

Where he has brought assets of the estate into this State, he may prosecute and defend actions in the courts of this State, but not otherwise. *Re Webb*, 11 Hun, 126.

The next of kin may call him to account for such assets in this State without the appointment of an administrator here, but only in a case of pressing and peculiar circumstances and to prevent a failure of justice. *Kohler v. Knapp*, 1 Bradf. 244; *Gulick v. Gulick*, 21 How. Pr. 83, 33 Barb. 102; *McNamara v. Dwyer*, 7 Paige, 239, 4 N. Y. Ch. L. ed. 139; *Shults v. Pulver*, 8 Paige, 122, 3 N. Y. Ch. L. ed. 107; *Brown v. Brown*, 4 Edw. Ch. 346, 6 N. Y. Ch. L. ed. 901; *Price v. Brown*, 60 How. Pr. 514, 10 Abb. N. C. 70.

Where a surplus remains in the hands of a foreign or ancillary appointee after paying all debts in that jurisdiction the foreign court will, in the spirit of comity, and as matter of judicial discretion, order it to be paid over to the domiciliary executor or administrator if there be one, instead of making distribution. *Wright v. Phillips*, 56 Ala. 69; *Wright v. Gilbert*, 51 Md. 146; *Mackey v. Cox*, 69 U. S. 18 How. 100, 15 L. ed. 269; *Trimble v. Dzieduzycki*, 57 How. Pr. 203; *Story, Conf. L. § 513*; *Schouler, Exrs. § 174*.

This rule is, however, not absolute; the transfer will not be made if deemed under the circumstances improper. *Fretwell v. McLeomore*, 53 Ala. 124; *Lawrence v. Kitteridge*, 21 Conn. 377; *Gilchrist v. Cannon*, 1 Coldw. 581; *Porter v. Heybock*, 6 Vt. 374.

The legal personal representative constituted by the forum of the domicile of a deceased intestate is entitled to receive and receipt for the net residue, and to him residuaries and distributees should report. *Brown v. Brown*, 1 Barb. Ch. 189, 5 N. Y. Ch. L. ed. 849; *Richards v. Dutch*, 8 Mass. 508; *Campbell v. Sheldon*, 13 Pick. 22, 9 L. R. A.

Story, Conf. L. § 513; *Wharton, Conf. L. § 619*; 8 Wms. Exrs. 1763; 1 Wms. Exrs. 424, *note*, and authorities there cited; *Goodall v. Marshall*, 11 N. H. 88; *Low v. Bartlett*, 8 Allen, 259; *Fay v. Haven*, 3 Met. 109; *Davis v. Estey*, 8 Pick. 475; *Clark v. Blackington*, 110 Mass. 869; *Harvey v. Richards*, 1 Mason, 381; *Minor v. Austin*, 45 Iowa, 221.

The proceeds of real estate in Iowa, realized by an ancillary administrator appointed by the courts of this State, are assets for the payment of the debts of a nonresident decedent, to be administered upon by the administrator of the domicile, precisely the same as assets realized from the personal estate.

Hadley v. Gregory, 57 Iowa, 158; *Creswell v. Slack*, 68 Iowa, 115; *Re Hughes*, 95 N. Y. 62; *Barry's App.* 88 Pa. 183.

Messrs. Struble & Stiger for appellees.
Mr. J. W. Willett for the ancillary administrator.

Beck, J., delivered the opinion of the court:
1. There is no dispute as to the controlling facts in the case. Indeed, there is no real controversy as to any of the facts, the dispute arising

Distribution of estate.

The appointment of officers of the law in various countries where a decedent may have left assets may be necessary to recover, protect and collect them; but the disposition of such funds when collected depends upon the law of the domicile, and their distribution is to be made by officers appointed by that law, to whom such subsidiary collectors may be compelled to account. *Peterson v. Chemical Bank*, 2 Robt. 608.

A decree of the proper tribunal in the place of the intestate's domicile, and of the principal administration, is conclusive upon all parties thereto in respect to assets realized or claims against the administrator which might have then been adjudicated. *Churchill v. Prescott*, 8 Bradf. 238; *Heydook's App.* 7 N. H. 496; *Childress v. Bennett*, 10 Ala. 751.

Assets of a decedent's estate distributed in one State under ancillary administration, and brought into the State of primary administration by an executor or a legatee, remain assets in the latter State for the payment of any unpaid creditors choosing that forum. *Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532.

Such assets were impressed with a trust which such creditor has a right to have administered for his benefit. *Ibid*.

The decision of a probate court in the settlement of an estate, in a State where administration is merely ancillary, does not bar a claim of a party who is not a resident or citizen of that State or a party to the proceedings, or give legatees an indefeasible title as against him to what they have received under the sanction of that court. *Ibid*.

Distribution of the estate and all rights affecting the surplus should be regulated by the law of the domicile of decedent, at the time of his death. *Ordronaux v. Helle*, 8 Sandf. Ch. 512, 7 N. Y. Ch. L. ed. 990; *Jones v. Gerock*, 6 Jones, Eq. 190; *Tucker v. Condy*, 10 Rich. Eq. 12.

It is incumbent upon the ancillary administrator, before he remits the balance to the foreign executor or administrator, to pay the local debts out of the local assets and to satisfy the creditors, as the local statute prescribes. *Davis v. Estey*, 8 Pick. 475; *Mitchell v. Cox*, 23 Ga. 22.

Authority of domiciliary executor or administrator. See *note to Schluter v. Bowery Sav. Bank* (N. Y.) 5 L. R. A. 541.

ing wholly upon the law as applicable to the facts. Briefly stated, but with sufficient fullness, the facts in the case demanding consideration are these: John S. Gable, always a resident of Pennsylvania, died in that State, August 11, 1881. He owned property in Pennsylvania and lands of great value in Iowa, some of them situate in Tama County. He was at the time of his death largely indebted, and, as it now appears, was insolvent, the assets of his estate being sufficient to pay but an inconsiderable portion of his indebtedness. He left a will devising his property almost exclusively to his wife and children. The particulars of this disposition of his property by his will need not be stated. The will authorized the executors to sell and convey the real estate, to the end that the estate "be settled up as advantageously and profitably as possible" within four years. The executors named in the will were discharged, and on the 27th day of December, 1881, others were appointed by the proper court in Pennsylvania. At their request an administrator was appointed by the proper court of Tama County, who soon after resigned, and on the 8th day of April, 1882, R. E. Austin was appointed administrator by the same court, and proceeded in the discharge of his duties as such. It is shown that administration was taken out in this State in compliance with the request and direction of the Pennsylvania administrators, and was intended to be auxiliary. Claims to a large amount were filed against the estate in Pennsylvania, and were paid, so far as the assets were sufficient; but the large portion of the claims after the assets were exhausted remained unpaid. Claims were filed against the estate in Iowa, and, upon the petition of the administrator, lands of great value were sold, and the proceeds applied to the payment of the claims filed and proved here. A large balance remained in the hands of the Iowa administrator, which the petitioners in this case pray may be distributed to the heirs and devisees of the decedent. The Pennsylvania administrators intervene in this action, claiming that the principal administration in the case was in Pennsylvania, and the Iowa administration was merely auxiliary. They pray that the money assets in the hands of the Iowa administrator may be transmitted to them, to be used in the payment of the debts of the estate which have been or may be duly proved.

2. The evidence shows, we think, beyond dispute, that the Iowa administration was taken out upon the request of the Pennsylvania administrators, and was intended by them and the Iowa administrator to be auxiliary. The Iowa administrator, in his petition for the sale of Iowa lands, states that debts to the amount of \$90,000 in excess of assets are filed against the estate in Pennsylvania, and that claims against the estate in Iowa to the amount of \$7,000 are proved. It is shown that the Iowa administrator has in his hands more than \$19,000 after paying claims allowed by the Iowa court, \$7,000 being received for rents, and the balance from sales of lands. There seems to be no doubt that the Pennsylvania claims against the estate constituted the ground upon which the order for the sale of the lands was made. The petition for the sale is based upon that ground, among others, and there can be assigned no

other reason why the court ordered Iowa lands to be sold, realizing \$19,000 in excess of the Iowa claims. Unless such was the purpose, the order was improvident and erroneous, in that it required a sale of lands so largely in excess of the demands against the estate. But we will presume the existence of facts, in the absence of proof to the contrary, which establish the regularity of the order of sale.

3. We are now to determine what disposition ought to be made of the money assets in the hands of the Iowa administrator, being the proceeds of Iowa lands sold upon his petition, as above stated. The Pennsylvania administrators, who intervene, claim that this money should be transmitted to them to be disbursed in the payment of debts against the estate, duly established in accord with the laws of Pennsylvania. The heirs and devisees, who institute this proceeding by their petition, claim that the money assets in the hands of the Iowa administrator should be distributed to them, and no part of it be applied in payment of Pennsylvania creditors.

4. The testator was a resident of Pennsylvania, and died in that State. He owned and held personal property there, and was seised of lands situated therein. Administration was first taken in Pennsylvania, and creditors residing there, in accord with the laws of that State, established their claims against the estate. Administration was afterwards taken out in Iowa, at the request of the Pennsylvania administrator, to the end that the lands owned by the testator in Iowa should be appropriated to the payment of the debts of the estate. Under these facts no doubts can be entertained that the Pennsylvania administrator is the principal, and the Iowa the auxiliary, administrator. *Chamberlin v. Wilson*, 45 Iowa, 149; *Story*, Conf. L. § 518; *Whart. Conf. L.* § 827; 8 Wms. Exrs. 6th Am. ed. 1762; *Stevens v. Gaylord*, 11 Mass. 256; *Fay v. Haven*, 8 Met. 109; *Williams v. Williams*, 5 Md. 487; *Clark v. Clement*, 33 N. H. 563; *Green v. Rugely*, 23 Tex. 539; *Spradling v. Fipkin*, 15 Mo. 118; *Childress v. Bennett*, 10 Ala. 751; *Perkins v. Stone*, 18 Conn. 270.

We are not required to consider the functions and duties of the principal and auxiliary administrations further than to inquire as to the dispositions to be made of assets in the hands of the last, after all debts of the estate established therein have been paid. It may here be remarked that the duties of the auxiliary administration are not prescribed by statute, and that the common law prescribes those duties in obedience to the obligations of comity existing between independent States. It is true that courts are not commonly considered as bound to obey the laws of comity; that they are enforced through the spirit of friendship, and not in obedience to the requirements of superior law. This is quite true. But there is an obligation wherever the laws of comity rest which impels courts to enforce them with an authority not to be disregarded, though it be not prescribed by statute or by the common law. That obligation exists when justice demands authority to be exercised to the end that right may prevail; that property and property rights, domestic rights and the liberty of the citizens may be protected and enforced. A

court of justice, which is established that justice may be enforced and upheld, can have no more binding obligation resting upon it than that which requires that it shall do justice.

5. What is an auxiliary administration? It is subservient and subordinate to the principal administration. The subserviency and subordination is to attain the ends of justice, which is the object and aim of all acts of a court of justice. The terms relate to the objects and ends attained by the administration, not to the methods and practice pursued by the courts having jurisdiction of the administration. Under the law upon the subject, which prevails over the whole Union, all the property of a decedent, including his lands, except a homestead and other exemptions, is subject to the payment of his debts, and is assets for that purpose. Debts must be paid before the assets could be distributed to the heirs, legatees and devisees, without regard to the place of residence of the creditors. Justice requires that creditors should be paid when they have duly established their claims. Such claims may be established either in the principal or auxiliary administration. They will be paid when established in the auxiliary administration, if assets sufficient are found within its jurisdiction. If sufficient assets for the payment of debts are not found under the control of the principal administration, and there is under the control of the auxiliary administration money assets in excess of the debts proved therein, justice would forbid that such administration should disregard the demands of right, and distribute the assets to the heirs; but, as it has not before it the claims of all the creditors, some having been established in the principal administration proceedings, justice demands that the auxiliary administration, in response to the demands of comity, transmit the money assets to the principal administrator. Story, Conf. L. §§ 518, 519; Whart. Conf. L. §§ 619, 620; 3 Wms. Exrs. 1768, 1767, and notes; 1 Wms. Exrs. 424; *Goodall v. Marshall*, 11 N. H. 88; *Low v. Bartlett*, 8 Allen, 259; *Fay v. Haven*, 8 Met. 109; *Davis v. Estey*, 8 Pick. 475.

6. As we have before said, lands now in all the States of the Union, except such as may be exempted by law, are assets for the payment of the debts of a decedent. They are sold, and the money proceeds are applied to the payment of the decedent's debts. It is vain to discuss the question, whether the avails of lands so sold are to be treated as personalty or real estate. The land is converted into money. The land then ceases to be assets of the estate;

the money becomes assets. There is no mystery in changing lands into money. One owning a farm knows he owns and is possessed of so many acres of land. He sells it, and receives therefor \$10,000 in cash. He then knows he owns no lands, but in the place of his farm he has \$10,000 in cash. He would probably be amused should anyone claim that his money was realty, or should be regarded and treated by the law as realty. The law provides for the change of the lands of estates into money. When the money is received, it is personal property. It doubtless is true that cases arise where, in order to enforce liens or equities, money proceeds of lands are appropriated as the land would have been appropriated had there been no sale of it. It appears that there ought to be no doubt, obscurity or mystery as to the character of the money and the appropriation of it to be made. It is avails of land set apart by the law for the payment of debts of the estate. The land was converted into money, as shown by the petition filed in the auxiliary administration, asking for the sale of the Iowa lands, for the purpose of paying debts proved in both the principal and auxiliary administrations. If there had been no debts, the land would not have been sold, and all the land would not have been sold except to pay the Pennsylvania creditors. It is now found that, after the auxiliary administrator has paid all debts established therein, a surplus remains. To carry out the purpose of the law and the objects for which the land was sold, the balance in the hands of the auxiliary administrator must be transmitted to the principal administrator in Pennsylvania.

Our conclusions as to the character of the residuum of the money assets in the hands of the auxiliary administrator, and the disposition to be made of it, demand for their support no further argument and no further citation of authorities. Exhaustive, learned and acute arguments of the respective counsel, and numerous authorities cited by them, bearing upon the questions discussed, need not therefore be further considered.

Our conclusions require the decree of the district court to be reversed. The cause will be remanded to the district court for a decree in harmony with this opinion, directing and requiring the administrator appointed in this State to transmit to the principal administrator in Pennsylvania all funds remaining after the payment of all debts proved in the district court, and costs and expenses of administration.

Reversed.

Petition for rehearing overruled June 8, 1890.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Samuel K. SCHWENK, *Appt.*,

2.

Emily F. WYCKOFF, *Resp.*

(...N. J. Eq....)

The assignment by a retired officer of the United States army of his unearned pay is against public policy and will not be upheld by the courts.

9 L. R. A.

(July 26, 1890.)

APPEAL by defendant from a decree of the Chancery Court in favor of complainant in a suit brought to compel specific performance of an agreement to assign certain pay which was not due to defendant at the time of the agreement. *Reversed.*

The facts sufficiently appear in the opinion

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Mr. Gilbert Collins, with Mr. Frederick Frambach, Jr., for appellant:

Such an assignment as that attempted to be enforced in this case is against public policy and void.

Flarty v. Odum, 8 T. R. 681; *Stuart v. Tucker*, 2 W. Bl. 1137; *Lidderdale v. Montrose*, 4 T. R. 249; *Stone v. Lidderdale*, 2 Anst. 533; *Barwick v. Reade*, 1 H. Bl. 627; *Arbuckle v. Cowtan*, 3 Bos. & P. 328; *Davis v. Duke of Marlborough*, 1 Swanst. 79; *Palmer v. Bate*, 2 Brod. & B. 673; *Hill v. Paul*, 8 Clark & F. 295; *Wells v. Foster*, 8 Mees. & W. 149; *Bliss v. Lawrence*, 58 N. Y. 442; *Bangs v. Dunn*, 66 Cal. 72; *Schloss v. Hewlett*, 81 Ala. 266; *Wayne Twp. v. Cahill*, 5 Cent. Rep. 835, 49 N. J. L. 144.

Such an assignment is prohibited by Act of Congress.

U. S. Rev. Stat. § 8477; *United States v. Gillis*, 95 U. S. 407, 24 L. ed. 503.

Mr. Frank Bergen for appellee.

Reed, J., delivered the opinion of the court:

The right of the appellee, who was the complainant below, to the relief for which she prays, rests upon an assignment made to her husband by the defendant. The subject matter which the assignment was supposed to operate upon was the unearned pay of the defendant, to become due to him as a retired officer of the United States army.

In the consideration of the cause we meet at the outset a difficulty which lies at the root of the complainant's case. It exists in the shape of an objection interposed by the defendant that this assignment purports to transfer a chose in action belonging to a class which are not assignable, or, what in effect produces the same result, the assignment of which the courts will not enforce or recognize. The rule is established in the English courts that the unearned salary or emolument of an officer which may become payable during his life is incapable of assignment. This restriction upon the general power to dispose of rights having a potential existence is put upon the ground that the recognition of such assignments would operate prejudicially upon the public service. The considerations which led to this judicial result were in substance the following: It was apparent that the salary or remuneration incident to a public office, as a rule, was essential to a decent and comfortable support of the incumbent. If the officer should be deprived of this support, there would arise a hazard of his being driven to an inappropriate meanness of living, of his being harassed by the worry of straitened circumstances, and tempted to engage in unofficial labor, and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive. It was because of these probable consequences that the courts refused to countenance any act or proceeding which might result in stripping the officer of his anticipated reward. The cases in which this question has been mooted, and the foregoing rule established, in the English courts, are the following: *Flarty v. Odum*, 8 T. R. 681; *Barwick v. Reade*, 1 H. Bl. 627; *Arbuckle v. Cowtan*, 3 Bos. & P. 328; *Davis v. Duke of Marlborough*, 1 Swanst. 79; *Lidderdale v. Montrose*, 4 T. R. 248; *Stone v. Lidderdale*, 2 Anstr. 533; *Wells v.*

Foster, 8 Mees. & W. 149; *Palmer v. Bate*, 2 Brod. & B. 673.

In the case of *Flarty v. Odum*, 8 T. R. 681, it was held by the Court of King's Bench that this rule was applicable to the assignment of half-pay by an officer of the British army. It was ruled that future accruing payments did not pass to an assignee appointed under proceedings against an insolvent officer taken for the benefit of his creditors.

Afterwards, in the case of *Lidderdale v. Montrose*, 4 T. R. 249, the validity of a voluntary assignment of the half-pay of an officer came before the same court, and it was held that there was no distinction to be made between a voluntary assignment, and an assignment, as in the last-mentioned case, under the Insolvent Debtor's Act, and so the voluntary assignment was also held to be void.

The same dispute, under the name of *Stone v. Lidderdale*, was shifted into the Court of Exchequer, and by that court it was remarked that half-pay was granted for the purpose of keeping experienced officers in such a situation as not to be compelled to turn themselves to other pursuits, or to be by other circumstances reduced to extreme poverty. The assignment was therefore held to be void. 2 Anstr. 533.

Since the decision of these causes the nullity of an assignment of unearned half-pay by an officer has been repeatedly recognized. The remarks of Lord Alvanley in *Arbuckle v. Cowtan*, *supra*, and of Baron Parke in *Wells v. Foster*, *supra*, display an understanding in the English courts that by the case of *Flarty v. Odum* this question had been definitely set at rest.

In this country there are two cases in which the assignment of a portion of a salary to become due has been held valid. One case is *Brackett v. Blake*, 7 Met. 335, in which case it was held that the unearned salary of a city marshal was capable of assignment. It is quite remarkable that the only question discussed in the opinion of Chief Justice Shaw in that case was whether the anticipated salary was such a possibility, coupled with an interest, as to be capable of assignment. Upon the court's concluding that it was such an interest, the assignment was sustained, without a word in respect to the point raised in the brief of counsel that the assignment was opposed to public policy. This question seems to have been entirely overlooked in the decision of that case. There are two subsequent cases in Massachusetts sometimes cited as sustaining the same doctrine; but both these cases, namely, *Mulhall v. Quinn*, 1 Gray, 105, and *Macomber v. Doane*, 3 Allen, 541, as decided, involve only the question of the assignability of wages to become due upon contracts for services rendered.

The second, and only other, case in which the assignment of the prospective pay of a public officer has been the subject of judicial approval, is that of *State v. Hastings*, 15 Wis. 78. This case involved the assignment of the future salary of a judge. In delivering the opinion the judge remarked that it had not been contended that the doctrine of the English cases holding that assignments of the pay of officers in the public service, judges' salaries, pensions, etc., were void, was applicable to the

condition of society, or to the principles of law or public policy, of this country. The soundness of the rule laid down by the English cases, however, was not impugned. Nor was it explained in what way the propriety of supporting this rule of public policy ceased under our political or judicial system. Nor does the possibility of any rational explanation seem clear. The object of the rule in both countries is to secure the most efficient service to the public by those who are appointed or elected to perform public duties. So long as there are public officers who are remunerated for their services, the same conditions exist in both countries which renders the stripping of such officer of his expectation of pay impolitic. In respect to this general rule of policy, therefore, no solid discrimination can be made between the political situation of this country and that in which the rule was first adopted. This was the view taken by the Court of Appeals of the State of New York in the case of *Bliss v. Lawrence*, 58 N. Y. 442; after a thorough review of the English and American cases by Judge Johnson. This has become a leading case in this country, and the doctrine announced by it, namely, that the assignment by a public officer of the future salary of his office is contrary to public

policy, and void, has been followed in this country in the cases of *Bangs v. Dunn*, 66 Cal. 72; *Schloss v. Hewlett*, 81 Ala. 266; *Beal v. McVicker*, 8 Mo. App. 202. Involving the same principle is the case of *Field v. Chipley*, 79 Ky. 260.

The foregoing doctrine in respect to the non-assignability of unearned official pay may be regarded as settled in this country, as it is in England, by the great weight of reason and authority. Nor is there any difference between the position of a retired army officer in this country, and those officers in respect to whose pay the English court were ruling. The officer here, as well as there, although retired from actual campaigning, is still subject to military orders. By the Federal Statute he is liable to be assigned to officer soldiers' homes, and to instruct in military institutes. Rev. Stat. U. S. §§ 1256, 1259, 4816.

He stands, therefore, upon the footing of an officer owing service to the public when called upon for its rendition, and the rule announced protects his pay from himself and his creditors until he earns it. The decree below must be reversed.

Reversed unanimously.

NEW YORK COURT OF APPEALS (2d Div.).

August C. NANZ, *Appt.*,

v.

Jesse OAKLEY, *Respt.*

(.....N. Y.....)

1. An action on an administrator's bond may be maintained against the sureties for wrongful acts of one administrator, although a

co-administrator was the only distributee of the estate, by one who has become the owner of the latter's claim.

2. One joint executor or administrator is not liable for the assets which come into the hands of the other, nor for the laches, waste, devastavit or mismanagement of the other, unless he consents to or joins in an act resulting in loss to the estate.

NOTE.—Several executors considered as one person.

The general rule is, that several co-administrators or co-executors are, in law, but one person representing the testator, and acts done by one in reference to the delivery, sale, gift or release of the testator's goods, are deemed the acts of all, with this qualification, that at common law each was responsible only for such assets as came to his own hands. Ames v. Armstrong, 106 Mass. 18; Gill v. Atty-Gen. Hardr. 814; Sadler v. Hobbs, 2 Bro. Ch. 114; Croose v. Smith, 7 East, 240, 256; Hovey v. Blake-man, 4 Ves. Jr. 596; Brice v. Stokes, 11 Ves. Jr. 819; Sterrett's App. 3 Penn. & W. 419; Edmonds v. Crenshaw, 39 U. S. 14 Pet. 166, 10 L. ed. 402; Boughton v. Flint, 13 Hun, 208; Murray v. Blatchford, 1 Wend. 568; Jackson v. Robinson, 4 Wend. 436; Allegheny First Nat. Bank's App. (Pa.) 5 Cent. Rep. 509; Hertell v. Bogert, 9 Paige, 52, 4 N. Y. Ch. L. ed. 605; Re Delaplaine, 19 Abb. N. C. 418.

Each has full control of the assets and may dispose of the same without the co-operation of his associates (Brennan v. Lane, 4 Dem. 328), and they cannot by mutual receipts release each other from responsibility. Black's Estate, Tuck. 146; Brennan v. Lane, 4 Dem. 323, 328; Douglass v. Satterlee, 11 Johns. 18; Hall v. Carter, 8 Ga. 383; Wheeler v. Wheeler, 9 Cow. 34.

Each may discharge debts due to the estate by receiving payment, or release real estate from the lien of an incumbrance. People v. Coleman, 42 Hun, 585; People v. Keyser, 28 N. Y. 223. 9 L. R. A.

Where two executors take an obligation to themselves jointly, as representatives of their testator, for a debt belonging to his estate, one of them can receive, pay and lawfully discharge the obligation, whether his co-executor be dead or alive. People v. Keyser, 28 N. Y. 223, 17 Abb. Pr. 217; Douglass v. Satterlee, 11 Johns. 18; Bogert v. Hertell, 4 Hill, 492.

One of two or more executors may sell and dispose of the personal assets, as fully as if all joined in the act of transfer. Each possesses a power over the whole funds. Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 533; Gardiner v. Callender, 19 Pick. 376; Bogert v. Hertell, 4 Hill, 492; Sohermerhorn v. Barhydt, 9 Paige, 31, 4 N. Y. Ch. L. ed. 597.

One executor, by his single indorsement, may transfer a note made to two executors jointly. Mackay v. St. Mary's Church, 1 New Eng. Rep. 143, 15 R. I. 121.

One executor may maintain a suit, although three are appointed by the will, if two have not qualified. Providence Rubber Co. v. Goodyear, 78 U. S. 9 Wall. 783, 19 L. ed. 568.

Where all the executors must unite to make a valid conveyance, no valid contract to convey can be made by a part of them. Crowley v. Hicks, 73 Wis. 539.

The doctrine of equitable conversion by which real estate is held for certain purposes to be personal property does not make it such in the sense that part of the executors only are authorized to sell it, where it would require all of them to make a valid conveyance of real estate. *Ibid.*

2. A statute requiring a joint and several bond from executors and administrators does not change the rule which makes them jointly liable for joint acts, and only severally liable for their own acts.

(*Follett, Ch. J., and Vann, J., dissent.*)

(April 5, 1880.)

APPEAL by plaintiff and Eliza Mundy from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit entered upon a verdict directed for defendant in an action brought against the surety on an administrator's bond to recover the amount which had been adjudged to be due by his principal. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. William H. Arnoux for appellant.

Mr. David Thornton, for respondent:

No cause of action is made out herein, in favor of this plaintiff. He claims under an alleged assignment from the party in whose favor the surrogate's decree was made; this is not permitted; there is no authority for such a course.

Code Civil Proc. § 2607.

Rachel Depew, administratrix, was equally bound with her co-administrator, Winant, so far as this defendant was concerned, to look after the Schultz estate, and neither could be permitted, as against their sureties, to take advantage of any liability growing out of an omission to observe this duty. Whatever loss

there was, was occasioned by the result of the negligence and wrong-doing of Mrs. Depew, who failed to discharge her duties. There never existed a law that would permit such an action to be maintained, and no court will allow it.

Briggs v. Easterly, 62 Barb. 57.

In other words, a principal sues her own surety upon a bond executed by herself with the surety for the wrongful acts of her co-principal, and seeks in effect to make a surety liable to his own principal, reversing the whole theory of the relation of principal and surety. There is no authority therefor, either by the terms of the bond or any law.

See *Nanz v. Oakley*, 87 Hun, 495; *Sperb v. McCoun*, 1 L. R. A. 490, 110 N. Y. 605; *Townsend v. Whitney*, 75 N. Y. 425; *Westcott v. King*, 14 Barb. 82.

A surety is entitled on payment to be put in the creditor's place and so have all the creditor's remedies against the principal.

Lewis v. Palmer, 28 N. Y. 271; *Ellsworth v. Lockwood*, 42 N. Y. 89, 98; *Hayes v. Ward*, 4 Johns. Ch. 128, 1 N. Y. Ch. L. ed. 786; *New York State Bank v. Fletcher*, 5 Wend. 85; *Van Horne v. Eversen*, 18 Barb. 526.

Therefore this defendant could, on payment of any claim, have had immediate recourse against Mrs. Depew, under whom this plaintiff pretends to claim. Mrs. Depew would be liable in the event that nothing could be recovered from Winant, before Oakley would be.

See *Johnson v. Corbett*, 11 Paige, 265, 5 N. Y. Ch. L. ed. 129.

Liability on receipt of assets.

A joint receipt is only presumptive evidence that the money came into possession or under the control of both administrators. And this presumption may be rebutted by proof that the money was in fact received by one and that the other joined only as a matter of form and for the sake of conformity. *McKim v. Aulbach*, 130 Mass. 484, 39 Am. Rep. 478; *Deaderick v. Cantrell*, 10 Yerg. 270, 31 Am. Dec. 578; *Manahan v. Gibbons*, 19 Johns. 427; *Ochiltree v. Wright*, 1 Dev. & B. Eq. 386; *Monell v. Monell*, 5 Johns. Ch. 283, 1 N. Y. Ch. L. ed. 1084.

If assets come to the hands of one executor only, but both join in a receipt for them, both are equally liable to legatees and creditors. *Johnson v. Johnson*, 2 Hill, Eq. 293.

Where executors receive estate jointly and file joint account, they are jointly liable for all the account shows to be in their hands. *Suydam v. Basado*, 2 Cent. Rep. 201, 40 N. J. Eq. 438; *English v. Newell*, 4 Cent. Rep. 552, 42 N. J. Eq. 72.

But in Pennsylvania it is held that the fact that money received by one executor is receipted for by both executors is not sufficient to create a joint responsibility of the executors. *Wilson's App.* 6 Cent. Rep. 639, 115 Pa. 95.

So where one executor, under objection and after advice of counsel, permitted the other to receive and retain moneys of the estate, under the claim by the latter that he was the natural guardian of his minor children, who were legatees under the will, it was not such conduct as would render the former executor liable for a misappropriation of the funds by the latter. *Ibid.*

Yet where he voluntarily places funds in the hands of his co-executor, who misapplies them, he will be liable therefor. *English v. Newell*, 4 Cent. Rep. 553, 42 N. J. Eq. 78.

It was, however, held otherwise in *Brown v. Edgar*, 1 U. S. 1 Dall. 811, 1 L. ed. 152.
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Each executor is liable only for his own acts and what he receives and applies, unless he joins in the direction and misapplication of assets. *Peter v. Beverly*, 85 U. S. 10 Pet. 533, 9 L. ed. 522; *Edmonds v. Crenshaw*, 39 U. S. 14 Pet. 166, 10 L. ed. 402.

And each is liable to the *cestui que trust* to the full extent of the funds he has himself received. *Edmonds v. Crenshaw*, *supra*.

One executor having received funds cannot exonerate himself and shift the trust to his co-executor by paying over to him the sums received. *Ibid.*

Each executor is liable for his own acts unless he hands over the moneys received by him to his co-executor, or joins in the misapplication of them (*Sutherland v. Brush*, 7 Johns. Ch. 23, 2 N. Y. Ch. L. ed. 208); so that if he receives and misapplies the money, or does any act by which it gets to the hands of the other, who diverts or wastes it, and but for which act the latter would not have had it, a liability to make good the loss results. *Croft v. Williams*, 88 N. Y. 833. See *Langford v. Gascoyne*, 11 Ves. Jr. 336; *Ames v. Armstrong*, 106 Mass. 18; *Candler v. Tillett*, 23 Beav. 257; *Clark v. Clark*, 8 Paige, 152, 4 N. Y. Ch. L. ed. 379.

One trustee may show by satisfactory proof that the joining in the receipt was necessary, or merely formal, and that the moneys in fact were paid to his companion. *Deaderick v. Cantrell*, 10 Yerg. 270.

One executor in trust is not answerable for the receipts of the other, merely by taking probate, permitting the other to possess the assets and joining in acts necessary to enable him to administer. He is only answerable by concurring in the application of the assets. *English v. Newell*, 4 Cent. Rep. 553, 42 N. J. Eq. 82; *Sutherland v. Brush*, 7 Johns. Ch. 17, 2 N. Y. Ch. L. ed. 206; *Ormiston v. Olcott*, 84 N. Y. 339.

There are cases which give some color to the idea

Haight, J., delivered the opinion of the court:

One Eliza Mundy as the present owner of the claim in suit joins with the plaintiff in this appeal. The action was brought against the defendant as surety upon an administrator's bond to recover the amount adjudged by the surrogate to be due and owing by the administrator and which he was ordered to pay to Cornelius W. Depew as administrator of Rachel Depew, deceased.

It appears that one Mary Ann Shultz died in the City of New York intestate and that Rachel Depew was her only heir at law and next of kin. That on her petition Bornt P. Winant and herself were appointed administrator and administratrix of the estate, and the defendant and one Peter Cortelyou executed the usual bond, which was joint and several, as sureties. It further appears that Winant alone administered the estate, and that on a final accounting before the surrogate it was adjudged and decreed that there was in his hands as such administrator the sum of \$1,980, which with the interest, costs and disbursements of the proceedings to compel him to account amounted in the aggregate to \$4,017.67, which sum he was ordered to pay over to Cornelius W. Depew, as administrator of Rachel Depew, she having died in the meantime. Winant having converted the money to his own use failed to make payment and the decree was duly docketed, execution issued and returned unsatisfied, and thereupon this action was brought against the defendant, the sole surviving surety

upon the administrator's bond, Depew, as such administrator, having assigned the claim to the plaintiff.

The trial court held that the plaintiff was not entitled to recover for the reason that Rachel Depew was a co-administratrix with Winant; that she was one of the principals in the bond of which the defendant was surety, and that she could not maintain an action against her own surety for the wrongful acts of her co-principal. This would be so if by executing the bond she became liable as surety for the devastavit of Winant, her co-principal. This question has received attention in numerous reported cases in the different States, in some of which it has been held that one executing a bond is liable for the default of his co-principal. *Brazer v. Clark*, 5 Pick. 96; *Towns v. Amidown*, 20 Pick. 585; *Newton v. Newton*, 58 N. H. 587; *Ames v. Armstrong*, 106 Mass. 15; *Boyd v. Boyd*, 1 Watts, 865; *Bostick v. Elliott*, 8 Head, 507; *Babcock v. Hubbard*, 2 Conn. 536; *Oaskie v. Harrison*, 76 Va. 85; *Jeffries v. Lawson*, 39 Miss. 791; *Braxton v. State*, 25 Ind. 82; *Moore v. State*, 49 Ind. 558; *Eckert v. Myers*, 45 Ohio St. 525, 14 West. Rep. 156.

In several of these cases the question appears to have received but slight attention. Some have cited as authority the case of *Brazer v. Clark*, *supra*, of which we shall speak later on; whilst others have been overruled by later decisions.

In the case of *Boyd v. Boyd*, the administrators filed a joint inventory, and it was held that they were jointly and severally liable for

of liability for a joint sale where the proceeds were received by one alone but the better opinion both upon authority and principle is, that such joint act, where necessary and only formal, by itself, draws with it no liability for the waste of the co-executor. *Croft v. Williams*, 88 N. Y. 890; *Paulding v. Sharkey*, 88 N. Y. 424; *Kip v. Denniston*, 4 Johns. 26.

Executors severally liable for their own tortious acts.

Trustees are not jointly liable unless they have made themselves so by some joint act. *DeForest v. Parsons*, 2 Hall, 142; *Stuyvesant v. Hall*, 2 Barb. Ch. 151, 5 N. Y. Ch. L. ed. 592.

A trustee is not liable for the waste or dereliction of his co-trustee, which was not occasioned by any act or agreement of the former. *Banks v. Wilkes*, 3 Sandf. Ch. 103, 7 N. Y. Ch. L. ed. 787; 2 Story, Eq. 66 1281-1284; *Sutherland v. Brush*, 7 Johns. Ch. 22, 2 N. Y. Ch. L. ed. 208; *Manahan v. Gibbons*, 19 Johns. 428, 440; *Leigh v. Barry*, 3 Atk. 584.

The rule applicable to executors, as such, is that each is liable only for his own acts; and one cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein. *Ormiston v. Olcott*, 84 N. Y. 846; *Sutherland v. Brush*, 7 Johns. Ch. 22, 2 N. Y. Ch. L. ed. 208; *Manahan v. Gibbons*, 19 Johns. 427.

An executor who had taken no part in the administration of the estate is not liable for a waste or misappropriation committed, without knowledge or suspicion on his part, by his co-executor, who had assumed all the active duties of the administration, it appearing that an account which purported to be a joint executors' account was, in fact, the separate account of the acting executor only. *English v. Newell*, 4 Cent. Rep. 551, 48 N. J. Eq. 78.

A devastavit by one of two executors or administrators shall not charge his companion, provided
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he has not intentionally or otherwise contributed to it; for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other. *Wilmerding v. McKesson*, 4 Cent. Rep. 528, 103 N. Y. 829.

An executor is not a guarantor for the safety of securities committed to his charge, and does not warrant such safety under all circumstances; and hence he is not liable for a breach of trust on the part of his co-executor unless it appears that he had knowledge of or assented to the acts of his co-executor, or had notice which should have put him on inquiry. *Ibid.*

If the circumstances are such as to create a doubt in respect to the safety of uninvested funds of the estate, an executor is not exonerated from the duty of vigilance in protecting them by the fact that the securities were received by and were in the exclusive possession of his co-executor. *Ibid.*

Liability of sureties on executor's bond.

When persons become sureties upon the bond of an administrator, they make themselves privy to the proceedings against their principal, and when he, without fraud or collusion, is concluded, they are concluded also. *Gerould v. Wilson*, 81 N. Y. 583; *Casoni v. Jerome*, 58 N. Y. 815.

An administrator's bond not executed by the administrator is not binding on the sureties. *Trustees of Schools v. Schiek*, 5 West. Rep. 523, 119 Ill. 579.

The liability of sureties on the bond of an executor or administrator is limited by the terms of the covenant of the bond, and cannot be extended by implication. *Hooper v. Hooper*, 22 W. Va. 523.

Sureties for administrator with will annexed are liable for failure to account for purchase money received. *State v. Gregory*, 119 Ind. 508; *Wetherill v. Com. (Pa.)* 1 Cent. Rep. 312.

the whole amount of the personal property described in the inventory upon the joint and several bond which they had given. In the case of *Ames v. Armstrong* it was held that the bond was binding upon both of the executors as to all the assets included in their inventory which had come into their joint possession.

In the case of *Braser v. Clark* two executors gave a joint and several bond with sureties. One died, and afterwards the survivor committed waste which the sureties upon the bond had to pay. It was held that they had no right of action for indemnity or contribution against the heirs or representatives of the deceased executor; and to the same effect is the case of *Towns v. Amidown*.

It will be observed that these cases have chiefly been disposed of upon questions of liability outside of the bond, and in the last two cases the decision was in fact against the right to recover.

The Indiana cases to which we have referred have been expressly overruled in the case of *State v. Wyant*, 67 Ind. 25, in which case it was held that where two persons, as administrators, execute a single bond with sureties, such bond must be construed as if each of the principal obligors therein had executed a separate bond with the same sureties subject to the same conditions; and in such a case, after the resignation of one of the administrators, the other may maintain an action against him and his sureties upon the bond for breaches committed by him alone.

In our own State but one case has been

found in which the question appears to have been considered, and that was the case of *Kirby v. Taylor*, first reported in 6 Johns. Ch. 245-253, 3 N. Y. Ch. L. ed. 114-117, where *Chancellor Kent* remarks that "it was probably not the intention of the bond that Thompson should himself be considered as a surety for his co-guardians." The same case was again reported in *Hopkins' Chancery*, 809-831, in which *Chancellor Sandford* considers the question in an elaborate opinion, reaching the conclusion that a principal in a guardian's bond is not liable to the sureties for the default of his co-principal.

This question was not considered in the case of *Tygh v. Morrison*, 116 N. Y. 263; and, in the case of *Sperb v. McCoun*, 110 N. Y. 605, 1 L. R. A. 490, the question was as to whether one administrator could maintain an action upon the bond against the sureties to recover the amount of the devastavit of a co-administrator, and it was held that such action could be maintained even upon the assumption that the plaintiff individually was liable to the sureties upon the bond; but it was expressly stated by the court in its opinion that it did not deem it important to determine the relation which the plaintiff individually, as one of the principals in the bond, bears to the sureties in reference to the default.

The question in reference to the liability of executors and administrators for the default of each other independent of any bond is well settled by the authorities. Each of several executors or administrators has the power to re-

Where no settlement of account and discharge as executor have taken place, the sureties on the executor's bond are liable for the residue of the personal estate, after payment of debts and legacies, not disposed of for charitable purposes, with a deduction for executor's commissions. *White v. Ditson*, 1 New Eng. Rep. 485, 140 Mass. 351.

Sureties on an administration bond are properly charged with a claim against an administrator, where, although insolvent for several years before his death, he was able to pay. *Gay v. Grant*, 101 N. C. 203.

Sureties on an executor's bond are liable only for the proceeds of land sold by the executor as such, and not for proceeds of land sold under a trust power given by the will, and going into the residuum of the estate. *White v. Ditson*, *supra*.

Sureties on an executor's bond are not liable for the proceeds of lands sold under a power in the will, in excess of the amount required for the payment of debts and legacies. *Ibid*.

Where a bond of the administrator was given to secure the proceeds of real estate sold for the payment of debts and legacies, the sureties are not liable for the proceeds of real estate sold under power in the will. *Minot v. Estate of Healey*, 3 New Eng. Rep. 438, 143 Mass. 323.

The sureties of an administrator are chargeable under Ind. Rev. Stat. 1881, § 2303, with promissory notes and interest thereon, of insolvent principals and sureties, negligently taken by the administrator on the sale of the personal property of his intestate. *Lindley v. State*, 115 Ind. 502.

Administrators' sureties are responsible for uncollected notes due the estate, if they could have been collected by the exercise of due diligence. *Murray v. Luna*, 36 Tenn. 393.

A surety's liability on an administrator's bond is not discharged by the appointment of his co-surety as administrator *de bonis non* before any default on 9 L. R. A.

the part of the administrator. *Cluck v. Farr*, 31 S. C. 423.

Notice by a surety in an administration bond, before adjudication, to creditors of the estate, that the administratrix is wasting the estate, and that all claims against the estate must be pushed at once, or he will not be responsible for losses, is ineffectual to relieve him from liability to such creditors. *Kauffman v. Com. (Pa.)* 7 Cent. Rep. 593.

Although an administrator, in his individual or other capacity, afterwards obtains title or possession of the property taken from his custody as administrator by the heirs in Louisiana, the liability of his sureties on his bond is not thereby restored. *Norman v. Buckner*, 135 U. S. 500, 34 L. ed. 333.

Liability where new bond filed.

Sureties on a new bond of an executor, required to be given by the court on motion of the sureties on the old bond to be relieved under the Statute, are liable for assets converted by the executor prior to the new bond. *Foster v. Wise*, 14 West. Rep. 531, 45 Ohio St. 20.

Such assets may be recovered by the administrator appointed upon removal of the executor. *Ibid*.

Where the principal filed a new bond, which was approved without any petition having been made to the judge of probate, it does not supersede the original bond; but the sureties on the several bonds may be treated as co-sureties in proportion to the several liabilities assumed by them. *Brooks v. Whitmore*, 3 New Eng. Rep. 743, 143 Mass. 399.

The mere approval of a new bond cannot be deemed a substitution of the previous bond, but only an acceptance thereof as an additional security. *Ibid*.

Where a second bond was voluntarily given, although under a misapprehension of fact, and was accepted, the sureties thereon are liable; and it is no defense to the sureties that, by reason of the

duce to possession the assets and collect all the debts due the estate, and is responsible for all that he receives. The payment of money or delivery of assets to a co-executor or co-administrator will not discharge him from liability for having received the assets in his official capacity; he can discharge himself only by a due administration thereof in accordance with the requirements of the law. Consequently, one joint executor or administrator is not liable for the assets which come into the hands of the

other, nor for the laches, waste, devastavit or mismanagement of his co-executor or co-administrator, unless he consents to or joins in an act resulting in loss to the estate, in which event he will become liable. In other words, co-executors and co-administrators may act either separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults. *Bruen v. Gillet*, 115 N. Y. 10; *Croft v. Williams*, 88 N. Y. 884; *Ormiston v. Olcott*,

validity of the prior bond, their liability will be less than they intended. *Ibid.*

Where an executor pledged notes of the estate with a bank, to secure his personal debt, and subsequently gave a second bond, the sureties on the first bond were liable, though the bank took no title to the notes, and though there was a breach of the second bond also for the failure on the part of the executor to reclaim and recover the notes, as he might and ought to have done. *State v. Jones*, 5 West. Rep. 422, 39 Mo. 470.

Subrogation of surety on payment of claim.

Sureties on the administrator's bond who have been compelled to pay creditors after an order of distribution may be subrogated to the rights of such creditors, and may pursue and recover trust funds in the hands of the administrator, which have been diverted and misapplied. *Pierce v. Holzer*, 8 West. Rep. 754, 65 Mich. 262.

If compelled to pay the judgment they are subrogated to rights of principal and of heirs paid in full by him. *Stetson v. Moulton*, 1 New Eng. Rep. 740, 140 Mass. 597.

A surety who has paid the judgment against the administrator, by the administrator *de bonis non*, for failure to account, is subrogated to the rights of such administrator. *Cowgill v. Linville*, 3 West. Rep. 581, 20 Mo. App. 128.

The estate of a deceased co-surety is liable to make contribution, whether he died before the liability arose or after. *Wyckoff v. Gardner* (N. J.) 4 Cent. Rep. 181. See notes to *Southal v. Farish* (Va.) 1 L. R. A. 641; *Merwin v. Austin* (Conn.) 7 L. R. A. 84.

Action on executor's bond.

Action on executor's bond is not maintainable until default is adjudged by the surrogate. *Haight v. Brieblin*, 1 Cent. Rep. 222, 100 N. Y. 219.

Until the affairs of a succession have been liquidated and ascertained by a final account duly homologated, showing the net balance in the administrator's hands, there is no proof of a breach in the condition of the bond, which is a condition precedent to enforcement of liability against a surety. *Chapron v. Chapron*, 41 La. Ann. 436.

A judgment at law or a decree of the orphans' court ascertaining the amount of the personal responsibility of the administrator to the particular creditor suing is a sufficient prerequisite to maintain an action on his bond. *Kauffman v. Com.* (Pa.) 7 Cent. Rep. 539.

A surety is concluded by a judgment against the administrator. *Braiden v. Mercer*, 5 West. Rep. 197, 44 Ohio St. 339.

To maintain an action on an administration bond it is not necessary to push the administrator to insolvency. *Kauffman v. Com.* (Pa.) 7 Cent. Rep. 539.

The rule that there has been no breach of the bond until the administrator has been cited to account does not apply to insolvent estates. *Webb v. Gross*, 4 New Eng. Rep. 668, 79 Me. 224.

An action may be maintained on the bond of an administrator of an insolvent estate, who fails to settle an account within six months after the re-

turn of the commissioners. The damages in such an action are nominal if no actual injury is proved. *Ibid.*

Although an administrator's bond must be sued on in the obligee's name, it is available for the enforcement of all legal obligations assumed by the makers. *Waterman v. Dockray*, 4 New Eng. Rep. 278, 79 Me. 149.

When leave is granted to the attorney of several heirs to prosecute a probate bond, it is not necessary that his name be indorsed on the writ. *Probate Court v. Sawyer*, 3 New Eng. Rep. 880, 59 Vt. 57.

When expedient, the ordinary may stay a suit on a forfeited executor's bond. *Re Lee*, 9 Cent. Rep. 508, 509, 43 N. J. Eq. 173, 175.

It is the duty of the ordinary to see that the bond is not prosecuted for the purpose of vexation and oppression. *Ibid.*

Under Mo. Rev. Stat. 1879, § 290, an action at law upon an executor's bond, for damages for breach of the condition, may be maintained in the first instance. *State v. Grigsby*, 10 West. Rep. 839, 32 Mo. 419.

A distributee of an estate, after the debts are all paid, has his right of action on the statutory bond, whether final settlement by the representative or order of distribution by the probate court has been made or not. *Ibid.*

One of two administrators can maintain an action under order of the surrogate against the sureties on their joint bond for moneys misappropriated by his co-administrator, against whom a decree has been rendered directing him to pay the money to the plaintiff. The liability of the plaintiff as an individual to the sureties is not a matter for consideration in such suit by him as administrator. *Sperb v. McCoun*, 1 L. R. A. 490, 110 N. Y. 606.

In an action on the bond of an administrator or executor, no account need be taken to show that assets came to his hands sufficient to meet the debts, where this fact is clearly shown by his own settled accounts. *Morrison v. Lavell*, 81 Va. 519.

In such action a recovery cannot be had of rents and profits received by the administrator from lands which descended to the heirs. *State v. Barrett*, 121 Ind. 92.

A surety may defend on the ground that his co-surety was released and a new bond filed prior to the breaches assigned. *Ibid.*

He cannot plead that he signed only a temporary bond, and that he subsequently signed the bond sued on, under a statement by the ordinary that the temporary bond had been lost and that he merely wanted this signed as a temporary bond in its stead, and that he signed it under the representation that it was only temporary, and that he could read but poorly, and that the bond was not read to him, but was stated to be a copy of the former bond. *Brown v. Davenport*, 78 Ga. 799.

Where the defendant pleaded that no person injured by the breach of the bond ever applied to the probate court for leave to prosecute, and that said court never granted such leave to any person injured or claiming to be injured, the plaintiff should traverse the plea, instead of demurring. *Probate Court v. Sawyer*, 3 New Eng. Rep. 880, 59 Vt. 57.

84 N. Y. 389; *Adair v. Brimmer*, 74 N. Y. 589; 2 Woerner, Law of Administration, § 848; Brandt, Suretyship, § 490.

It is not claimed that any of the estate came into the hands of Rachel Depew as administratrix, or that she, as such, committed any act or default that would make her liable for the devastavit of Winant, unless she may be liable therefor upon the bond executed by her. The bond thus executed was in the form required by the Statute, conditioned that they should faithfully execute the trust reposed in them as such administratrix and administrator, and that they shall obey all orders of the surrogate touching the administration of the estate committed to them. The Statute provides that every person appointed administrator shall, before receiving letters, execute a bond to the people of the State with two or more competent sureties to be approved by the surrogate, and to be jointly and severally bound. 3 Rev. Stat. 6th ed. § 2, § 56.

So that before receiving letters she was required to execute the statutory bond, and having been associated with Winant as a co-administratrix she joined with him in executing the bond in which they each undertook to faithfully execute the trust reposed in them as administratrix and administrator. What was the trust reposed in her as administratrix? It was to administer upon the money and assets coming into her hands and for which she became personally liable, and for such assets as came into their joint possession on which they became jointly liable to administer and account, and not to execute the trust as to money and assets which came into the exclusive control and management of her co-principal over which she had no jurisdiction or control. They were to obey all orders of the surrogate touching the administration of the estate committed to them. What orders was she to obey? Those that were addressed to her; not those that were addressed to her co-administrator. The object of an administrator's bond is to enforce or insure the discharge of the duty reposed in the persons appointed. It was not intended by the Statute, in requiring such a bond to be executed, to change the liability or duties of the persons appointed from that which existed under the provisions of the Statute independent of the bond.

The bond was not intended to vary their obligation or their rights and duties as they are defined by law. Their duties were the same after the bond had been given as they would

have been had no bond been required or executed. They were consequently jointly liable for joint acts and severally liable for their own acts. Rachel Depew and Winant each signed the bond as principal. Neither signed it as surety. The defendant signed as surety and as such he became liable for the joint acts of the principals and for the individual defaults of each.

It is true they joined in executing a single bond jointly with sureties. They doubtless had the right to execute and file separate bonds, but this was unnecessary, for their act in executing the one instrument should be construed as if they had executed separate bonds. Joint administrators may be willing to undertake the trust reposed in them when each knows that he is responsible only for his own acts, and those in which he joins with his associate, when he would not be willing to become surety for the separate acts of his colleague. The claim that joint liability for the acts of each other under the bond will promote diligence on the part of the principals, does not appear to us to be well founded. It may be true that sureties are at times without power by timely intervention to prevent waste by one of several administrators, but such want of power may be equally true in reference to the other joint administrators. As we have seen, one may collect a debt or take into his possession an asset, and having reduced it to possession he must be responsible for the proper administration of it. His associate cannot demand or recover it from him, and should he see fit to abscond or commit waste without the knowledge of his associate, such associate would have no other, further or greater power to prevent than the surety.

Other questions were raised upon the argument in reference to the transfer of this claim to the plaintiff, but none which we deem it necessary to here discuss.

As to the appeal of Eliza Mundy, we have not thought it necessary to consider at this time. It has done no harm. No motion was made to dismiss in this court. Such motions have been made in the court below, one of which is said to be still pending.

For the reasons already stated, *the judgment should be reversed, and a new trial granted, with costs to abide the event.*

All concur, except Follett, Ch. J., and Vann, J., dissenting.

Petition for rehearing overruled October 7, 1890.

NEBRASKA SUPREME COURT.

Ellis L. BIERBOWER *et al.*, *Plffs. in Err.*,
v.

John F. MILLER.

(.....Neb.....)

***The right of a nonresident defendant**

*Head note by CORR, Ch. J.

to remove a suit from any state court to the circuit court of the United States upon the ground that, from prejudice or local influence, he will not be able to obtain justice in such state court, etc., is confined to cases in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000.

(September 16, 1890.)

NOTE.—Removal of cause for local prejudice; right dependent on amount in dispute.

Under the Act of March 3, 1887, the right of removal of a cause to the federal court on the ground

of prejudice or local influence does not exist unless the amount involved exceeds \$2,000. *Malone v. Richmond & D. R. Co.* 86 Fed. Rep. 625.

A nonresident defendant sued in a state court

9 L. R. A.

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged wrongful conversion of certain of plaintiff's property. *Affirmed.*

The facts are fully stated in the opinion.

Messa, Montgomery & Jeffrey, for plaintiffs in error:

It has been the constant practice since the law went into effect to make the application to the federal court, although in some of the earlier cases the petition and bond were first filed in the state court, and in no case has such practice been decided to be improper. In most cases it has been unquestioned, but whenever questioned such practice has been expressly approved.

Fisk v. Henarie, 82 Fed. Rep. 418; *Malone v. Richmond & D. R. Co.* 85 Fed. Rep. 628; *Kattel v. Wylie*, 88 Fed. Rep. 865.

The right to remove is given to any nonresident defendant when there is a controversy between him and a citizen of the State where the suit is brought.

Fisk v. Henarie, 82 Fed. Rep. 418.

Such right is not confined to cases where the controversy between the plaintiff and the defendant seeking the removal is a separable one.

Whelan v. New York, L. E. & W. R. Co. 1 L. R. A. 65, 85 Fed. Rep. 849.

Mr. G. M. Lambertson, for defendant in error:

Where the real cause of action is between citizens of the same State, citizens of another State cannot, by procuring themselves to be

substituted for the defendant, procure the removal of the cause into the federal court, and thereby deprive the plaintiffs of their remedy against the original defendant for a trespass committed by him.

Ohlquist v. Farwell, 18 Fed. Rep. 805; *Allin v. Robinson*, 1 Dill. C. C. 119; *Gibson v. Bruce*, 108 U. S. 561, 27 L. ed. 825; *Cable v. Ellis*, 110 U. S. 889, 28 L. ed. 186; *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 853, 28 L. ed. 455; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 30 L. ed. 1235; *Phelps v. Oaks*, 117 U. S. 286, 29 L. ed. 888; *Stewart v. Dunham*, 115 U. S. 64, 29 L. ed. 830; *Bronson v. St. Croix Lumber Co.* 85 Fed. Rep. 684.

The action is not removable because it could not have been commenced originally in the circuit court; and only such actions are removable as the court could have taken cognizance of, if begun in the circuit court.

McNeal P. & F. Co. v. Howland, 99 N. C. 202, 6 Am. St. Rep. 518.

The local-prejudice clause of section 2 of the Act of March 8, 1887, is limited by the first clause of the section.

Malone v. Richmond & D. R. Co. 85 Fed. Rep. 625.

The right in question may therefore be waived by any sufficient agreement of the party, as well by direct consent as by that implied by the non-exercise of the right in the manner prescribed by law.

Desty, Removal of Causes, p. 88; *Home Ins. Co. of Columbus v. Curtis*, 82 Mich. 403; *Home Ins. Co. of N. Y. v. Morse*, 87 U. S. 20 Wall. 445, 22 L. ed. 865.

may remove the cause if more than \$2,000 is involved, and if the controversy is between citizens of different States, or between citizens and foreign citizens or subjects. *Fales v. Chicago, M. & St. P. R. Co.* 82 Fed. Rep. 678.

The question whether a suit can be removed into the circuit court on the ground of local prejudice, under the Act of Congress of March 3, 1887, where it involves more than \$500 or less than \$2,000, has elicited conflicting opinions in the different circuits. *Frishman v. Insurance Co.* 41 Fed. Rep. 449.

The requirement that the matter in dispute, to give jurisdiction to a circuit court of the United States, must amount to \$2,000, where the jurisdiction depends on citizenship, applies to removals on account of local prejudice. *Roraback v. Pennsylvania Co.* 42 Fed. Rep. 420.

Although the sum sought to be recovered is less than \$2,000, yet if the defendant interposes a counterclaim exceeding that sum, the suit is removable under the local-prejudice clause of the Act of Congress of March 3, 1887. *Carson & E. Lumber Co. v. Holtzclaw*, 80 Fed. Rep. 878. See note to *Whelan v. New York, L. E. & W. R. Co.* (Ohio) 1 L. R. A. 65, on the question whether, on motion to remand, the amount is to be determined by plaintiff's demands, or by defendant's, where a counterclaim is set up.

A motion to remand a suit on the ground that the matter does not exceed the value of \$2,000 has no merit, where the petition for removal alleges that the value is more than that sum, and there is nothing in the pleadings to show that it is less. *Langdon v. Hillside Coal & Iron Co.* 41 Fed. Rep. 808.

Plaintiff has no right to remove the cause.

A party who has brought an action in the court of his own State against a citizen of another State cannot remove the action to the United States circuit court, under the Act of March 2, 1887. *Hurst v. Western & A. R. Co.* 96 U. S. 71, 23 L. ed. 806.

Suits cannot be removed from the state courts on account of "prejudice or local influence," unless the party opposed to him who petitions for the removal is a citizen of the State in which the suit is brought. *American Bible Society v. Grove*, 101 U. S. 610, 25 L. ed. 847.

The Act of 1887, on the subject of the removal of cases from the state to the federal courts, does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant. The party in whom a cause of action is vested as a trustee is the one whose citizenship is to be regarded, instead of those beneficially interested. *Knapp v. Troy & B. R. Co.* 87 U. S. 20 Wall. 117, 22 L. ed. 823.

Plaintiffs have no right of removal, under the Act of March 3, 1887, on the ground of local prejudice. *Tullock v. Webster County*, 40 Fed. Rep. 706. See, however, *Carson & E. Lumber Co. v. Holtzclaw*, 80 Fed. Rep. 885.

Claimants on appeal from an audit of county supervisors to the district court in Nebraska are plaintiffs, within the rule as to removal of causes on the ground of local prejudice. *Tullock v. Webster County*, *supra*.

All necessary parties plaintiff must be citizens of the State where suit is brought.

The provision in Rev. Stat., § 639, subd. 2, for the removal of a separable controversy, and the provision in the third subdivision of the same section, for the removal of causes on the ground of local prejudice, have no relation to each other. To warrant a removal under the third subdivision, it is not enough that there may be a separable controversy between parties having the necessary citizenship. The Act of 1875 has not changed this subdivision. *Cambria Iron Co. v. Ashburn*, 118 U. S.

The cause not being removable, the order of the circuit court directing its removal is not conclusive.

Ex parte Smith, 94 U. S. 455, 24 L. ed. 165; *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 657, 9 L. ed. 1233; *Short v. Chicago, M. & St. P. R. Co.* 83 Fed. Rep. 114; *Shedd v. Fuller*, 86 Fed. Rep. 609; *Stevens v. Nichols*, 180 U. S. 230, 32 L. ed. 914; *Crehore v. Ohio & M. R. Co.* 181 U. S. 240, 33 L. ed. 144.

Cobb, Ch. J., delivered the opinion of the court:

The plaintiff in the court below alleged that: (1) on November 11, 1886, he was the owner and in possession of a general stock of goods and merchandise in Deloit, Holt County, consisting of dry goods, clothing, hats and caps, boots and shoes, hardware, groceries, fruits and candies, powder and shot, paints and varnishes, trunks, and such other goods as are kept in a country store, also counters, show-cases, lamps and other fixtures, with books and book-accounts, in all of the value of \$3,200, as per schedule attached (Exhibit A); that on said day Ellis L. Bierbower, who is made defendant, wrongfully, forcibly and unlawfully took said goods from the possession of the plaintiff, and converted them to his own use, to the plaintiff's damage \$3,250; (2) and, for a second cause of action, alleged that on said day he was engaged in a large and profitable retail business of buying and selling general merchandise at Deloit, Holt County, and was the owner and in possession of the goods and stock of merchandise hereinbefore mentioned;

that on the said day the defendant forcibly, wrongfully and unlawfully took possession of all of said goods and chattels, and converted them to his own use; (3) that prior to said day the plaintiff had borne a good character as a merchant, and was in good financial credit and standing; (4) that, by the wrongful acts of the defendant in taking possession of said goods and converting them to his own use, the plaintiff has been greatly injured in his good name, credit and business standing, in so much that various merchants and persons who formerly dealt with him have ceased to do so, and he is no longer able to buy goods on credit of foreign merchants, as he was formerly accustomed to do, whereby he has lost gains which otherwise would have accrued in his business that by said wrongful acts his business has been broken up and destroyed by the defendant, to the damage of the plaintiff \$3,250 of which there has been paid \$1,237, leaving a balance due of \$1,963, with interest at 7 per cent per annum, from November 11, 1886, for which he asks judgment.

The defendant made his special appearance in the suit, for the purpose of objecting to the sufficiency of the service of the summons, and to the jurisdiction of the court over his person, for the reason that he is a resident of Douglas County, and was at the time of the service of the summons, and now is, and long had been, marshal of the United States circuit and district courts for this State, and as such was, under an order, in pursuance of the duties of his office, and was required to be, in attendance upon the session of the January Term,

54, 80 L. ed. 60; *American Bible Society v. Groves*, 101 U. S. 611, 25 L. ed. 848; *Jefferson v. Driver*, 117 U. S. 272, 29 L. ed. 897.

The right of removal under Act of March 3, 1887, cl. 4, § 2, for local prejudice, is not confined to cases where there is a separable controversy between plaintiff and defendant seeking the removal. Such cases are provided for by clause 3 of that section. *Malone v. Richmond & D. R. Co.* 85 Fed. Rep. 625.

Under the Local Prejudice Act there can be no removal from a state court to the circuit court, unless all the necessary parties on one side are citizens of different States from those on the other. *Myers v. Swann*, 107 U. S. 546, 27 L. ed. 533; *Grover & Baker S. M. Co. v. Florence S. M. Co.* ("Case of the Sewing-Machine Companies") 85 U. S. 18 Wall. 553, 21 L. ed. 914; *Vannevar v. Bryant*, 88 U. S. 21 Wall. 41, 22 L. ed. 476; *American Bible Society v. Price*, 110 U. S. 61, 28 L. ed. 70; *Jefferson v. Driver*, 117 U. S. 272, 29 L. ed. 897; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 30 L. ed. 60; *Hancock v. Holbrook*, 119 U. S. 586, 30 L. ed. 538.

U. S. Rev. Stat., § 639, cl. 3, requiring all the parties on one side to be citizens of different States from those on the other side, to entitle them to removal for local prejudice, is repealed by the Act of March 3, 1887, § 2, cl. 4, giving nonresident defendants the right of removal for local prejudice, and § 6, providing that all laws or parts thereof "in conflict herewith are hereby repealed." *Malone v. Richmond & D. R. Co.* *supra*.

Under the Act of Congress of 1887, there can be no removal of a cause from a state to a federal court, under the local-prejudice clause, unless all the necessary parties on the side of the plaintiff are citizens of the State in which the suit is brought. *Thouren v. East Tennessee, V. & G. R. Co.* 83 Fed. Rep. 673.

The Act of 1887 is not unconstitutional, although 9 L. R. A.

by virtue of the removal the circuit court obtains jurisdiction of the entire cause, including controversies between plaintiff and any resident defendants. The jurisdiction of the United States circuit court is not affected by the fact that Congress has not given it original jurisdiction of such case. *Malone v. Richmond & D. R. Co.* *supra*.

The Act of March 2, 1887, authorizing removal to the circuit court of the United States, because of prejudice or local influence, of suits in any state court between a citizen of the State where the suit is brought and a citizen of another State, invests the circuit court with jurisdiction to determine the suit, although that court could not have taken original cognizance of the case. *Gaines v. Fuentes*, 93 U. S. 10, 23 L. ed. 524.

Time within which application must be made.

The petition "at the first term at which the cause should be first tried," must be filed so as to be presented to the court before the trial is in good faith entered upon. The case must be actually on trial before the right of removal is gone. *Myer v. Delaware R. R. Construction Co.* ("Removal Cases") 100 U. S. 457, 25 L. ed. 568.

A petition for removal is filed in time if filed after the cause has been heard on demurrer, before the final hearing of the case. *Schraeder Min. & Mfg. Co. v. Packer*, 129 U. S. 683, 32 L. ed. 760; *Malone v. Richmond & D. R. Co.* 85 Fed. Rep. 625.

The provision of the Act of 1887, embodied in Rev. Stat., § 639, cl. 3, which authorizes removals on the ground of prejudice and local influence at any time before the trial or final hearing of the suit, is not repealed by the Act of 1875. It furnishes its own cause for removal, and prescribes its reasons, one of which is that the prejudice may not exist at the beginning, or the hostile local influence may not become known or developed at an

1888, of said circuit and district courts, by law held at Lincoln, in Lancaster County, at the time of the service of the summons upon him; and that the pretended service of the same upon him was while he was so in the discharge of his official duties at and in Lancaster County, in attendance upon said courts, as required by law, and is wholly void, and he should not be further required to answer or obey said summons.

On April 20, 1888, at the February Term of the court below, the motion to quash the service of summons on defendant was heard and argued, and was overruled, to which the defendant excepted on the record.

On June 9, 1888, at the May Term of the court below, the motion of William Groneweg and John Schoentengen for leave to intervene as parties defendant was heard and argued, and was sustained; and, for answer to the plaintiff's petition, they state: That they deny each and every allegation in the petition contained. Count 2: They admit that on November 11, 1886, they directed the United States marshal to levy upon a certain stock of merchandise in the Town of Deloit, Neb., the taking of which is the seizure complained of, but whether Exhibit A is a correct list of the property taken defendants are unable to say, but deny the same, and leave plaintiff to his proof. They allege that plaintiff's claim to the property is based upon a pretended purchase made from D. L. Cramer and D. V. Coe, or one of them, without consideration, and with the purpose and intent on the part of all of them to hinder, delay and defraud these defendants

and other creditors of Cramer and Coe, who were, at the time of said pretended sale, greatly embarrassed financially, and unable to meet their obligations, and were insolvent; all of which was then well known to the plaintiff, by reason of which defendants allege the plaintiff's claim is fraudulent, and he cannot recover. Count 8: For further answer defendants aver that on November, 1886, they commenced their action in the Circuit Court of the United States for the District of Nebraska, claiming of D. L. Cramer and D. V. Coe \$1,800 upon certain promissory notes of theirs, in pursuance of which a writ of attachment was issued and levied upon the property, as stated in count 2 of this answer. That on December 4, 1886, the plaintiff herein filed in said cause in said circuit court his petition as follows: "Comes now John F. Miller, as intervenor, and informs this court and avers that the property attached herein belongs to him, and so belonged at the time it was seized and levied upon by virtue of the order of attachment herein, and at the time of making said levy said property was in the possession of said intervenor, in the County of Holt, in this State, and was wrongfully, unlawfully and forcibly taken from his possession without his consent. (2) Since the taking of said property from his possession he has demanded of the marshal a return of the same, and said marshal has refused to return or in any manner account for the same. He prays that said attached property be returned to him, and that he have judgment for his costs." That on February 23, 1887, at a term of the United States cir-

earlier stage of the proceedings. *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927; *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 30 L. ed. 436.

The report of the commissioners to whom a claim has been referred by a probate court, under the Statutes of Michigan, is not a final hearing within the meaning of that section. *Hess v. Reynolds*, *supra*.

The applications must strictly comply with the Federal Statute giving the right of removal for such causes. *Fleming v. Philadelphia F. Assn.* 76 Ga. 673.

The Act of March 2, 1867, authorizes the removal only where an application is made before final judgment in the court of original jurisdiction, where the suit is brought. *Stevenson v. Williams*, 86 U. S. 19 Wall. 572, 22 L. ed. 162.

Where a petition for removal well states two grounds,—one that of citizenship, the other that of local prejudice,—the removal may be sustained although the petition was filed too late to secure a removal on the former ground, not being before or at the time at which the suit could be first tried. *Neale v. Foster*, 81 Fed. Rep. 53.

After one trial, the right to a second must be perfected before the transfer can be made. The action must at the time of the application be actually pending for trial. *Vannevar v. Bryant*, 88 U. S. 21 Wall. 41, 22 L. ed. 476; *Chicago & Northwestern R. Co. v. McKinley*, 99 U. S. 147, 25 L. ed. 272.

A petition filed while the case was pending, after a new trial had been granted, was in time. *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 30 L. ed. 436.

The Act of 1876, requiring the petition to be filed before or at the term at which the cause should be first tried, does not apply to cases removed on this ground. *Ibid*.

After a trial by jury in the state court, if the judgment thereon is vacated and a new trial granted—9 L. R. A.

ed, the cause may be removed. The judgment, having been vacated, is not final within the meaning of the Act. *Home L. Ins. Co. of Brooklyn v. Dunn*, 86 U. S. 19 Wall. 214, 22 L. ed. 68; *Chicago & Northwestern R. Co. v. McKinley*, 99 U. S. 147, 25 L. ed. 272.

But a subsequent rehearing in the state court and modification of judgment will operate as a revocation of the order for a new trial, and take the case out from under the petition for removal. *Chicago & Northwestern R. Co. v. McKinley*, *supra*.

Where the supreme court of a State reversed the decree of the court below, and made a decree on the merits, and, through the court below, sent the case to a master to settle the details of the final decree, it is too late to file a petition for removal, under the Act of 1867, on the ground of prejudice or local influence. *Jifkins v. Sweetser*, 102 U. S. 177, 26 L. ed. 129.

A foreign insurance company which has obtained a new trial in a suit against it cannot obtain a removal to the federal court after the calling of a second trial, and after counsel has moved to dismiss the case on the ground that the process attached to the declaration is insufficient, as the final trial of the case has then begun, and the petition for removal comes too late. *Fleming v. Philadelphia F. Assn.* 76 Ga. 673.

Application for removal to be made to the circuit court.

Under the Act of Congress of March 3, 1867, § 8, where a removal is sought upon the ground of prejudice or local influence, the application therefor should be made to the circuit court of the United States, and not to the state court; and the mere filing of the petition for the removal and bond in the state court is not of itself a removal.

cuit court then being held at Lincoln, the plaintiff's claim was tried, and submitted to a jury, upon which was the following verdict: "*Groneweg and Schoentengen v. D. L. Cramer et al., Defendants. John F. Miller, Intervenor.* We, the jury, find that, at the time of the taking of the property herein attached, the title to the property and the possession of the same was in the intervenor, John F. Miller, and was then of the value of \$2,800, and the price at which the same was sold by the marshal was \$1,260."

The plaintiff thereupon elected to take, and did take and receive, from the United States marshal the amount in his hands realized by the sale of said attached property, which is the sum of \$1,267, mentioned in the second count of plaintiff's petition. And defendants allege that all the claim of the plaintiff against them arising out of said attachment was fully adjudicated and settled in said intervening proceedings, and plaintiff cannot now relitigate the same.

On June 29, 1888, at said May Term of the court below, leave was given defendant Bierbower to answer *instantly*, and answer filed as follows: "The said defendant says that in

whatever he did in the premises he did in his capacity of United States marshal, under the direction of Groneweg and Schoentengen, and has no interest in the controversy; that said defendants are wholly responsible, if anybody, for whatever damage, if any, was sustained by plaintiff on account of said levy and seizure and attachment complained of. Defendant denies each and every allegation in said petition contained."

The plaintiff replied to the respective answers of defendants, denying each and every allegation therein contained not expressly admitted. (2) He admits that he purchased the property levied on by defendant Bierbower at the instance of the other defendants, but denies that the same was made with any fraudulent intent, or with intent to defraud Groneweg or Schoentengen, or any of the creditors of the vendor. On the other hand, such purchase was bona fide and for a valuable consideration. He denies that Cramer and Coe were financially embarrassed, and that he had full knowledge of that fact at the time he made the purchase. (3) He admits the allegations in the third count of the answer respecting the intervention of the plaintiff in a suit in the circuit court of the

Rome & C. C. Co. v. Stansberry (Ga.) Jan. 18, 1890; Beyer v. Soper Lumber Co. (Wis.) Jan. 7, 1890.

The Act substitutes the judgment of the circuit court on such application for the judgment of the removing party, and makes the existence of such prejudice a traversable issue, while before it was left wholly to the conscience of the affiant. *Amy v. Manning*, 38 Fed. Rep. 868.

The circuit court will not inquire into the truth of the affidavit and ground for removal where a foreign corporation, defendant, files a petition accompanied by an affidavit stating that, of affiant's own knowledge, the petitioner will not be able to obtain justice in the state courts. *Cooper v. Richmond & D. R. Co.* (Ga.) 8 L. R. A. 366.

Its decision thereon may be reconsidered upon a motion to remand, and vacated, and the case remanded, if the court is satisfied that the removal has been improperly granted. *Amy v. Manning*, 38 Fed. Rep. 868.

The provisions of the Removal Act of 1887 relating to removals on the ground of local prejudice, which were continued in U. S. Rev. Stat., § 639, are repealed by the Act of 1887, § 2. *Southworth v. Reid*, 36 Fed. Rep. 451.

Under the Act of 1887, to obtain a removal on the ground of local prejudice, it must be made to appear to the circuit court that, from prejudice or local influence, the party will not be able to obtain justice in the state court where the action is pending, or in any other state court to which the defendant may, under the laws of the State, have the right to remove the same. *Ibid.*

Defects in a petition and affidavit for removal on the ground of local prejudice, by reason of making the application to the state court instead of the circuit court, and in failing to present sufficient reasons for believing that justice cannot be obtained in the state court, are not waived by continuing the case one term in the circuit court, as that court cannot take jurisdiction by consent of parties. *Ibid.*

A cause cannot be removed to the circuit court on the ground of citizenship where part of the defendants were citizens of the same State as the plaintiff, and the controversy is not severable. *Ibid.*

9 L. R. A.

Affidavit in support of application.

U. S. Rev. Stat., § 639, cl. 3, prescribing the procedure of procuring a removal to the federal court for prejudice or local influence, is not repealed by the Act of 1887. *Fisk v. Henarie*, 35 Fed. Rep. 230.

Under the Act of March 3, 1887, providing that it shall be made to appear to the circuit court that, from prejudice or local influence, defendant will not be able to obtain justice in the state court, it is the duty of the circuit court to investigate the facts upon which the alleged inability to obtain justice in the state court rests; and a simple affidavit by the defendant, stating generally the existence of prejudice, in the language of the Statute, plaintiff having been given no opportunity by notice to controvert the statement, should not be accepted as sufficient evidence of that fact. *Ibid.*

Under this Act, an affidavit alleging that the affiant has good reason to believe and does believe that, from prejudice and local influence, he will not be able to obtain justice in the state courts, is insufficient to obtain a removal. *Minnick v. Union Ins. Co.* 40 Fed. Rep. 369; *Hakes v. Burns*, 40 Fed. Rep. 33. But see *Fisk v. Henarie*, 35 Fed. Rep. 230.

An affidavit which states simply that he will not be able to obtain justice, "from prejudice and local influence," without directly averring the existence of prejudice or stating facts to support the averments of the petition, is insufficient to warrant removal. *Goldworthy v. Chicago, M. & St. P. R. Co.* 38 Fed. Rep. 789.

An affidavit containing mere opinion, even though in the form of positive statement, as to the existence of prejudice or local influence, is not sufficient to warrant a removal; but the facts and circumstances which justify a judicial conclusion that the requisite cause exists must be set forth. *Amy v. Manning*, 38 Fed. Rep. 868.

The decision of a federal court that a cause is removable may be reconsidered upon a motion to remand. *Ibid.*

As to removal of cause for prejudice or local influence, see *Huskina v. Cincinnati, N. O. & T. P. R. Co.* 8 L. R. A. 545, 37 Fed. Rep. 504.

Affidavit, sufficiency of. *Cooper v. Richmond & D. R. Co.* (Ga.) 8 L. R. A. 366.

See, generally, construction of Act of 1887. *Wheelan v. New York, L. E. & W. R. Co.* 1 L. R. A. 65, 35 Fed. Rep. 849.

United States by Groneweg and Schoentengen against Cramer and Coe, being that in which the attachment was issued, except the plaintiff's rights were absolutely concluded in that proceeding, and, by the decree of that court, they were barred from prosecuting this action. Plaintiff denies that his intervention in this action, and the proceedings and judgment that followed, is a bar to the proceedings of this action. On the other hand, plaintiff avers that by the verdict and judgment of the circuit court the title and ownership of the property in question were conclusively found to be in him, and the defendants are thereby barred and estopped from setting up the defense and claim that the plaintiff is not the owner of the property in question, or that the sale to him was a fraudulent one, as all those matters were put in issue by the answer of the defendants filed therein, in reply to intervenor's petition, as follows: "*Groneweg and Schoentengen, Plaintiffs, v. Cramer and Coe, Defendants, and John F. Miller, Intervenor.*" They admit that at the time of the levy said intervenor was in the possession of the property attached, and that the marshal refused to return to him the property taken, and they deny every other allegation in his petition contained." (2) Plaintiffs allege that they are informed and believe and charge that the intervenor claims the title to said property by virtue of a pretended sale thereof made by D. V. Coe, and plaintiffs allege that said pretended sale is void for the reason that the same was without consideration; that, at the time, said Coe was largely indebted to plaintiffs and other creditors, of which the intervenor had notice; that said pretended sale was made with the fraudulent purpose and intent to hinder, delay and defraud the creditors of said Coe, in collecting their claims against him, and said conveyance was received by the said intervenor with the fraudulent intent and purpose to assist Coe in hindering, delaying and defrauding his creditors. (3) Plaintiffs further say that they are informed and believe and charge that, at the time of the said pretended sale of the said property, there was no delivery thereof, nor did said intervenor take possession until a long time thereafter, nor was any instrument conveying said property, nor copy thereof, filed in the office of the county clerk of O'Neil County, where said Coe then resided; and, by reason of such fact, the pretended conveyance is absolutely void, by force of the statute in such cases, and no rights in or to said attached property accrued to said intervenor thereunder. The plaintiffs aver that while the title to the property in question was adjudged in that proceeding to be in the plaintiff, yet the court by its final judgment simply ordered the payment of the amount realized at the marshal's sale, instead of the full value of the goods found by the jury, and expressly reserved to these plaintiffs in said judgment the right to prosecute this action against the defendant for the full damages occasioned by the levy of the attachment, as appears by the judgment of the Circuit Court of the United States for the District of Nebraska, as follows: "*Groneweg and Schoentengen v. Cramer and Coe, Defendants, and John F. Miller, Intervenor.*" This cause was heard on the motion for a new trial,

and in arrest of judgment, and the motion of the intervenor to correct the judgment entered in this action; and it is ordered and adjudged that the marshal and clerk pay over to the intervenor the amount of money now in their hands, realized upon the sale of the goods and property claimed by the said intervenor, to wit, the sum of \$1,289.34, and seized by the marshal, by virtue of a writ of attachment issued in this cause. This order to be without prejudice to the rights of John F. Miller to bring suit against the marshal or the plaintiffs for the recovery of damages caused by the illegal seizure and detention of the goods and property seized under said writ of attachment, and for the recovery of the full value of the same. It is further adjudged that the intervenor recover the costs of his intervention herein, and that the plaintiffs pay all costs of the seizure and sale of the goods and property levied upon by the marshal under the writ of attachment, and now adjudged to be the property of the intervenor. It is ordered that the motion for a new trial and arrest of judgment be overruled." Wherefore plaintiff asks that the prayer of the petition be granted, and judgment be allowed for the amount prayed for therein.

Stipulation of the parties in the court below, filed November 22, 1888: "It is hereby stipulated that this case shall not be tried before December 15, 1888, and not then except by agreement of parties, and in consideration the defendants agree that they will make no application to remove the cause to the federal court, but that the same shall be tried in this court. It is further stipulated that the original files marked by the clerk of the circuit court of the United States in the cause of *Groneweg and Schoentengen v. Cramer et al.*, including the petition of intervention of John F. Miller, and the answer thereto, and the reply to the answer, may be used and treated on the trial of the cause the same as copies duly certified by the clerk of the circuit court."

At a session of the circuit court of the United States at Omaha, on May 18, 1889, before Hon. Elmer S. Dundy, United States District Judge, the cause of John F. Miller, plaintiff, against William Groneweg and John Schoentengen, defendants, was heard upon the defendants' petition for the removal of the cause from the District Court of the State of Nebraska for Lancaster County to the Circuit Court of the United States for the District of Nebraska, and upon the proofs offered in support thereof; and it having been made to appear that from prejudice and local influence the said defendants will not be able to obtain justice in the court in which this action is pending, or in any other state court to which said defendants may, on account of such prejudice or local influence, have a right under the laws of the State of Nebraska to remove this cause, and it further appearing that this suit is one properly removable under the Acts of the Congress of the United States to the said circuit court, it is hereby ordered that the said suit be, and the same hereby is, removed from the said State District Court of Nebraska within and for the County of Lancaster into the Circuit Court of the United States for the District of Nebraska.

On May 22, 1889, there was a trial in the

count below to a jury, and verdict for the plaintiff for \$1,780, with judgment for that sum, and costs, \$41.15. Subsequently the defendants filed their motion to vacate the judgment, set aside the verdict and grant a new trial, for the reasons: (1) Because the verdict is not sustained by the evidence and the law in the case, and was rendered by the jury without authority to render it, because the court was without jurisdiction to try the cause at the time it was tried. (2) Because the verdict is contrary to law, the court and jury being without jurisdiction to try the cause and render the verdict. (3) Because of error of law occurring at the trial, and excepted to by defendants, and, especially, because the court had no jurisdiction of the cause or right to try it at the time of trial,—which motion was heard and overruled. The plaintiffs in error assign the following causes for review: (1) the district court was without jurisdiction to try the cause; (2) the court erred in overruling defendants' objection to the trial of the cause, prior to the trial, and to the impaneling of the jury; (3) the court erred in overruling defendants' objection to the introduction of evidence; (4) in rendering final judgment in favor of the plaintiff below; (5) in overruling defendants' motion for a new trial.

The above assignments all resolve themselves into a single proposition of law, to wit, that, the cause having been removed from the district court of the State of Nebraska to the circuit court of the United States, the former tribunal was, at the date of the trial and judgment complained of, without jurisdiction to hear or determine the cause, and therefore said judgment is erroneous. Doubtless, if the premises be true both in fact and in law, the conclusion follows. If the action had been, pursuant to the law of the land, removed from the district court, then its judgment is void, and should be reversed. But it is quite conceivable that although certain forms of law may have been gone through with for the purpose of removing said cause, the circuit court may have assumed jurisdiction of it when in law the case remained with the district court. And this is the case, whatever steps were taken, if the cause is not one of those of which the circuit court of the United States has jurisdiction under the law, and the removal of which from the state to the federal courts has been provided for by law, and that it is not, is the contention of the defendant in error.

In disposing of the case, I will give the Act of Congress of March 3, 1887, such examination as is deemed necessary in order to express my views of its application to the case at bar, but will make no attempt to reconcile the conflicting opinions of the courts in respect thereto. The title of the Act is: "An Act to Amend the Act of Congress Approved March 3, 1875, Entitled 'An Act to Determine the Jurisdiction of the Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for Other Purposes,' and to Further Regulate the Jurisdiction of Circuit Courts of the United States, and for Other Purposes." By the Act of which this is amendatory, it was provided that the circuit courts of the United States should have original cognizance, concurrent with the courts of the several States, of

all suits of a civil nature at common law or in equity, where the matter in dispute exceeded, exclusive of costs, the sum or value of \$500, and arising under the Constitution or laws of the United States, or treaties made, or which should be made, under their authority, or in which the United States were plaintiffs or petitioners, or in which there should be a controversy between citizens of different States. By the Amendatory Act it is provided that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. It clearly appears from the language of the first section of the Amendatory Act that where there is a controversy between citizens of different States, the circuit court of the United States has jurisdiction, provided the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and it is as certain, although not expressed in words, that such court has not jurisdiction if the matter in controversy, exclusive of costs, does not exceed the sum or value of \$2,000. It is equally certain from the reading of the first section that the matter in controversy shall exceed, exclusive of interest and costs, the sum or value of \$2,000, as it is that the controversy must be between citizens of different States. The jurisdiction of the federal court is as much dependent upon one of the facts as it is upon the other. In the absence of either, that court has not jurisdiction of the cases mentioned in the third provision of the first section of the Amendatory Act. In the enactment of the Amendatory Law, the intent of Congress was to raise the minimum sum or value of the matter in dispute from \$500, exclusive of costs, to \$2,000, exclusive of interest and costs. The second section of the Amendatory Act provides "that any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now, or which may hereafter be, brought in any state court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defend-

ants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause." Under this section it is claimed that a defendant may, where there is a controversy between citizens of different States, remove a pending cause into the circuit court of the United States for the proper district, regardless of the sum or value of the matter in dispute; that no application for a removal need be made to the state court, and that no petition for a removal need be filed in the state court, and that no bond is required of the party removing. It is clear that under section 2 of the Amendatory Act only those suits are removable to the federal court of which that court was given jurisdiction by the precedent section, (section 1 of the Amendatory Act); in other words, only such suits can be removed into the circuit court as could originally have been commenced there. The clause of section 2 which authorizes a defendant to remove a suit into the circuit court on account of prejudice or local influence simply gives the right of removal at any time before the trial, and dispenses with petition and bond, while in other cases of removal the petition or application therefor must be filed in the state court at or before the time that the defendant is by the state law or rule of the state court required to answer or plead. But this clause of the second section is to be construed with the preceding clauses of the same section, which require as a prerequisite to removal that the matter in dispute shall exceed the specified amount. In the enactment of this Amendatory Act Congress evidently had in view the fact that if a party desired to remove a case on the ground of citizenship alone, he could as well make his application therefor on or before the answer day as thereafter, but that he might not be aware of the existence of prejudice or local influence which would prevent his obtaining justice in the state courts until after issues were joined; and hence a party who might be willing to litigate in the state courts, provided he could obtain justice therein, if he afterwards, and before the trial, was able to make it appear that on account of prejudice or local influence he could not obtain justice in any state court, should have the right to remove the case into the federal court at any time before the trial; but a reasonable interpretation of the Statute does not lead to the conclusion that a defendant could remove a case where the amount in controversy did not exceed \$2,000, and hence of a class of cases of which jurisdiction had not been conferred on

the federal courts. It is the first section alone of the Amendatory Act which gives the federal court jurisdiction. The second and third sections simply provide the manner in which causes shall be brought within that jurisdiction.

Had it been the intent of Congress to authorize a defendant to remove a suit in which was involved less than the prescribed amount, the first section of the Act—the section giving jurisdiction—would have conferred upon the circuit court of the United States jurisdiction concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, in which there was a controversy between a citizen of the State in which the suit was brought, and a citizen of another State, without regard to the sum or value of the matter in controversy, whenever it should be made to appear to said circuit court that the defendant in such suit, not being a citizen of the State where the suit is brought, could not, on account of prejudice or local influence, obtain justice in any state court. That Congress did not in terms confer such jurisdiction, regardless of the amount involved, argues strongly against the contention that a defendant may, under the last clause of the second section, remove a suit into the federal court, regardless of the amount involved. The position that the last clause of section 2 relates merely to the time when the defendant may make his application for removal, and dispenses with the petition or bond, is strengthened by the first part of section 8, which reads as follows: "Sec. 8. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such state court at the time, or any time before, the defendant is required, by the laws of the State or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the circuit court, to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail, if special bail was originally requisite therein."

It thus appears from the third section that in all cases except those mentioned in the last clause of section 2, viz., those which the defendant may remove on the ground of prejudice or local influence, the party entitled to remove must file his petition on or before the answer day, and must file therewith the prescribed bond; while, in the cases mentioned in the last clause of the second section, the application for removal may be made at any time, and the cause may be removed at any time before trial, provided it be made to appear to the circuit court that by reason of prejudice or local influence the defendant will not be able to ob-

tain justice in the state courts. Before it can be held that the purpose of Congress was to confer upon the federal courts jurisdiction of suits between citizens of different States, regardless of the sum or amount in controversy, under a statute the first section of which confers such jurisdiction, there must be something in the section which confers jurisdiction showing that intent. There being, as I conceive, nothing either in the letter or spirit of the Statute, I conclude that no such jurisdiction was conferred.

The Act of September 24, 1789, conferred jurisdiction "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and . . . an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." This provision remained undisturbed until the passage of the Act approved March 8, 1875, in which Act jurisdictional language somewhat different is used; but so far as the limitations of such jurisdiction to suits where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500 is concerned, it is substantially the same. And the Act of 1875 contains a repealing clause by which all Acts and parts of Acts in conflict with the provisions of said Act are thereby repealed. The Act of March 8, 1887, is, as we have seen, amendatory of the Act of 1875, and its provisions, including the jurisdictional clause, are made expressly to take the place of the provisions of said Act; so that, as I conclude, there is no Act of Con-

gress now in force conferring jurisdiction upon the circuit court unaccompanied by the limitation of \$2,000.

It is probably necessary here to meet the possible objection that, the judicial power of the United States having been declared by clause 1, § 2, art. 3, of the Constitution of the United States to "extend to . . . controversies . . . between citizens of different States," jurisdiction exists in the circuit court by virtue of that instrument. This question was before the Supreme Court of the United States in the case of *Sheldon v. Sill*, 49 U. S. 8 How. 441 [13 L. ed. 1147], where it was expressly held that (I quote the syllabus) "courts created by statute can have no jurisdiction but such as the statute confers."

The circuit court of the United States, then, having been created by Act of Congress, received and retains its jurisdiction, in such terms, and with limitations, as Congress has expressed and imposed. The circuit court, therefore, being without jurisdiction to order the removal of the cause from the district court of this State to the Circuit Court of the United States for the District of Nebraska, for the reason that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of \$2,000, the district court of this State was not deposed of jurisdiction to hear and determine said cause, notwithstanding the record presented in the case.

The judgment of the District Court is affirmed.
The other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS.

Arthur MANCHESTER.

(....Mass....)

1. Statute 1886, chap. 192, regulating the using of nets or seines for taking fish in the waters of Buzzard's Bay, repeals by implication Statute 1865, chap. 212, so far as the latter relates to the taking of menhaden by the use of a purse seine in the waters of that bay.
2. For the purpose of regulating fishing therein, a State may claim jurisdiction over a bay within its borders, the headlands at the mouth of which are less than two marine leagues apart, although the distance between the opposite shores of the bay within the headlands is more than that; and it may prevent a citizen of another State from taking fish in such bay, although he is using a vessel duly enrolled and licensed under the laws of the United States for carrying on such fishery, at least in the absence of any law of Congress relating to the subject and

of all discrimination against citizens of other States.

(September 18, 1890.)

REPORT from the Superior Court for Barnstable County, after verdict of guilty, of an action brought to recover the statutory penalty for illegal fishing in the waters of Buzzard's Bay. *Judgment on the verdict.*

The case sufficiently appears in the opinion. *Meers. Andrew J. Waterman, Atty-Gen., and H. C. Bliss, Asst. Atty-Gen., for the Commonwealth:*

The federal government received nothing from Great Britain. Whatever belonged to the sovereignty by the common law was inherited by the States.

Martin v. Waddell, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Whenton v. Peters*, 88 U. S. 8 Pet. 591, 8 L. ed. 1055; *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181.

And these powers have been retained by the States, except so far as by express terms they have been conferred upon the general government. When the States became sovereign, at the close of the Revolution, they respectively succeeded to the title of the crown in the tide waters within their territorial limits and to such rights therein as had previously been granted to local governments established under royal sanction.

Martin v. Waddell, 41 U. S. 16 Pet. 367, 10

NOTE.—*Fishery; right of.*

The inhibition in the Province Charter of Massachusetts Bay against the abridgment of the rights of English subjects to fish, etc., confers no rights in favor of fishermen at this date. *Attorney-General v. Tarr*, 3 L. R. A. 87, 143 Mass. 309. See note to *Lawton v. Steele* (N. Y.) 7 L. R. A. 124, 9 L. R. A.

L. ed. 997; *Pollard v. Hagen*, 44 U. S. 8 How. 212, 11 L. ed. 565; *Howard v. Ingersoll*, 54 U. S. 18 How. 881, 14 L. ed. 189; *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 9 L. ed. 578; *Mumford v. Wardwell*, 78 U. S. 6 Wall. 428-436, 18 L. ed. 756-760; *Smith v. Maryland*, 59 U. S. 18 How. 74, 15 L. ed. 270; *Withers v. Buckley*, 61 U. S. 20 How. 84, 15 L. ed. 816; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248, 27 Gratt. 985; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Bennett v. Boggs*, 1 Bald. C. C. 60; *Gough v. Bell*, 21 N. J. L. 156; *Attorney-General v. Stevens*, 1 N. J. Eq. 369; *Stevens v. Patterson & N. R. Co.* 84 N. J. L. 532; *Paul v. Haeleton*, 87 N. J. L. 106; *Attorney-General v. Hudson Tunnel R. Co.* 27 N. J. Eq. 176; *Storer v. Freeman*, 6 Mass. 435; *Com. v. Alger*, 7 Cush. 58; *Weston v. Sampson*, 8 Cush. 847; *Lakeman v. Burnham*, 7 Gray, 437-440; *Com. v. Roxbury*, 9 Gray, 451; *Nichols v. Boston*, 98 Mass. 39-42; *Boston v. Richardson*, 105 Mass. 361; *Chapman v. Kimball*, 9 Conn. 40; *Simons v. French*, 25 Conn. 846; *Church v. Meeker*, 24 Conn. 421; *State v. Sargent*, 45 Conn. 358-372; *Hollister v. Union Co.* 9 Conn. 443; *Pitkin v. Olmstead*, 1 Root, 219; *Moulton v. Libbey*, 37 Me. 472; *Doer v. Portsmouth Bridge*, 17 N. H. 200; *Clement v. Burns*, 43 N. H. 609; *Browne v. Kennedy*, 5 Har. & J. 195; *Owings v. Norwood*, 2 Har. & J. 96; *Cunningham v. Browning*, 1 Bland, 299; *State v. Medbury*, 8 R. L. 138; *Chase v. American Steamboat Co.* 9 R. L. 419-427; *Providence Steam Engine Co. v. Providence Steamship Co.* 12 R. L. 848; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21; *Lansing v. Smith*, 8 Cow. 146; *Rogers v. Jones*, 1 Wend. 261; *People v. New York & S. I. F. Co.* 68 N. Y. 71; *Toule v. Remsen*, 70 N. Y. 803, 808; *Mahler v. Norwich & N. Y. Transp. Co.* 85 N. Y. 352; *People v. Tibbets*, 19 N. Y. 523; *People v. Vanderbilt*, 26 N. Y. 287; *Hudson River R. Co. v. Loeb*, 7 Robt. 418; *Dunlap v. Com.* 103 Pa. 607; *Dunham v. Lamphere*, 3 Gray, 268.

The jurisdiction and property of the sovereignty beyond the line of the shore is a marine league, or three miles from the shore; and in cases where an arm of the sea extends into the land, the jurisdiction of the sovereignty of the mainland extends over such water, providing that the distance between the headlands is less than two marine leagues.

Vatelle, Grotius, Bynkershoek, Hester, Halleck; Wheaton, International Law, 255; Gould, Waters, §§ 13, 16.

The right of fishing in the waters adjacent to the coast of any nation within its territorial limit belongs exclusively to the sovereigns of the state.

Wheaton, International Law, p. 258; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Bennett v. Boggs*, 1 Bald. C. C. 60; *Thompson v. Whitman*, 83 U. S. 18 Wall. 457, 21 L. ed. 897; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Smith v. Maryland*, 59 U. S. 18 How. 74, 15 L. ed. 270; *Com. v. Alger*, 7 Cush. 58; *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 9 L. ed. 578; *Pollard v. Hagen*, 44 U. S. 8 How. 212, 11 L. ed. 565; *Hess v. Muir*, 5 Cent. Rep. 583, 65 Md. 601; *Brown v. Degroff*, 12 Cent. Rep. 818, 50 N. J. L. 409; *Dunlap v. Com.* 103 Pa. 607.

The jurisdiction of a State is co-extensive with its territory.

9 L. R. A.

United States v. Bevans, 16 U. S. 8 Wheat. 336, 4 L. ed. 404.

The general jurisdiction adheres to the territory as a portion of sovereignty not yet given away. The residuary power of legislation is still in Massachusetts.

United States v. Evans, supra; *United States v. Wiltberger*, 18 U. S. 5 Wheat. 76, 5 L. ed. 87; *United States v. Davis*, 2 Sumn. 482; *United States v. Grush*, 5 Mason, 290.

Defendant is not protected by his federal license or enrollment to engage in fishing.

Dunham v. Lamphere, 3 Gray, 268; *Haney v. Compton*, 89 N. J. L. 507; *State v. Medbury*, 8 R. L. 138; *New England Oyster Co. v. McGarvey*, 12 R. L. 385; *Johnson v. Drummond*, 20 Gratt. 419.

Messrs. George A. King and James F. Jackson, for defendant:

The *faucēs terræ* of Buzzard's Bay are so far apart that it is impossible to discern objects from one headland to the other, and its waters are not within the body of a county, but are a part of the open sea.

1 Kent, Com. 366; *United States v. Grush*, 5 Mason, 290; *Com. v. Peters*, 12 Met. 387.

Neither the law of nations nor the common law has annexed to a State a marine belt of any width whatsoever, but on the open coast the water-line is the limit of jurisdiction.

Reg. v. Keyn, L. R. 2 Exch. Div. 63.

The States never possessed the essential rights of sovereignty.

Madison, Secret Proceedings and Debates of Federal Convention, p. 199; Story, Const. § 210.

The claim of a State to jurisdiction over a belt of the open sea apart from any constitutional provision would be inherently and essentially incompatible with its relations to the Union. These rights whenever they exist pertain to the nation, and do not under our government concern the States.

See Wheaton, Int. Law. § 179.

The judicial power of the federal courts extends to all cases of admiralty and maritime jurisdiction.

Fed. Const. art. 3, § 2.

The boundary between common-law and admiralty jurisdiction at the adoption of the Constitution was the water-line.

1 Kent, Com. 367; *United States v. Ross*, 1 Gall. 624; *The Harriet*, 1 Story, 251, 259; *United States v. Robinson*, 4 Mason, 807; *The Commerce*, 66 U. S. 1 Black, 574, 579, 17 L. ed. 107, 109.

The jurisdiction of admiralty includes, not only civil causes, but extends to all crimes and offenses (1 Kent, Com. 360, 368; *Martin v. Hunter*, 14 U. S. 1 Wheat. 304, 335, 4 L. ed. 97, 106; *United States v. Wiltberger*, 18 U. S. 5 Wheat. 76, 5 L. ed. 87, and note on p. 109), including those against fishery laws.

2 Browne, Civil Law and Adm. 463, 474.

The admiralty and maritime jurisdiction, vested in the general government on the adoption of the Constitution, was no less and in some respects more ample than the admiralty jurisdiction of England.

De Lovio v. Boit, 2 Gall. 471; *Waring v. Clarke*, 46 U. S. 5 How. 458, 13 L. ed. 234; *The Genesee Chief v. Fitzhugh*, 58 U. S. 12

How. 443, 18 L. ed. 1058; *The Lottawanna*, 88 U. S. 21 Wall. 558, 23 L. ed. 654.

This admiralty jurisdiction of the national government is exclusive.

1 Kent, Com. 397; *United States v. Grush*, 5 Mason, 290; *Com. v. Peters*, 12 Met. 387; Federalist, No. 82; Story, Const. § 1673; *United States v. Coolidge*, 1 Gall. 488, 496; *The Ohusan*, 2 Story, 455; *United States v. Wilson*, 8 Blatchf. 485, 489; *The Wave*, Blatchf. & H. 285, 252; *American Ins. Co. v. Canter*, 26 U. S. 1 Pet. 511, 7 L. ed. 242; *United States v. Beavans*, 16 U. S. 3 Wheat. 396, 4 L. ed. 404; *The Moses Taylor*, 71 U. S. 4 Wall. 811, 18 L. ed. 397; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401; *American Steamboat Co. v. Chace*, 88 U. S. 16 Wall. 522, 531, 21 L. ed. 899, 871.

This exclusive jurisdiction in admiralty is not to be confounded with the power to legislate granted to Congress.

The Belfast, 74 U. S. 7 Wall. 624, 640, 19 L. ed. 266, 271; *The Genesee Chief v. Fitzhugh* and *The Commerce*, *supra*.

The vessel and her crew were covered and protected by a license issued under the laws of the United States for carrying on the menhaden fishery.

U. S. Rev. Stat. § 4323; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 213, 6 L. ed. 74; *Sinnot v. Davenport*, 63 U. S. 22 How. 227, 241, 16 L. ed. 243, 246; *Foster v. Davenport*, 68 U. S. 23 How. 244, 16 L. ed. 248; *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 788, 18 L. ed. 108.

Field, *Ch. J.*, delivered the opinion of the court:

The defendant was complained of for taking fish by the use of a purse seine in the waters of Buzzard's Bay within the jurisdiction of the Commonwealth. It appears by the report that the point in Buzzard's Bay where the seine was used "was within that part of Buzzard's Bay which the harbor and land commissioners, acting under the provisions of § 2 of chap. 196 of the Acts of 1881, had, so far as they were capable of doing so, assigned to and made a part of the Town of Falmouth;" that the distance between the headlands at the mouth of Buzzard's Bay is "more than one and less than two marine leagues;" "that the distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties." The place "was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of" the Town of Falmouth "to the south line" of said town. Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side and Bristol and Plymouth Counties on the other. The defendant offered evidence that he was fishing for menhaden only with a purse seine, and that the bottom of the sea "was not encroached upon or disturbed;" "that it was impossible to discern objects from one headland to the other at the mouth of Buzzard's Bay;" that he was a citizen of Rhode Island, and that the vessel upon which he was employed and in connection with which he was using the seine, belonged to 9 L. R. A.

Newport, Rhode Island, and had been "duly enrolled and licensed at that port under the laws of the United States for carrying on the menhaden fishery."

It was contended at the trial, among other things, that Stat. 1886, chap. 192, under which the complaint was made, had not repealed Stat. 1865, chap. 212, but this has not been argued in this court. It is plain that Stat. 1886, chap. 192, was intended to regulate the whole subject of using nets or seines for taking fish in the waters of Buzzard's Bay, and that by implication it repealed Stat. 1865, chap. 212, so far as that Statute related to the taking of menhaden by the use of a purse seine in the waters of that bay. The principal question argued here is whether the place where the acts of the defendants were done was within the jurisdiction of the Commonwealth of Massachusetts.

Pub. Stat., chap. 1, §§ 1, 2, are as follows: "Sec. 1. The territorial limits of this Commonwealth extend one marine league from its seashore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues between its headlands a straight line from one headland to the other is equivalent to the shore line. Sec. 2. The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof, subject to the right of concurrent jurisdiction granted over places ceded to the United States."

Pub. Stat., chap. 22, § 1, contains the following provision: "The boundaries of counties bordering on the sea shall extend to the line of the Commonwealth as defined in section 1, chapter 1;" and section 11, *Id.*, is as follows: "The jurisdiction of counties separated by waters within the jurisdiction of the Commonwealth shall be concurrent upon and over such waters."

Stat. 1881, chap. 196, which has been referred to, is as follows:

"Sec. 1. The boundaries of cities and towns bordering upon the sea shall extend to the line of the Commonwealth as the same is defined in section 1 of chapter 1 of the General Statutes.

"Sec. 2. The harbor and land commissioners shall locate and define the courses of the boundary lines between adjacent cities and towns bordering upon the sea or upon arms of the sea, from high-water mark outward to the line of the Commonwealth as defined in said section 1, so that the same shall conform as nearly as may be to the course of the boundary lines between said adjacent cities and towns on the land; and they shall file a report of their doings with suitable plans and exhibits showing the boundary lines of any town by them located and defined in the registry of deeds, in which deeds of real estate in such town are required to be recorded, and also in the office of the secretary of the Commonwealth."

Section 1, chapter 1, of the General Statutes, contains the provisions which have been before recited as now contained in Pub. Stat., chap. 1, § 1, and chap. 22, §§ 1, 11. These provisions were first enacted by Stat. 1859, chap. 289.

Rev. Stat., chap. 1, § 1, was as follows: "Sec. 1. The sovereignty and jurisdiction

of the Commonwealth extend to all places within the boundaries thereof, subject only to such rights of concurrent jurisdiction as have been or may be granted over any places ceded by the Commonwealth to the United States." The boundaries of the Commonwealth on the sea were first exactly defined by Stat. 1859, chap. 289. The boundaries of the territory granted by the charter of the Colony of New Plymouth, or of the territory included in the Province Charter, need not be particularly set forth. Buzzard's Bay was undoubtedly within the territory described in those charters.

By the definitive treaty of peace "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, etc., to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, property and territorial rights of the same and every part thereof." If Massachusetts had become an independent nation there can be no doubt, we think, that her boundaries on the sea, as she has defined them by the Statutes, would be acknowledged by all foreign nations, and that her right to control the fisheries within these boundaries would be conceded. It has often been a matter of controversy how far a nation has a right to control the fisheries on its sea coast and in the bays and arms of the sea within its territory, but the limits of this right have never been placed at less than a marine league from the coast on the open sea, and bays wholly within the territory of a nation, the headlands of which are not more than six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie. More extensive rights in these respects have been and are now claimed by some nations, but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast and in bays within the territory the headlands of which are not more than two marine leagues apart.

In the proceedings of the Halifax Commission under the Treaty of Washington of May 8, 1871, where it was for the interest of the United States to claim against Great Britain independently of treaties as extensive rights of fishing as could be maintained, the claim was stated in the answer on behalf of the United States as follows: "It becomes necessary at the outset to inquire what rights American fishermen and those of other nations possess, independently of treaty, upon the ground that the sea is the common property of all mankind. For the purposes of fishing, the territorial waters of every country along the sea coast extend three miles from low-water mark; and beyond is the open ocean free to all. In the case of bays and gulfs such only are territorial waters as do not exceed six miles in width at the mouth upon a straight line measured from headland to headland. All larger bodies of water connected with the open sea form a part of it. And whenever the mouth of a bay or gulf exceeds the maximum width of six miles at its mouth, and so loses the character of ter-

ritorial or inland waters, the jurisdictional or proprietary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay according to its sinuities, and the limit of exclusion is three miles from low-water mark." House of Representatives U. S. 2d Sess. 45th Congress, Ex. Doc. No. 89, p. 120.

The government of Canada had been instructed by the government of Great Britain on April 12, 1866, "that American fishermen should not be interfered with either by notice or otherwise unless found within three miles of the shore or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839," but afterwards the British Government issued instructions "that the United States fishermen will not be for the present prevented from fishing except within three miles of the land or in bays which are less than six miles broad at the mouth." Id. pp. 120, 121.

It is true that Mr. Dana, of counsel for the United States, contended in argument with reference to the right to fish in the open sea "that the deep-sea fisherman pursuing the free swimming fish of the ocean with his net or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser though he approach within three miles of a coast by any established recognized law of all nations." Id. p. 1654.

This contention, however, did not touch the right to fish in bays or arms of the sea, and it was not the claim actually made by the United States before the commission. This is stated in the answer and in the brief of the United States. The answer does not allude to any such position as that taken by Mr. Dana in his closing argument but in the brief it is said: "Many authorities maintain that whenever under the Law of Nations any part of the sea is free for navigation, it is likewise free for fishing for those who sail over its surface. But without insisting upon this the inevitable conclusion is that, prior to the Treaty of Washington, the fishermen of the United States as well as those of all other nations could rightfully fish in the open sea more than three miles from the coast, and could also fish at the same distance from the shore in all bays more than six miles in width measured in a straight line from headland to headland." Id. p. 166.

The counsel for the defendant in the case at bar place much reliance upon the decision in *Reg. v. Keyn*, L. R. 2 Exch. Div. 63. In that case the defendant was the officer in command of *The Franconia*, a German steamer, which at a point "one mile and one tenth of a mile S. S. E. from Dover Pier Head and within two and a half miles from Dover Beach," in the English Channel, ran down and sunk the British steamer *Strathclyde* and one of the *Strathclyde's* passengers was drowned. The defendant was indicted in the Central Criminal Court for manslaughter. The question was whether the offense was committed within the jurisdiction of the admiralty, the Central Criminal Court having jurisdiction to hear and determine any of-

fense alleged "to have been committed within the jurisdiction of the admiralty of England." A majority of the court held that the offense was committed on the German steamer, and not on the British steamer, and that under the laws then existing there was no admiralty jurisdiction over an offense committed by a foreigner on a foreign ship on the open sea, whether within or without a marine league from the shore of England. In consequence of this decision Parliament passed the Statute of 41 and 42 Vict., chap. 73. By that Act it was declared that "for the purpose of any offense declared by this Act to be within the jurisdiction of the admiral any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of her majesty's dominions." It is obvious that by this decision the court did not attempt to define the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only the extent of the existing admiralty jurisdiction over offenses committed on the open sea. The courts of England would undoubtedly enforce any Act of Parliament conferring upon them jurisdiction over offenses committed anywhere. It is equally obvious that the decision has nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. The case contains a great deal of learning upon the respective limits of the common-law jurisdiction and of the admiralty jurisdiction in England over crimes and upon the boundaries of counties in England under the laws then existing. These distinctions are immaterial in the case at bar, except with reference to the contention that the place where the acts complained of were done was within the admiralty jurisdiction of the courts of the United States.

The boundaries of counties in Massachusetts may be defined by statute, and they may be made to extend over all the territory of Massachusetts, whether it be sea or land; and if Massachusetts has a right to control the fisheries in Buzzard's Bay, offenses in violation of the regulations which the State may establish can be tried in any of its courts upon which it may confer jurisdiction. It is to be noticed, however, that in all the citations contained in the different opinions given in *Queen v. Keyn*, wherever the question of the right of fishery is referred to it is conceded that the control, to the extent at least of a marine league, belongs to the nation on whose coasts the fisheries are. The argument of Mr. Benjamin of counsel for the defendant, is not contained in the report of the case, but from the statement of *Mr. Justice Lindley*, found on p. 90, Id., it seems that he admitted that the dominion of a State over the seas adjoining its shore existed for the purpose of protecting "its coast from the effects of hostilities between other nations which may be at war, the protection of its revenue and its fisheries, and the preservation of order by its police."

In *Direct United States Cable Co. v. Anglo-American Teleg. Co.*, L. R. 2 App. Cas. 394, it became necessary for the privy council to 9 L. R. A.

determine whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was a part of the territory of Newfoundland and within the jurisdiction of its Legislature. The average width of the bay "is about fifteen miles," and the distance between the headlands is "rather more than twenty miles." *Lord Blackburn*, in delivering the opinion, says (p. 416, Id.): "The question raised in this case, and to which their lordships confine their judgment, is as to the territorial dominion over a bay of the configuration and dimensions such as those of Conception Bay above described. The few English common-law authorities on this point relate to the question as to where the boundary of counties ends and the exclusive jurisdiction at common law of the court of admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shores."

He cites the well-known language of *Lord Hale*: "That arm or branch of the sea which lies within the *fauces terre* where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner,"—and comments upon its indefiniteness, and then cites the case of *Reg. v. Ounningham*, Bell, C. C. 86, and says that in this case "this much was determined: that a place in the sea out of any river and where the sea was more than ten miles wide was within the County of Glamorgan and consequently in every sense of the words within the territory of Great Britain. Apparently he was of opinion that by most of the text-writers on international law, Conception Bay would be excluded from the territory of Newfoundland and the part of the Bristol Channel which, in *Reg. v. Ounningham*, was decided to be in the County of Glamorgan would be excluded from the territory of Great Britain; but he decides that Conception Bay is a part of the territory of Newfoundland because the British government has exercised exclusive dominion over it with the acquiescence of other nations, and it has been declared by Act of Parliament "to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

We regard it as established that as between nations the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish or fish attached to or embedded in the soil. The open sea within this limit is of course subject to the common right of navigation, and all governments for the purpose of self protection in time of

war or for the prevention of frauds on its revenue exercise an authority beyond this limit. We have no doubt that the British crown will claim the ownership of the soil in the bays and in the open sea adjacent to the coast of Great Britain to at least this extent whenever there is any occasion to determine the ownership. The authorities are collected in Gould on Waters, part 1, chap. 1, §§ 1-17, and notes. See also *Neill v. Duke of Devonshire*, L. R. 8 App. Cas. 185; *Gammell v. Woods & Forests Comrs.* 8 Macq. H. L. Cas. 419; *Mowatt v. McFee*, 5 Sup. Ct. (Can.) 66; *Reg. v. Oubitt*, L. R. 23 Q. B. Div. 623; Stat. 46 & 47 Vict. chap. 22.

But it is argued that if the fisheries of Buzzard's Bay are within the control of either the State of Massachusetts or of the United States, this control by the Constitution of the United States is exclusively with the United States. The question is therefore whether the Statutes of Massachusetts which have been cited are repugnant to the Constitution and laws of the United States. There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States.

It is conceded that the case of *Dunham v. Lamphere*, 8 Gray, 268, is decisive of the case at bar if that case was correctly decided. That case was decided before the passage of Stat. 1859, chap. 289, and the place where the acts complained of were done was not within a bay but in the sea within one mile of Gravel Island. Shaw, Ch. J., says in the opinion: "Being within a mile of the shore puts it beyond a doubt that it was within the territorial limits of the State, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be that these limits extend a marine league, or three geographical miles, from the shore, and in ascertaining the line of shore this limit does not follow each narrow inlet or arm of the sea, but when the inlet is so narrow that persons and objects can be discerned across it by the naked eye the line of territorial jurisdiction stretches across from one headland to the other of such inlet." He then proceeds to discuss the question "whether the right of property and of dominion and government over the sea-coast fisheries and all fisheries in tide waters and arms of the sea belong properly to the general government or remain with the state government;" and he concludes that "in the distribution of powers between the general and the state governments" "the right to the fisheries and the power to regulate the use of the fisheries on the coasts and in the tide waters of the State" were left by the Constitution of the United States with the States, "subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic;" and he says: "That the exercise of both of these are not inconsistent and therefore not in conflict with each other was also settled by the Supreme Court of the United States in the case of *Willson v. Blackbird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7 L. ed. 412]."

In *Dunham v. Lamphere* the defendant was
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a citizen of Rhode Island and the owner and master of a fishing vessel which had been duly licensed as a fishing vessel pursuant to the laws of the United States; but it is said that this license did not affect the question. We are asked to reconsider this decision mainly on the ground that the admiralty and maritime jurisdiction of the courts of the United States was not considered in the opinion. It has, indeed, been suggested that the recent decisions of the Supreme Court of the United States upon the power of Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" require that this decision be reconsidered, but no recent decisions of that court have been cited which relate to the regulation and control of the fisheries within the territorial tide waters of a State, and the decisions of that court which relate to this subject are considered hereafter, and they do not appear to be in conflict with the decision in *Dunham v. Lamphere*. The argument addressed to us is that by the Constitution of the United States the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction;" that this power is exclusive; that the case at bar is within this jurisdiction, and that therefore the courts of Massachusetts have no jurisdiction over it. It must, we think, be considered as settled that if land on the coast be reclaimed from the sea, or if piers or wharves be extended into the sea, such land and structures are a part of the territory of the State whose shores they adjoin. *Pollard v. Hagan*, 44 U. S. 8 How. 212 [11 L. ed. 565]; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57 [21 L. ed. 798]; *Barney v. Keokuk*, 94 U. S. 824 [24 L. ed. 224]; *Com. v. Roxbury*, 9 Gray, 451; *Com. v. Alger*, 7 Cush. 58; *Boston v. Richardson*, 105 Mass. 851; *Galveston v. Menard*, 28 Tex. 849.

In *McCready v. Virginia*, 94 U. S. 891 [24 L. ed. 248], it is said in the opinion that "the precise question to be determined is whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State, where the tide ebbs and flows, when its own citizens have that privilege. The principle has long been settled in this court that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. *Pollard v. Hagan*, 44 U. S. 8 How. 212 [11 L. ed. 565]; *Smith v. Maryland*, 59 U. S. 18 How. 74 [15 L. ed. 270]; *Mumford v. Wardwell*, 78 U. S. 6 Wall. 423-436 [18 L. ed. 756-760]; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 66 [21 L. ed. 802].

"In like manner the States own the tide waters themselves, and the fish in them so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 41 U. S. 16 Pet. 410 [10 L. ed. 1018].

"The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such

grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right in its discretion to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes, not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right and not a mere privilege or immunity of citizenship."

In *Smith v. Maryland*, 59 U. S. 18 How. 74 [15 L. ed. 270], every question was discussed which arises in the case at bar except the question whether the place where the acts of the present defendant were done was within the territory of Massachusetts. In that case the plaintiff in error was a citizen of Pennsylvania, and owner of a sloop licensed to be employed in the coasting trade and fisheries, which was seized by the sheriff of Anne Arundel County in Maryland, while engaged in dredging for oysters in Chesapeake Bay in violation of a statute of Maryland enacted for the purpose of preventing the destruction of oysters in the waters of that State. The questions presented and argued were whether that Statute was repugnant to the provisions of the Constitution of the United States which grant to Congress the power to regulate commerce, or to those which declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, or which declare that the citizens of each State "shall be entitled to all privileges and immunities of citizens in the several States."

Mr. Justice Curtis in delivering the opinion says: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the Declaration of Independence. *Pollard v. Hagan*, 44 U. S. 8 How. 212 [11 L. ed. 565]; *Martin v. Waddell*, 41 U. S. 16 Pet. 387 [10 L. ed. 997]; *Den v. Jersey Co.* 56 U. S. 15 How. 426 [14 L. ed. 757]. But this soil is held by the State not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish."

He also says that the Statute of Maryland does "not touch the subject of the common liberty of taking oysters save for the purpose of guarding it from injury to whomsoever it may belong and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland or may lawfully be enjoyed in common by all citizens of the United States, whether this public use may be restricted by the State to its own citizens, or a part of them, or by force of the Constitution of the United States must remain common to all citizens

of the United States; whether the national government by a treaty or Act of Congress can grant to foreigners the right to participate therein, or what in general are the limits of the trust upon which the State holds this soil or its power to define and control that trust,—are matters wholly without the scope of this case and upon which we give no opinion."

Upon the question of the admiralty jurisdiction, he says: "But we considered it to have been settled by this court in *United States v. Bevens*, 16 U. S. 8 Wheat. 336 [4 L. ed. 404], that this clause in the Constitution did not affect the jurisdiction nor the legislative power of the States over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution."

He also held that it was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, and that the enrollment and license of the vessel conferred upon the plaintiff in error no right to violate the Statute of Maryland. It is said in the opinion that "no question was made in the court below whether the place in question be within the territory of the State. The law is in terms limited to the waters of the State." The question, therefore, did not arise "whether a voyage of a vessel licensed and enrolled for the coasting trade had been interrupted by force of a law of a State while on the high seas and out of the territorial jurisdiction of such State." The dimensions of Chesapeake Bay do not appear in the report of the case, but it has been said that this bay is "twelve miles across at the ocean." 1 Bishop, Crim. Law, § 75. It is a bay considerably larger than Buzzard's Bay, and is not wholly within the State of Maryland, although at the point where Anne Arundel County bounds upon it it is wholly in that State. *Hancy v. Compton*, 36 N. J. L. 507; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Weston v. Sampson*, 8 Cush. 371; *Mahler v. Norwich & N. Y. Transp. Co.* 35 N. Y. 352; *United States v. Smiley*, 6 Sawy. C. C. 640. The argument from the grant of judicial power to the United States in all cases of admiralty and maritime jurisdiction proceeds upon the theory that the jurisdiction thus granted is the jurisdiction as to subject matter and place which courts of admiralty exercised in England when the Constitution was adopted, and that this is an exclusive jurisdiction, civil and criminal, which is fixed and cannot be changed by legislation. But in civil causes the jurisdiction both as to subject matter and place is not exactly that of England at any time, and this jurisdiction can, within certain limits, be changed by Congress, and under the existing laws personal suits on maritime contracts or for maritime torts can be maintained in the state courts, and the

courts of the United States, merely by virtue of this grant of judicial power, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States. *Butler v. Boston & S. S. Co.* 180 U. S. 527 [33 L. ed. 1017]; *The Belfast*, 74 U. S. 7 Wall. 624 [19 L. ed. 266]; *The Eagle*, 75 U. S. 8 Wall. 157 [19 L. ed. 865]; *Leon v. Galceran*, 78 U. S. 11 Wall. 185 [20 L. ed. 74]; *American Steamboat Co. v. Chace*, 83 U. S. 16 Wall. 522 [21 L. ed. 869], 9 R. I. 419; *Schoonmaker v. Gilmore*, 102 U. S. 118 [36 L. ed. 95]; *New England Marine Ins. Co. v. Dunham*, 78 U. S. 11 Wall. 1 [20 L. ed. 90]; *Ex parte Byers*, 82 Fed. Rep. 404.

In each of the cases of the *United States v. Bevans*, 16 U. S. 8 Wheat. 386 [4 L. ed. 404], and of *Com. v. Peters*, 12 Met. 387, the place where the offense was committed was in Boston Harbor, and it was held to be within the jurisdiction of Massachusetts according to the meaning of the Statutes of the United States which punished certain offenses committed upon the high seas or in any river, haven, basin or bay "out of the jurisdiction of any particular State."

The test applied in *Com. v. Peters*, decided in the year 1847, was that the place was within a bay "not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side," and was therefore within the body of a county.

In *United States v. Bevans*, Marshall, *Op. J.*, said: "The jurisdiction of a State is co-extensive with its territory, co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts unless that jurisdiction has been ceded to the United States."

There are no statutes of the United States which, as we construe them, purport to regulate the menhaden fisheries on the coast or within the bays of Massachusetts. The rights granted to British subjects by the Treaties of June 5, 1854, and May 8, 1871, to take fish upon the shores of the United States, had expired before the Statute of Massachusetts was passed, which the defendant is charged with violating. If the place where the offense charged in this case was committed is within the general jurisdiction of Massachusetts, then, according to the principles declared in *Smith v. Maryland*, the Statute in question is not repugnant to the Constitution and laws of the United States. The contention is that the jurisdiction of a State, as between it and the United States, must be confined to the body of counties, and that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States, and that by this usage counties were bounded by the margin of the open sea, and that as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. We are unable to find any 9 L. R. A.

indication anywhere that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation, and, except so far as any right of control over this territory has been granted to the United States, the control remains with the State.

In *United States v. Bevans*, Marshall, *Op. J.*, in the opinion asks the following questions: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?" "As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water where the tide flows and fight a duel are they not within the jurisdiction and punishable by the laws of Massachusetts?"

It is a startling proposition that all persons who step into tide water on the open coast of Massachusetts are while they remain there wholly beyond the jurisdiction of the State. The Statutes of the United States define and punish but few offenses on the high seas, and unless other offenses when committed in the sea near the coast can be punished by the States, there is a large immunity from punishment for acts which ought to be punishable as criminal. There are reasons, perhaps, why the States should not exercise in all respects the same authority over the open sea near the shore as over bays within their limits, and Congress or the courts of the United States might refuse to recognize the right of a State by statute to extend its territorial limits beyond what is generally recognized as the territorial limits of States by the law of nations. Within these limits we think a State can define its boundaries on the sea and the boundaries of its counties, and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties. The Statutes of Massachusetts in regard to bays at least make definite boundaries which before the passage of the Statutes were somewhat indefinite; and if it were necessary so to consider the Statutes they might well be taken to be a definition of the distance which a person can see, although the origin and history of the Statutes has no connection with the English law concerning the boundaries of counties.

It is to be noticed that Rhode Island and some other States have passed similar Statutes defining their boundaries. R. I. Pub. Stat. 1882, chap. 1, §§ 1, 2; chap. 3, § 6; Gould, Waters, § 16, and *note*.

The waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited (*Com. v. King*, 150 Mass. 221, 5 L. R. A. 586); but we have no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or Acts of Congress which seem to us to relate to the menhaden fisheries within such a bay. The Statute of Massachusetts which the defendant

is charged with violating is in terms confined to waters "within the jurisdiction of this Commonwealth," and it was passed, we think, for the preservation of the fish; and it makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the Statute may well be considered as an impartial and reasonable regulation of this liberty, and the subject is one which a State may well be permitted to regulate within its territory in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit, and we are of opinion that the Statute is not repugnant to the Constitution and the laws of the United States.

We see no error in the rulings at the trial, and there must be *judgment on the verdict*.

Charles A. WELCH *et al.*, Exrs., *et c.*, of
Isaac Adams, Deceased,

Julius ADAMS *et al.*

(...Mass....)

1. Executors acting under ancillary letters of administration granted by a

NOTE.—Foreign letters of administration.

The general rule is that letters testamentary or of administration have no extraterritorial force. *Corrigan v. Jones* (Colo.) March 28, 1890; *MacKay v. St. Mary's Church*, 1 New Eng. Rep. 143, 15 R. L. 121; *Re Traznier*, 2 Redf. 172; *Smith v. Webb*, 1 Barb. 280; *Robinson v. Crandall*, 9 Wend. 425.

When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary. *Corrigan v. Jones* (Colo.) March 28, 1890.

The rule in New York is that an executor or administrator appointed in another State has not, as such, any authority outside of the State appointing him. *Miller v. Knapp*, 39 Fed. Rep. 592; *Ulster County Sav. Inst. v. New York Fourth Nat. Bank*, 24 Hun. 140.

An administratrix, appointed in Colorado, of an intestate dying there, whose domicile was in Illinois, where his son also took out letters of administration, has no title upon which she can maintain suit in Kansas upon notes and mortgages against parties domiciled there, where the mortgaged lands also are situated, and where no letters have been issued, although such notes and mortgages were in intestate's possession at his death, and have come into her possession, and have not been in the possession of the administrator in Illinois. *Moore v. Jordan*, 36 Kan. 271.

Record of foreign probate, force and effect of. See note to *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 79; *Gara v. Austin*, *ante*, 218.

Power and authority of foreign executors and administrators.

The powers of an executor are derived from the will, and he can do no valid act beyond his authority. L. R. A.

court in whose jurisdiction personal property of the testator was found are, in dealing with such property, accountable to that court, and without its order a transfer by them of the proceeds thereof for administration to the jurisdiction in which they were originally appointed would be irregular, even if they had paid all debts due where the property was found.

2. That a testator was domiciled in another State, and that his will was originally proved there, is no valid objection to the giving of instructions, by a court which has granted ancillary administration, and which has statutory discretion to distribute funds found within its jurisdiction, as to the payment of certain legacies out of personal property which was within its jurisdiction at the time of testator's death and has since continued to be so, where such property is ample to pay all debts and legacies and all parties interested are before the court.

3. The date from which a legacy carries interest is to be determined by the law of testator's domicile.

4. Where a widow has power to accept or reject the provisions made for her by will in lieu of dower, in case she accepts she can take only what the will gives and in the mode in which it is given. In such case if the will fixes some date other than that of the death of the testator as the one from which interest will begin to run, the rule which regards the widow as a purchaser for value entitled to interest from testator's death will be disregarded.

5. Where a pecuniary legacy is given to a widow in lieu of dower, together with certain productive real estate, to the considerable income of which she is at once entitled, the legacy will not draw interest until after the expiration of the time usually allowed after the death of

ity. This extends to real property only by express provision of the will. *Brush v. Ware*, 40 U. S. 15 Pet. 93, 10 L. ed. 672.

The interest of an executor in his testator's estate is what the testator gives him; that of an administrator, what the law gives. *Hill v. Tucker*, 54 U. S. 18 How. 458, 14 L. ed. 228; *Goodall v. Tucker*, 54 U. S. 18 How. 469, 14 L. ed. 237.

The relation between executors and their testators in Louisiana is the same as at common law. *Ibid.*

An executor or administrator, under letters granted at the domicile of the deceased, may receive and discharge a debt voluntarily paid to him in another jurisdiction, may transfer negotiable choses in action so as to enable the transferee to sue in his own name in the courts of another State, may receive dividends on, and sell and transfer, stock in a corporation of another State. These acts he may do for the reason that letters granted at the domicile of the deceased by operation of law vest in the executor or administrator the entire personal estate, wherever situate; and the title so derived will be recognized, by comity, by the courts of another State, unless creditors residing in the latter State have previously intervened and taken out letters for their protection. *Re Cape May & D. B. Nav. Co.* 51 N. J. L. 78.

An executor, although incompetent to act as such beyond the jurisdiction in which he is appointed, if he be the donee of a power of sale contained in the will, may execute that power beyond the jurisdiction. *Woolworth v. Root*, 40 Fed. Rep. 723.

So he may lawfully, under that administration, receive a debt voluntarily paid in any other State. *United States v. Cox*, 59 U. S. 18 How. 100, 15 L. ed. 229; *Wilkins v. Ellett*, 108 U. S. 254, 27 L. ed. 718.

A payment at his residence, by a foreign debtor,

the testator for the collection of assets; especially where no time for its payment is specified further than that it is to be paid "as soon as convenient" after testator's decease.

6. If a will is silent as to the time when a legacy is to be paid, the legatee, in case he stands in the position of a purchaser for value, is entitled to have the time of payment determined by the legal presumption of the testator's intent.

7. Executors and administrators may ask the instruction of a court of equity as to their duties under a will and as to the effect of acts already done, unless the matter is one which can be more appropriately dealt with in the probate court; equity may also in its discretion give instructions as to future accounts of which the probate court has no jurisdiction, although the latter court could pass upon them after their rendition and application for a final settlement.

8. A legatee is not bound to recognize any tender of his legacy made by executors out of funds collected by them from the testator's personal property which was situated in the jurisdiction where the tender was made, if they had then received no letters testamentary, and were simply authorized to take care of and preserve the property, which they had never been directed to transfer to themselves as executors under their foreign letters; and the fact that they subsequently received letters in the jurisdiction where the property was situated will have no effect upon the rights of the parties as fixed by the refusal of such tender.

9. A legatee is not bound, in the absence of an order of court, to accept payment of his legacy in installments at the discretion or convenience of the executor.

10. A deposit by executors for a legatee of a sum which does not equal the amount of the legacy and interest then due, and which the legatee refuses to accept as a partial payment, will not stop interest on the legacy or any part thereof.

11. A legatee's claim to interest is not defeated by the fact that he has caused delay by unjustifiable legal proceedings, embarrassing the executors in the settlement of the estate.

12. Interest on a legacy should be computed at the legal rate notwithstanding the fact that the funds could not be safely invested by the executors so as to earn that amount.

(June 23, 1890.)

RESERVATION from the Supreme Judicial Court for Suffolk County (Knowlton, J.) for the consideration of the full court, of a suit brought by the executors of the will of Isaac Adams, deceased, praying the instruction of the court as to their duties respecting certain pecuniary legacies given thereby.

The facts are fully stated in the opinion.

Mr. Charles A. Welch, for plaintiffs:

The jurisdiction of this court is not affected by the circumstance that the testator was domiciled in New Hampshire.

Stevens v. Gaylord, 11 Mass. 256, 264; *Harvey v. Richards*, 1 Mason, 381; *Enoch v. Wylie*, 10 H. L. Cas. 1; *Ewing v. Orr Ewing*, L. R. 9 App. Cas. 84, 89; *Ewing v. Orr Ewing*, L. R. 10 App. Cas. 453, 502; 1 Story, Eq. Jur. § 589; *Heydock's App.* 7 N. H. 496, 503; *Burbank v. Whitney*, 24 Pick. 148, 154; *Fellows v. Miner*, 119 Mass. 541, 545.

to an administrator appointed at the domicile of the intestate, is good as against an ancillary administrator appointed at the debtor's residence. *Wilkins v. Ellett*, 78 U. S. 9 Wall. 740, 19 L. ed. 532.

An administratrix who recovers judgment on a debt due to the estate may sue on such judgment outside the State, as the right of action thereon belongs to her as an individual. *Newberry v. Robinson*, 36 Fed. Rep. 841; *Lewis v. Adams*, 70 Cal. 403.

In the absence of ancillary administration or statutory prohibition, a foreign administrator has authority to sell decedent's stock in a resident corporation; and the corporation may voluntarily consent by accepting the outstanding certificate, and issuing a new one to the purchaser. *Luce v. Manchester & L. R. Co.* 2 New Eng. Rep. 263, 63 N. H. 223.

Gen. Laws, chap. 201, § 16, does not take away or abridge this authority, but enables foreign executors and administrators to compel unwilling bailees and corporations holding property of the deceased in this State to recognize their title without the expense and inconvenience of administration here. *Ibid.*

Foreign executors who, by virtue of their appointment, have become owners of a judgment, and have made a contract to assign it, may be sued on such contract outside of the State of their appointment. *Johnston v. Wallis*, 2 L. R. A. 623, 112 N. Y. 230.

The general rule that foreign executors and administrators can be sued only in the State where they are appointed is confined, at least in the State of New York, to claims and liabilities resting wholly upon their representative character. *Ibid.*

Where defendants, appointed the executors in New Jersey, entered into an agreement to sell a judgment recovered in New York, and, the price to be paid having, pursuant to the agreement, been

fixed by arbitrators, refused to assign the judgment, the contract having been made by themselves and not by their testator,—the fact that they were foreign executors constituted no defense to an action for specific performance. *Johnston v. Wallis*, 41 Hun. 420.

Under Gen. Stat. 1878, chap. 53, § 16, a foreign administrator may be admitted to defend an action pending against his intestate. *Brown v. Brown*, 85 Minn. 191.

Authority of foreign executor or administrator. See note to *Schluter v. Bowery Sav. Bank* (N. Y.) 5 L. R. A. 541.

Incapacity of foreign executor or administrator.

A foreign executor cannot maintain an action here by virtue of his appointment abroad. *Metcalf v. Clark*, 41 Barb. 43. See *Smith v. Webb*, 1 Barb. 230; *Slatyer v. Carroll*, 2 Sandf. Ch. 573, 7 N. Y. Ch. L. ed. 708; *McNamara v. Dwyer*, 7 Paige, 230, 4 N. Y. Ch. L. ed. 139; *Vermilya v. Beatty*, 6 Barb. 431.

Nor can he be substituted in the place of the deceased in an action therein, pending against him at the time of his death. The rule is otherwise where the executor has brought assets of the estate into this State. *Re Webb*, 11 Hun. 123; *Lyman v. Parson*, 28 Barb. 372; *Metcalf v. Clark*, 41 Barb. 43; *Pugh v. Jones*, 6 Leigh, 299, 310; *Smith v. Webb*, 1 Barb. 230.

Foreign administrators are not liable to be sued in their representative character in the courts of this State. *Durie v. Blauvelt*, 4 Cent. Rep. 533, 49 N. J. L. 114.

The statutes of Florida do not clothe a foreign executor with authority to defend a suit in its courts; nor can such authority be given by consent of parties that he shall become a party defendant to a suit pending. *Sloan v. Sloan*, 21 Fla. 539.

Jurisdiction would not be exercised, when the

The plaintiffs, as executors, are entitled to maintain their bill to obtain the direction of the court in the execution of their trust, notwithstanding it may be necessary, in giving such directions, to determine the effect of acts that have been done since the testator's death.

Dimmock v. Birby, 20 Pick. 868, 874; *Lewin*, Tr. 5th ed. 288, 8th ed. 351; 2 Story, Eq. Jur. § 961; *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 898, 401; *Treadwell v. Cordis*, 5 Gray, 841, 848; 1 Story, Eq. Jur. § 532; *Crocker v. Dillon*, 138 Mass. 91, 98, 102; *Putnam v. Collamore*, 109 Mass. 509; *Daland v. Williams*, 101 Mass. 571; *Hutcheson v. Hammond*, 3 Bro. Ch. 128, 145, 148; *Thomas v. Montgomery*, 1 Russ. & M. 729.

Messrs. Gaston & Whitney and F. E. Snow, for Julius Adams:

Where legacies are paid at the place of ancillary administration, the law of that place is to determine the rate of interest, and whether or not interest is to be paid at all.

Malcolm v. Martin, 3 Bro. Ch. 50; *Bourke v. Bicketts*, 10 Ves. Jr. 880; *Hamilton v. Dallas*, 88 L. T. N. S. 215.

The Massachusetts rule is, that a legacy to a widow in lieu of dower bears interest from the death of the testator.

Pollard v. Pollard, 1 Allen, 490; *Lamb v. Lamb*, 11 Pick. 871; *Toule v. Swasey*, 106 Mass. 100.

If a legacy be given to a creditor in satisfaction of a debt, such legacy bears interest from the death of the testator, and a legacy to a widow in lieu of dower stands precisely the same, and for the same reason carries interest from the same time.

Williamson v. Williamson, 6 Paige, 298, 3 N.

foreign administrator has fully discharged his functions in the country where he was appointed, and has no effects for which he would there be held accountable. *Ordronaux v. Helle*, 3 Sandf. Ch. 518, 7 N. Y. Ch. L. ed. 941.

Where a person domiciled in England died, leaving property both in England and Pennsylvania, and the executor took out letters testamentary in both countries, in a suit in England against the executor by the administrator of a deceased claimant, the parties were restricted to the limits of the country to which their letters extended. Under his English letters the executor could do no act as executor beyond England, nor could he voluntarily transfer the Pennsylvania assets to the foreign jurisdiction to be distributed there. *Aspden v. Nixon*, 45 U. S. 4 How. 487, 11 L. ed. 1069.

Incapacities of foreign executors and administrators. See notes to *Schluter v. Bowery Sav. Bank* (N. Y.) 5 L. R. A. 586; *Johnston v. Wallis* (N. Y.) 2 L. R. A. 823; *Gara v. Austin*, ante, 218.

Exceptions to rule.

Actions in equity have been entertained against foreign executors who have brought or had in this State property of the testator, to prevent its waste and secure its application to the payment of the debts of the testator. This has been allowed to prevent a total failure of justice. *McNamara v. Dwyer*, 7 Paige, 280, 4 N. Y. Ch. L. ed. 189; *Fild v. Gibson*, 20 Hun, 278, 56 How. Pr. 238; *Lockwood v. Brantly*, 31 Hun, 157.

When the intestate was domiciled in the State where such remedy is sought, and the assets and the person of the foreign administrator are there present, and the distributees are resident thereof, unless the remedy can be there obtained, it may be impossible to obtain it anywhere. *Cureton v.* 9 L. R. A.

Y. Ch. L. ed. 994; *Hopburn v. Hopburn*, 2 Bradf. 74; *Parkinson v. Parkinson*, 2 Bradf. 77; *Seymour v. Butler*, 3 Bradf. 193; *Re Combs*, 3 Dem. 848; *Lynch v. Mahoney*, 2 Redf. 484; *Clark v. Sewell*, 3 Atk. 99.

If the law of New Hampshire be deemed to govern the present case, interest in like manner runs from the death. Upon questions of this kind the foreign law will be presumed to be the same as the domestic, unless the contrary be proved.

Wharton, Internat. Law, §§ 596, 779; *Chase v. Alliance Ins. Co.* 9 Allen, 811; *Dubois v. Mason*, 127 Mass. 87.

Interest upon legacies is not affected by the pendency of long litigation which prevents the payment of the legacies.

Kent v. Dunham, 106 Mass. 586; *Ogden v. Patten*, 149 Mass. 82.

Plaintiffs had no right to offer payment of the legacies on August 8, 1887, because they had no right to make payment at that time, they being only special administrators, and the will never having been allowed in Massachusetts.

Bennett v. Woodman, 116 Mass. 518, 520.

Foreign executors have no right to act here, or to administer an estate here until they have been duly appointed in Massachusetts.

Campbell v. Sheldon, 18 Pick. 8; Pub. Stat. chap. 127, § 7.

The plaintiffs had no right to insist that the defendant should take the principal of the legacies without interest, and any offer to pay such principal sums, without interest, was wholly ineffectual.

City Bank v. Outter, 3 Pick. 414; *Dixon v.*

Mills, 18 S. C. 406, 36 Am. Rep. 711; *Jackson v. Johnson*, 34 Ga. 518.

If a foreign executor is liable to be sued here, he must, from the very nature of the case, *prima facie*, be responsible for the assets which are shown to have been in his possession within this State, no matter where they may have been received. *Gulick v. Gulick*, 21 How. Pr. 28, 38 Barb. 102.

One of the next of kin has the right to call a foreign administrator to account in this State for assets brought here by him without the appointment of an administrator here. But only in case of peculiar and pressing circumstances, and the necessity of administration in order to institute proceedings in equity, and not to the denial of the jurisdiction of the surrogate to grant administration. *Kohler v. Knapp*, 1 Bradf. 244; *Lawrence v. Lawrence*, 3 Barb. Ch. 71, 5 N. Y. Ch. L. ed. 821.

Ancillary letters of administration.

When a will has been admitted to probate in a foreign jurisdiction, and letters testamentary granted to the executor therein named, letters testamentary may be granted to him in Alabama, on his filing a certified transcript of the foreign probate and grant, with a copy of the will (Code, § 2880); and if the will relieves him of giving bond, no bond is necessary in either jurisdiction. *Leatherwood v. Sullivan*, 51 Ala. 458.

Ancillary administration in Texas granted in 1849 is not void from lapse of time where the intestate died in 1837. *McKee v. Simpson*, 36 Fed. Rep. 248.

Upon a judgment rendered by the courts of one State against an administrator appointed in that State, an action will not lie against an administrator appointed in another State. The record of the allowance of a claim against an administrator in

Parkes, 1 Esp. 110; *Boué v. Cottle*, 148 Mass. 310; *King v. Phillips*, 95 N. C. 247.

The rate of interest upon legacies in this Commonwealth is six per cent per annum.

Pub. Stat. chap. 77, § 8.

The interest upon legacies does not depend upon the amount earned, but is the legal rate.

Wheeler v. Ruthven, 2 Redf. 491, 496; *Wheeler v. Breen*, 38 Miss. 126; *Sitwell v. Bernard*, 6 Ves. Jr. 520, 543; *Ogden v. Patten*, *supra*.

Meers. M. Storey and J. L. Thorndike, for the residuary legatees:

Interest is payable upon pecuniary legacies from the time when by the terms of the will or by the rules of law they become due and ought to be paid.

Kent v. Dunham, 106 Mass. 590.

When the will does not specify the time of payment, the end of a year from the testator's death has been adopted by the courts for the general convenience as the time when the legacy shall become payable.

2 Wms. Executors, 8th ed. 1430; *Benson v. Maude*, 6 Madd. 15; *Sitwell v. Bernard*, 6 Ves. Jr. 539; *Webster v. Hale*, 8 Ves. Jr. 410, 415; *Wood v. Penoyre*, 18 Ves. Jr. 838; *Rotch v. Emerson*, 105 Mass. 434, 435; *Loring v. Woodward*, 41 N. H. 393.

The right to interest in case of a legacy to a widow, as in all other cases, depends upon the intention of the testator, either expressed in his will or, in the absence of such expression, presumed by law.

Orton v. Orton, 3 Abb. App. Dec. 411, 415. See *Benson v. Maude*, 6 Madd. 15.

It is not necessary that the provision for her

during the first year should be expressed to be for her support.

Williamson v. Williamson, 6 Paige, 298, 305, 3 N. Y. Ch. L. ed. 994, 998.

The exception, by which interest is given from the death, is properly confined to legacies in favor of infants, and does not extend to a legacy to an adult, even if such adult be the wife of the testator.

2 Wms. Executors, 8th ed. 1481; 2 Roper, Legacies, 1272; *Stent v. Robinson*, 12 Ves. Jr. 461; *Lowndes v. Lowndes*, 15 Ves. Jr. 801; *Spangler's Estate*, 9 Watts & S. 135, 141; *Gill's App.* 2 Pa. 321; *Raven v. Waite*, 1 Swanst. 553, 558; *Sullivan v. Winthrop*, 1 Sumn. 15.

The question ought to be determined by the law of New Hampshire, the testator's domicile, for it is a question of what he intended by his will.

Story, Conf. L. § 479 a, b, c; *Sevall v. Wilmer*, 133 Mass. 181, 196.

In New Hampshire the case of a minor child is the only exception to the rule that a pecuniary legacy is payable at the end of the year without interest, where no time of payment is specified.

Loring v. Woodward, 41 N. H. 391; *Bourke v. Ricketts*, 10 Ves. Jr. 830; *Malcolm v. Martin*, 3 Bro. Ch. 50; *Hamilton v. Dallas*, 38 L. T. N. S. 215.

It is according to the usual practice in the administration of estates for executors to make partial distributions of the estate from time to time among the legatees, and for the courts to order such partial distributions as justice and convenience may require.

Pennsylvania is not admissible in an action to establish the same claim against an auxiliary administrator in this State. *Creswell v. Slack*, 68 Iowa, 110.

Tribunals of the State where decedent was domiciled may decree a disposal of assets in the hands of a subsidiary administrator in any State, and such a decree is conclusive upon the parties thereto in an accounting by the administrator in his own State. *Peterson v. Chemical Bank*, 2 Robt. 608, 27 How. Pr. 501; *Churchill v. Prescott*, 3 Bradf. 238; *Suarez v. New York*, 2 Sandf. Ch. 173, 7 N. Y. Ch. L. ed. 554.

Distribution is regulated by law of domicile of decedent. *Hutton v. Hutton*, 2 Cent. Rep. 216, 40 N. J. Eq. 416.

It is to be made by officers appointed by that law, to whom such subsidiary collectors may be compelled to account. *Peterson v. Chemical Bank*, 27 How. Pr. 501; *Ordonaux v. Helie*, 3 Sandf. Ch. 512, 7 N. Y. Ch. L. ed. 993. See *note to Gara v. Austin*, *ante*, 218.

Any excess in the hands of an auxiliary administrator over the demands on the administration in that State is properly payable to the domiciliary administrator. *Hall v. Pegram*, 35 Ala. 522.

But an estate will not be remitted to the administrator of the domicile, when there are claimants within the jurisdiction of the ancillary administration. *Del Valle's App. (Pa.)* 3 Cent. Rep. 168.

The effects of an intestate in the hands of an administrator are to be distributed among his creditors according to the laws of the State of the administration, not according to the laws of the intestate's domicile. *Smith v. Union Bank of Georgetown*, 30 U. S. 5 Pet. 518, 3 L. ed. 212.

For the purpose of founding administration, a simple contract debt is assets where the debtor resides, although a bill of exchange or promissory

note has been given for it, and without regard to the place where the bill or note is found or payable. *Wyman v. United States*, 100 U. S. 354, 27 L. ed. 1003. See *note to Schluter v. Bowery Sav. Bank (N. Y.)* 5 L. R. A. 541.

Payment of legacies.

The Statute prohibits the payment of legacies until a year after the granting of letters testamentary. *Thorn v. Garner*, 113 N. Y. 202.

It is the executor's duty to discharge a specific legacy after expiration of one year from granting of letters. *Davis v. Crandall*, 2 Cent. Rep. 146, 101 N. Y. 311.

Where the legatee is a minor the legacy can only be discharged by delivery to his guardian. Where he has no guardian it is the executor's duty to procure appointment of a guardian and deliver such legacy to him. That the relatives of the infant do not procure the appointment of a guardian is no excuse to executor. *Ibid*.

Bequests by codicil stand on the same footing in regard to payment as bequests by will. *Pond v. Allen*, 1 New Eng. Rep. 879, 15 R. I. 171.

When the will devises the whole estate to one for life and the codicil provides legacies to others, the codicil changes the will to that extent, and the legacies are payable in the usual time, and are not subject to the life estate. *Beardsley v. Bridgeport*, 1 New Eng. Rep. 630, 63 Conn. 430.

Where payment of pecuniary legacies was deferred until the widow's death, the payment of a legacy for charitable purposes subsequently given by a codicil, with no limitation as to the time of payment, will also be postponed until the widow's death. *Wetter's App. (Pa.)* 10 Cent. Rep. 844.

"An income in cash of \$1,200 a year during life," to the widow, is payable annually. *Anthony v. Anthony*, 5 New Eng. Rep. 41, 55 Conn. 264.

1 Roper, Legacies, 876, 982; *Thomas v. Montgomery*, 1 Russ. & M. 729.

Executors are justified in acting without the intervention of the court what the court would have authorized or directed.

Hutcheson v. Hammond, 8 Bro. Ch. 128, 145, 148. See *Sullivan v. Winthrop*, 1 Sumn. 1, 18, 19; *Re Tann*, L. R. 7 Eq. 486.

It would be a great hardship both to the pecuniary legatees and to the residuary legatees if such partial distributions could not be made, where the final settlement of an estate is delayed.

Thomas v. Montgomery, 1 Russ. & M. 729.

It is the due appropriation of the legacy out of the general estate that discharges the rest of the estate from liability. The executors may, without the intervention of the court, make any appropriation that the court would have authorized.

Hutcheson v. Hammond, 8 Bro. Ch. 128, 145, 148; *Ex parte Champion*, cited in 8 Bro. Ch. 147; *Lewin*, Tr. 8th ed. 860, note; *Lyon v. Magagnos*, 7 Gratt. 877.

Executors derive their title and authority entirely from the will, and not from the probate court. Their acts before probate are always valid, provided that probate is obtained before it is required as evidence of their title and authority.

Smith v. Northampton Bank, 4 Cush. 1, 12; *Hatch v. Proctor*, 102 Mass. 851, 853; 1 Wms. Executors, 8th ed. 807, 813.

Interest upon legacies is allowed only as a convenient means of giving the legatee his share of the income that the estate may rea-

sonably be expected to produce from the time when the estate ought generally to be reduced to possession.

2 Wms. Executors, 8th ed. 1438; *Ogden v. Patten*, 149 Mass. 82; *Mayne*, Damages, 8d ed. 189, 4th ed. 158; *Beckford v. Tobin*, 1 Ves. Sr. 808, 811; *Gustam v. Holland*, 2 Atk. 843; *Wood v. Briant*, 2 Atk. 528; *Sitwell v. Bernard*, 6 Ves. Jr. 520, 539, 544; *Williamson v. Williamson*, 6 Paige, 306, 307, 3 N. Y. Ch. L. ed. 998; *Healey v. Toppan*, 45 N. H. 243, 267.

Devens, J., delivered the opinion of the court:

The plaintiffs, who bring this bill for instructions, are the executors of the will of Isaac Adams, which is dated the 18th of May, 1879. Mr. Adams had his legal domicile in the State of New Hampshire and died on July 19, 1888. His will having been admitted to probate in New Hampshire the present plaintiffs have there received letters testamentary under which they have duly qualified, the decree of the appropriate probate court having been finally affirmed by the Supreme Court of that State on August 6, 1885. On March 7, 1887, upon the petition of the plaintiffs, after due notice, it was ordered by a decree of the Probate Court for the County of Suffolk, that a copy of the said will and the probate thereof in New Hampshire, duly authenticated and presented to that court, should be filed and recorded, and letters testamentary be granted to the plaintiffs. Pub. Stat. chap. 127, §§ 15-17.

From this decree an appeal having been taken, it was affirmed on the 5th of October,

On a bequest of a certain sum to testator's daughter, with direction to pay a certain part thereof to her son on attaining majority, the whole sum should be paid to the daughter. *Re Denton*, 3 Cent. Rep. 43, 102 N. Y. 200.

A clause bequeathing a certain portion of testator's share in his father's estate to his brother is specific and calls for payment only to the extent which testator's share in his father's estate would permit; and to the extent of the deficiency in that fund the legacy must fail. *Gelbach v. Shively*, 9 Cent. Rep. 61, 67 Md. 498.

A sum given without reference to any particular fund for payment is a demonstrative legacy. *Ibid.*

By the terms of the will such legacies must be paid in full. *Bradford v. Brinley*, 4 New Eng. Rep. 860, 145 Mass. 81.

Where a general legacy is sustained by a valuable consideration, the legatee is entitled to full payment in preference to other general legatees who take merely of the testator's bounty. *Duncan v. Franklin Twp.* 9 Cent. Rep. 124, 43 N. J. Eq. 143.

Pecuniary legacies may sue for legacy, within three years from grant of letters, without giving refunding bond. Pub. Stat., chap. 187, applies to distributees. *Steere v. Wood*, 1 New Eng. Rep. 804, 15 R. I. 199.

The ordinary practice is to wait until the claims against an estate have been settled and a clear fund ascertained, before enforcing the payment of legacies. *Re Spencer*, 5 New Eng. Rep. 529, 16 R. I. —.

An executor who is also a residuary legatee may, in good faith and without concealment or the exercise of undue influence, pay the face of a legacy, taking an assignment and release under seal from the legatee for the benefit of the estate. *Lovett v. Morey* (N. H.) July 25, 1890.

When there is an original deficiency of assets, relief in equity will be given to an unpaid legatee. 9 L. R. A.

against the other legatees paid in full. See *Orr v. Kaines*, 2 Ves. Sr. 194; *Moore v. Moore*, Id. 593, 600; *Noel v. Robinson*, 1 Vern. 90, 94; *Edwards v. Freeman*, 3 P. Wms. 435, 447; *Walcott v. Hall*, 3 Bro. Ch. 805; 2 Pom. Eq. Jur. 226.

Interest on legacy.

Interest on a pecuniary legacy follows as an accretion. *Kent v. Dunham*, 106 Mass. 586; *Ogden v. Patten*, 149 Mass. 84.

Interest is recoverable in general, from the time such a legacy becomes payable, and not sooner; which means, usually, after the expiration of the year of testator's death. *Wood v. Penoyre*, 13 Ves. Jr. 838; *Crain v. Barnes*, 1 Md. Ch. 151; *Miller v. Congdon*, 14 Gray, 114; *King's Estate*, 11 Phila. 26; *State v. Crossley*, 60 Ind. 208; *Wms. Exrs.* 1424; *Tichenor v. Tichenor*, 41 N. J. Eq. 80; *Springer's App.* 2 Cent. Rep. 225, 111 Pa. 228; *Moore v. Davidson*, 23 S. C. 62; *Cook v. Lanning*, 40 N. J. Eq. 899.

It is allowed on the legacy from the expiration of a year after testator's death. *Hart v. Williams*, 77 N. C. 426; *Thorn v. Garner*, 113 N. J. 208.

And this is the rule though it is directed to be paid "as soon as possible." *Lawrence v. Embree*, 3 Bradf. 364; *Bartlett v. Slater*, 53 Conn. 102; *Kent v. Dunham*, 106 Mass. 586.

The rule applies where the legacy is decreed to be in satisfaction of a debt. *Way v. Priest*, 3 West. Rep. 109, 87 Mo. 180; *Clark v. Sewell*, 3 Atk. 96; *Shirt v. Westby*, 16 Ves. Jr. 393.

It is payable from that time, and continues until the legacy is paid unless the contrary intention is actually expressed. *Koon's App.* 5 Cent. Rep. 259, 133 Pa. 621.

The fact that the residuary estate out of which a legacy could be paid was in part composed of a trust fund, which did not fall into the residuary estate until twenty-six years after the death of the

1887, by this court, and the plaintiffs, having here received letters testamentary, have qualified and proceeded to act thereunder. All of the testator's personal estate except household effects, farming implements, etc., was in Massachusetts, and on November 26, 1888, by reason of the necessary delay in granting letters testamentary in respect to the testator's personal estate in this Commonwealth, which was large, the plaintiffs had been duly appointed special administrators thereof with authority to take charge of his real estate, and had given bond for the faithful performance of their duties as such.

By their bill the plaintiffs seek instructions as to the payment of two legacies, or rather of the interest claimed to be due thereon, which were given by the will respectively to Julius Adams, a son of the testator, and to Mrs. Anna R. Adams, his wife. Mrs. Adams having deceased since the death of the testator, Julius Adams has been appointed her administrator with her will annexed. It is found that the personal estate in the hands of the executors is more than sufficient after paying all debts and other legacies to pay all sums which are claimed on account of these legacies.

Under Pub. Stat., chap. 127, § 84, and chap. 156, §§ 5, 6, the supreme judicial court and the probate court have concurrent jurisdiction of a petition by the executor for instructions as to the construction of a will, and from the decree of the probate court any party aggrieved may appeal to this court. Assuming for the moment that the subjects on which the bill requests instructions present inquiries such as, in ordi-

nary cases where the testator has been domiciled here and original administration has been here granted, could properly be addressed to this court, it is to be considered whether the matter is in any way affected by the fact that the testator was domiciled in New Hampshire and that the original probate of his will was in that State. In dealing with personal property here found, the executors are accountable to the probate court in this Commonwealth, and there is no duty imposed upon them to transfer it or its proceeds to New Hampshire, to be there administered, even after the payment of the debts in this State. On the contrary, it would be irregular so to do unless an order to that effect was made by the probate court.

Pub. Stat., chap. 188, § 1, provides in the case of administration taken in this State on the estate of an inhabitant of any other State or country that "his estate found here shall, after payment of his debts, be disposed of according to his last will if he left any duly executed according to law;" otherwise his real estate is to descend according to the laws of this Commonwealth, and his personal estate to be distributed and disposed of according to the law of the State or country of which he was an inhabitant. Section 2 provides that after payment of the debts in this Commonwealth "the residue of the personal estate may be distributed and disposed of in the manner aforesaid by the probate court; or in the discretion of the court it may be transmitted to the executor or administrator, if any, in the State or country where the deceased had his domicile, to be there dis-

testator, does not prevent the above rule from taking effect. *Ibid.*

Nor will the general rule yield to the impossibility of getting in the estate so as to pay the legacy within the year allowed for that purpose. *Ibid.*

It is obvious, therefore, that the representatives of a party dying before the day at which interest was usually payable would be entitled to interest up to the time of the party's death. *Edwards v. Warwick*, 3 P. Wms. 176; *Hay v. Palmer*, *Id.* 501; *Banner v. Lowe*, 18 Ves. 183; *Wilson v. Harman*, 2 Ves. 8r. 673.

Where there is a dispute as to the amount of interest, acceptance by a legatee of a sum less than the one due on the legacy is accord and satisfaction. *Vermont State Baptist Convention v. Ladd*, 2 New Eng. Rep. 473, 58 Vt. 95.

If an annuity is given, the first payment is payable at the end of the year from the death; but if a legacy is given for life, with a remainder over, no interest is due till the end of two years. *Bartlett v. Slater* (Conn.) 3 New Eng. Rep. 646.

If interest be allowed before that time, without a specific direction in the will, it constitutes an exception to the rule, and is founded generally upon certain facts which the courts have agreed are equivalent to an express direction in the will to pay interest, because from such facts the courts will presume an intention on the part of the testator to have it paid. *Thorn v. Garner*, 118 N. Y. 203; *Bradner v. Faulkner*, 12 N. Y. 473; *Cooke v. Meeker*, 36 N. Y. 18; *Brown v. Knapp*, 79 N. Y. 136.

The burden is upon those who claim it, to show a clear intent that interest should be paid from the time of the death of the testator, notwithstanding his silence on the subject. *Thorn v. Garner*, 118 N. Y. 203; *Bradner v. Faulkner*, 12 N. Y. 473.

Where legacies are given with the intent that they shall immediately vest, although payment is 9 L. R. A.

postponed, the residuary legatee is not entitled to interest on the legacies, accruing before distribution. *Yost's Estate* (Pa.) 36 W. N. C. 120.

Legacies which do not bear interest.

As a general rule a legacy payable at a future day does not bear interest, except from the time it is payable. *Wheeler v. Ruthven*, 2 Redf. 494.

An exception to this general rule is when a legacy is given by a parent to an infant child, who is otherwise unprovided for. *Sullivan v. Winthrop*, 1 Sumn. 14; *Finn v. Finn*, 4 Del. Ch. 48; *Estate of Devlin*, 1 Tuok. 463; *Brown v. Knapp*, 79 N. Y. 143; *Kearney v. Kearney*, 17 N. J. Eq. 68; *Cooke v. Meeker*, 36 N. Y. 18; *Lowndes v. Lowndes*, 15 Ves. Jr. 801; *Hill v. Hill*, 8 Ves. & B. 183; *Lealie v. Lealie*, 1 Lloyd & G. 1; *Magoffin v. Patton*, 4 Rawle, 119; *Harvey v. Harvey*, 1 P. Wms. 128; *Inledon v. Northcote*, 3 Atk. 430; *Jordan v. Clark*, 16 N. J. Eq. 248; *Pierce v. Chamberlain*, 41 How. Pr. 501; *King v. Talbot*, 40 N. Y. 76.

In such cases it has been adopted as a settled rule of construction, from regard to the presumed intention of the testator, that the legacy draws interest from death of the testator. *Brinkerhoff v. Mersella*, 24 N. J. L. 632; *Beckford v. Tobin*, 1 Ves. Sr. 310; *Haughton v. Harrison*, 2 Atk. 323; *Raven v. Waite*, 1 Swanst. 553; *Ellis v. Ellis*, 1 Sch. & Lef. 1.

But if other funds are provided for his maintenance then interest is allowable as in other cases. *Sullivan v. Winthrop*, 1 Sumn. 14; *Mitchell v. Bower*, 3 Ves. Jr. 237; *Orickett v. Dolby*, 3 Ves. Jr. 10; *Lowndes v. Lowndes*, 15 Ves. Jr. 804; *Lambert v. Parker*, Coop. Ch. 143; *Cary v. Askew*, 1 Cox, 244. See *Stent v. Robinson*, 12 Ves. Jr. 461; *Perry v. Whitehead*, 6 Ves. Jr. 544.

Where a testator gave money in trust to his executor, to invest and apply the income "for the support and education" of his granddaughter, until

posed of according to the laws thereof. Sections 8, 4 and 5 provide for the settlement of the estate in this Commonwealth if it is insolvent, and are intended to enable creditors here to obtain an equal share in proportion to their respective debts of the whole property, whether within or without the Commonwealth. This Statute certainly gives the right to the probate court here to dispose of the estate according to the will as originally proved in another State. In leaving it in its discretion to determine whether, after the payment of debts here, the residue of the personal property shall be transmitted to another jurisdiction, the Statute is only declaratory of a general principle often acted on. *Stevens v. Gaylord*, 11 Mass. 256, 264; *Harvey v. Richards*, 1 Mason, 381; *Ewing v. Orr Ewing*, L. R. 9 App. Cas. 84, 89; *Ewing v. Orr Ewing*, 10 App. Cas. 453, 502.

It is said by *Mr. Justice* Story in discussing the question whether a court in which ancillary administration had been granted ought to entertain a decree for final distribution of the assets among the various claimants having equities or rights in the fund, that such court is not incompetent to act upon the matter, and that whether it will do so, or whether it will transmit the property to the forum of the domicile of the deceased, is a matter of judicial discretion dependent on the circumstances of the case. "There can be," he adds, "and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund when such interference will not be productive

of injustice, or inconvenience, or conflicting equities which may call upon such tribunals for abstinence in the exercise of their jurisdiction." Story, Eq. Jur. § 589. If the property had been transmitted to another jurisdiction, this court would not undertake to construe the will or determine how the estate should be distributed, or how interest should be computed on the legacies. *Emery v. Batchelder*, 183 Mass. 452.

But the personal property is here and was so when the testator deceased; it is ample for the payment of the legacies immediately in question, as well as all other legacies or debts, whatever may be the interest thereon. The legatees are also here as well as the residuary legatees, who are the only persons who can be affected by any determination as to these legacies; and no such case is presented as might be if the marshaling and distribution of the whole estate was now to be considered. Under such circumstances, it does not constitute a valid objection to the giving of instructions that the testator was domiciled in another State or that his will was originally proved there.

If it be urged that the probate court may yet in the exercise of its discretion order the personal property transmitted to New Hampshire, and thus that any instructions we might give would become inoperative, it is sufficient to say that it is not to be presumed that it would do so when all the circumstances exist which render the disposition of the property, so far as the legatees are concerned, more appropriate here than elsewhere, and when important rights of opposing parties have here

she attains the age of twenty-one years, then to pay her the principal and accrued interest, the indication was that interest was to be allowed from testator's death. *Nahmens v. Copely*, 2 Dem. 263; *Keating v. Bruns*, 3 Dem. 236.

This exception does not apply to a case in which the father gave to their mother for life the income of all the rest of his property. *Merritt v. Richardson*, 96 Mass. 241; *Heath v. Perry*, 8 Atk. 102; *Dawes v. Swan*, 4 Mass. 215; *Pollard v. Pollard*, 1 Allen, 491.

Nor does it apply to a case where a legacy is to be paid out of the fund arising from the sale of the real estate, which the executors were to make. *Bradford v. McConhibay*, 15 W. Va. 765; *Ballantyne v. Turner*, 6 Jones, Eq. 224; *VanBramer v. Hoffman*, 3 Johns. Cas. 200; *Kerr v. Boeler*, 68 Pa. 183; *Page's App.* 71 Pa. 402; *Dewart's App.* 70 Pa. 408; *Smith v. Moore*, 25 Vt. 127; *Magoffin v. Patton* 4 Rawle, 119; *Hearle v. Greenbank*, 3 Atk. 716; *Stephenson v. Axson*, 1 Bailey, Eq. 273.

Legacy in lieu of dower.

The bequest to the wife, although declared to be in lieu of dower, is in legal as well as common parlance a legacy. *Orton v. Orton*, 3 Abb. App. Dec. 414, 3 Keyes, 438; *Wake v. Wake*, 1 Ves. Jr. 335; *Williamson v. Williamson*, 6 Paige, 298, 3 N. Y. Ch. L. ed. 994.

The specific bequest to the widow does not abate with other legacies in case the fund is insufficient to pay all. The widow takes the estate which she elects to receive in lieu of dower as purchaser, for which she pays a consideration by surrendering her claim. *Re Gotzian's Estate*, 34 Minn. 167, 57 Am. Rep. 43; *Beekman v. Vanderveer*, 3 Dem. 625; *Betts v. Betts*, 4 Abb. N. C. 391; *Potter v. Brown*, 11 R. I. 236; *Tift v. Porter*, 8 N. Y. 523; *Borden v. Jenks*, 1 9 L. R. A.

New Eng. Rep. 706, 140 Mass. 564; *Tickel v. Quinn*, 1 Dem. 429.

The debts having already been paid out of the general estate, the widow is entitled to the full satisfaction of her legacy out of the remaining assets before any part shall be applied to the other legacies. *Warren v. Morris*, 4 Del. Ch. 302; *Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 3 Ves. Sr. 420; *Norcott v. Gordon*, 14 Sim. 258; *Loocock v. Clarkson*, 1 Deane, 471; *Stuart v. Carson*, Id. 500; *Ishhart v. Brown*, 1 Edw. Ch. 411, 6 N. Y. Ch. L. ed. 190; *Hubbard v. Hubbard*, 6 Met. 50; *Pollard v. Pollard*, 1 Allen, 490; *Reed v. Reed*, 9 Watts, 263; *Lord v. Lord*, 23 Conn. 327; *Farnum v. Bascom*, 123 Mass. 232; *Towle v. Swasey*, 106 Mass. 100; *Babcock v. Stoddard*, 3 Thomp. & C. 211; *Sanford v. Sanford*, 4 Hun, 753.

Preferences to widow over other legatees.

The fact that the pecuniary or other provisions in lieu of dower shall be greater than the dowress' right does not take the provisions out of the preference over other legacies, as the testator is the best judge of the price at which he is willing to purchase the dowress' right. *Re Dolan*, 4 Bedf. 512; *Re Combs*, 3 Dem. 349; *Tift v. Porter*, 8 N. Y. 516; *Williamson v. Williamson*, 6 Paige, 305, 3 N. Y. Ch. L. ed. 298.

While the moral obligation to provide for a child is not less than for a wife, yet, as she has a legal claim upon the estate, and the child has not, she is preferred in her legacy. *Farnum v. Bascom*, 123 Mass. 230; *Norcott v. Gordon*, 14 Sim. 258; *Pollard v. Pollard*, 1 Allen, 490; *Towle v. Swasey*, 106 Mass. 100.

The right of the widow to priority in the payment of the legacy which she takes in consideration of relinquishment of dower is well established. *Borden v. Jenks*, 1 New Eng. Rep. 705, 140

been settled upon full notice, especially so when any order for this transfer of the funds would be subject to review by this court sitting as the supreme court of probate.

The first question presented by the executors, according to the report, is whether the legacy by Mr. Isaac Adams to his wife carries interest from the date of the testator's death, or from one year thereafter. This bequest was "of the sum of sixty-four thousand dollars in money to be paid her as soon as convenient after my decease," and was accompanied by a devise to her of five pieces of productive real estate in Massachusetts, of which she was dowable. These provisions by the devise and bequest in behalf of his wife are declared to be in full satisfaction "of her dower and homestead rights in my estate and of all distributive share or rights whatsoever therein."

In *Pollard v. Pollard*, 1 Allen, 490, it was held that a widow to whom a legacy was given in lieu of dower was entitled to be paid in full in case of a deficiency of assets in preference to legatees who were mere volunteers, and also to receive interest thereon from the death of the

testator if he had provided no other means for her support during the first year after his death, and this upon the ground that she is to be regarded as a purchaser for value by reason of her relinquishment of her important rights in her husband's estate. The question here presented is, however, to be decided according to the law of New Hampshire. It is not merely a question of how property shall be here administered, but what is the intention of the testator by its provisions. The construction of the will, the distribution thereby made of the testator's personal estate, are to be governed by the law of his domicile. *Swett v. Wilmer*, 132 Mass. 186; Pub. Stat. chap. 138, § 1.

By the law of New Hampshire, as of Massachusetts, the wife is treated, in accepting a provision by will, as a purchaser for value, and the general rule which applies in the case of creditors who receive a legacy in satisfaction of a debt, and who are held entitled to interest from the death of the testator, would apply where no different intent is shown. *Towle v. Swasey*, 106 Mass. 100; *Williamson v. Williamson*, 6 Paige, 298, 3 N. Y. Ch. L. ed. 994.

Mass. 562, 54 Am. Rep. 507; *Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. Sr. 420; *Norcott v. Gordon*, 14 Sim. 258; *Pollard v. Pollard*, 1 Allen, 490; *Towle v. Swasey*, 106 Mass. 100; *Farnam v. Bascom*, 122 Mass. 282, 286.

A testamentary gift in lieu of dower has preference over unpreferred legacies. *Moore v. Alden*, 6 New Eng. Rep. 442, 80 Me. 801.

The rule holds true where the gift is an annuity, although it specifies that it is to be paid from earnings of certain property which turns out to be insufficient; in such case the deficiency is made up from the corpus of the estate. *Ibid*.

The reason of this preference is that such a legacy is not a mere bounty, but is supported by a valuable consideration, to wit, the relinquishment of the widow's right of dower. *Tickel v. Quinn*, 1 Dem. 429; *Williamson v. Williamson*, 6 Paige, 305, 3 N. Y. Ch. L. ed. 298; *Babcock v. Stoddard*, 3 Thomp. & C. 207; *Sanford v. Sanford*, 4 Hun, 753; *Isehart v. Brown*, 1 Edw. Ch. 411, 6 N. Y. Ch. L. ed. 190; *Chamberlain v. Chamberlain*, 43 N. Y. 448; *Brink v. Masterson*, 4 Dem. 526.

But her husband's debts must be satisfied before any property of his estate can be lawfully applied to the discharge of her legacy. *Beekman v. Vanderveer*, 3 Dem. 622.

A gift in lieu of dower and acceptance of same is in effect a contract whereby the widow becomes a purchaser of the property left to her by the will in consideration of relinquishing her dower. *Hathaway v. Hathaway*, 37 Hun, 298.

Legacies given in lieu of dower do not abate upon insufficiency of the estate to pay legacies in full, even though such legacies exceed the value of the dower right relinquished. *Re Brook (Surr. Ct.)* 30 N. Y. S. R. 941.

Legacy to widow draws interest from death of testator.

In case of a legacy to a widow, in lieu of dower, it draws interest from the death of the testator when he has made no other provision for her support during the first year after his death; and so in the case of a legacy to a child, whose support and maintenance are not otherwise provided for. *Cooke v. Meeker*, 36 N. Y. 24, 1 Trans. App. 30; *Parkinson v. Parkinson*, 3 Bradf. 78; *Howard v. Francis*, 30 N. J. Eq. 448. See *Irby v. McCrae*, 4 Deaus. 422, 423; *Williamson v. Williamson*, 6 Paige, 298, 3 N. Y. Ch. L. ed. 994.

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The widow was entitled to the interest on the share of the residue, put in trust for her, from the death of the testator. *Re Benson*, 96 N. Y. 511; *Cooke v. Meeker*, 36 N. Y. 15; *Lynch v. Mahoney*, 3 Redf. 434; *Sargent v. Sargent*, 103 Mass. 292.

Instruction of court of equity as to duties of executors and administrators.

There are exceptions to the rule that a court of chancery will not maintain a bill merely to declare future rights—as bills filed by executors or trustees for a construction of a will, and the direction of the court as to the disposition of the property. *Cross v. Del Valle*, 68 U. S. 1 Wall. 15, 17 L. ed. 519; *Lorillard v. Ooster*, 5 Paige, 172, 3 N. Y. Ch. L. ed. 674.

Any person interested in the trust may apply to the court for a construction of the will and directions to the trust. *Kiah v. Grenier*, 1 Thomp. & C. 380; *Walrath v. Handy*, 24 How. Pr. 855.

The court having entertained jurisdiction, and no objection thereto having been made, it may be that the judgment is conclusive upon the parties thereto. *Monarque v. Monarque*, 80 N. Y. 823, 3 Abb. N. C. 116, 19 Hun, 338; *Clarke v. Sawyer*, 2 N. Y. 468.

Costs of application for opinion of court.

Equity requires the estate of the testator, who made the doubtful or obscure will, to pay the expense of ascertaining its legal effect. *Chipman v. Montgomery*, 4 Hun, 747; *Kiah v. Grenier*, 1 Thomp. & C. 388; *Oxley v. Lane*, 35 N. Y. 340, 351; *Smith v. Smith*, 4 Paige, 271, 3 N. Y. Ch. L. ed. 432.

As where the will is so drawn as to create doubt and render resort to a court necessary or advisable. *Cook v. Munn*, 33 Hun, 27; *Wood v. Vandenburg*, 6 Paige, 277, 287, 3 N. Y. Ch. L. ed. 985, 989.

The rule that the costs of an application for the opinion of the court as to the duties of a trustee under a will, and the equities of the devisees, are to be a charge on the common estate, applies when all interested are to be equally benefited; but not when the devisees litigate questions therein capriciously, capriciously or without reason. *Neff v. Neff*, 2 Disney (Ohio) 468.

Costs of proceedings to establish the validity of a will as against one previously executed are awarded against the estate and not against the proponent, when the latter has been designated by the court to represent the parties interested. *Conely v. McDonald*, 40 Mich. 150.

But by the law of New Hampshire, as of Massachusetts, while the widow is a purchaser for value she also has a right to determine whether she will accept the provision made and to accept or reject it as she may choose. Gen. Laws N. H. chap. 203, §§ 9, 18, chap. 193, § 13.

If she accepts it she must accept upon the terms and conditions on which it is made. She can have only what the will gives her and in the mode in which it gives the property bequeathed to her. The precise point decided in *Pollard v. Pollard*, *supra*, does not appear to have been decided in New Hampshire.

In *Loring v. Woodward*, 41 N. H. 881, it is said that, to the general rule there laid down, that a pecuniary legacy payable generally without designation of any time of payment is payable at the end of a year from the death of the testator without interest, and if not, then paid with interest after the end of the year, there is one exception which is in favor of minor children of the testator, who are entitled, unless other provision is made for their support, to interest upon their legacies from the date of the testator's decease. It is argued, therefore, by the residuary legatees, that in New Hampshire no such exception exists in favor of the testator's widow as has been held to exist in Massachusetts, as otherwise the learned chief justice of New Hampshire who delivered the opinion would not have failed to state it. We shall not have occasion to consider this contention or whether the language used is fairly to be construed as holding that no other exception to the general rule than that specified actually exists in New Hampshire. We are of opinion that upon other grounds the position taken by the residuary legatees is correct.

In *Pollard v. Pollard*, *supra*, it is clearly implied that if other provision is made by the testator for the support of the wife, which will avail her during the year following her husband's decease, she would not be entitled to interest from that time. The legacy to Mrs. Adams was accompanied by a devise to her of five pieces of productive real estate to the considerable income of which she became at once entitled, and the case is not presented of a widow left without other means of support than her legacy.

In *Loring v. Woodward* it is said that minors are entitled to interest upon their legacies from the decease of the testator only in those cases where no other provision was made. If, therefore, it can be held that in New Hampshire the same exception exists in favor of the widow as to the allowance of interest that exists in this Commonwealth, it cannot be reasonably doubted that it applies only in those cases where other provision is not made for her support.

Again it is said in *Loring v. Woodward*, *supra*, that the general rules there laid down on the subject of interest and income do not apply where specific directions are given by the will, or where a different intention is to be inferred from its provisions. The inference is fairly to be drawn from the provisions of Mr. Adams' will that he did not intend that the payment of the legacy should be immediate. If a will is silent as to the time when a legacy

is to be paid, one to whom such a legacy is bequeathed, and who stands in the position of a purchaser for value, is entitled to have the time of payment determined by the legal presumption of the intent of the testator. If a time were specified for its payment, he could make no claim for any delay in its payment except after the expiration of the time specified. By the terms in which the legacy to Mrs. Adams was given, no time for its payment was specifically stated, but the provision that "it shall be paid as soon as convenient after my decease" distinctly shows that the legacy would not be paid at once, but that its payment would be governed by the convenience of the estate. The rule that legacies draw interest only after the expiration of a year contemplates that such a time is a reasonable one for the collection of assets and reducing them to money. By accepting her legacy to be paid at the convenience of the estate, for that is its fair interpretation, the widow consented to wait for the expiration of the usual time for its payment. It follows that she would not be entitled to interest until the end of a year, and such instruction is given accordingly.

The next question reserved for our consideration by the report, and on which the bill requests instructions, is, whether the interest upon both the legacies of \$64,000 to the widow and \$5,000 to Julius Adams is affected by a deposit made on August 8, 1887, with the New England Trust Company to the credit of Julius Adams, of an amount equal to these sums, and also in what manner and at what rate interest on these sums shall be computed. The inquiry thus presented does not involve the construction of the will, but concerns the duty of the executors under it, and the effect of the acts which they have already done. It is well established that trustees may ask the instruction of the court, not merely as to the construction of the instrument under which they act, but also as to their duties under it (*Hyde v. Wason*, 131 Mass. 450); nor is there any reason why executors and administrators might not do the same, except where the matter is one which can be more appropriately dealt with in the probate court, especially in the settlement of their accounts. *Treadwell v. Cordis*, 5 Gray, 341, 348.

Whenever a trustee doubts as to his safety and security, in complying with a claim of the *cestui que trust*, his only prudent and safe course is to wait for the directions of a court of equity. *Dimmock v. Baily*, 20 Pick. 368.

While our statutes have established an elaborate system of procedure for the administration of the estates of deceased persons, in the settlement of the accounts of executors, the jurisdiction of the probate court is limited to these, and it cannot upon a hearing of that character give directions as to how future accounts shall be rendered or the duties of executors performed. *Lincoln v. Aldrich*, 141 Mass. 312, 1 New Eng. Rep. 725; *New England Trust Co. v. Eaton*, 140 Mass. 582, 1 New Eng. Rep. 372.

The probate court may, indeed, upon proper petition, concurrently with this court, hear and determine all questions arising under wills or their construction, any party aggrieved by the decision of that court having a right of appeal

to this court. Pub. Stat. chap. 127, § 84, chap. 154, §§ 5, 6-11; *Stroesey v. Jacques*, 144 Mass. 135, 4 New Eng. Rep. 43.

It may be that the inquiry which the executors seek now to have determined could be passed upon and decided in the probate court on the final settlement of their account by the order for the payment of debts and legacies and of distribution to be passed thereon, from which order an appeal could be taken by any party aggrieved, to this as the supreme court of probate. Yet in the situation in which the executors find themselves by the delays and embarrassments of the case, and the accumulations of interest on the funds they have collected, a majority of the court are of opinion that they may properly ask instructions upon the matter thus in question. Whether such a bill shall be entertained or whether the parties interested shall be left to the other remedies provided, is to some extent a matter of discretion. The inquiries submitted have been fully argued by the legatees and the residuary legatees, who are the only persons interested, and both parties have desired that they should be definitely passed upon.

On August 8, 1887, the plaintiffs, after some correspondence with Julius Adams, who was then the administrator with the will annexed of the estate of his mother, who had deceased subsequently to the testator, deposited with the New England Trust Company the amount of the two legacies of \$64,000 and \$5,000 (together with another sum for rents collected, not necessary to be here considered) to the credit of Julius Adams. These sums were deposited without any interest being included, the matter of interest having been the matter in dispute between Adams and the executors. Adams never authorized or ratified this deposit with the Trust Company, refused to receive the deposit book and has in no way recognized the deposit which bore interest at the rate of 2½ per cent. He had been informed before the deposit was made, he having declined to receive these sums without interest, that they would be thus deposited unless he should receive them or designate some other place for their deposit. On behalf of the residuary legatees it is contended "that the executors had a right to require Julius Adams to receive, on account of the legacies, the principal of the amounts due; that he was not at liberty to refuse to receive any portion unless the whole sum due was paid, and that the deposit of these sums with the Trust Company was a valid appropriation in part satisfaction of the legacies." "It is conceded" by them "that the legacies carried interest from the end of a year after the testator's death, and therefore that the sums deposited on account of the legacies were less than the amounts due at that time."

The first inquiry which we consider in this transaction is whether the plaintiffs, as executors, were then in a position rightfully to make appropriations for the payment of legacies. If they were not, Adams could not be called upon to deal with them, or be bound to assent to their acts. On August 8, 1887, their situation was a somewhat peculiar one. The will of Isaac Adams had been finally admitted to probate in New Hampshire, and they were lawfully appointed executors in that State, on August 6,

1885. Previous to this time, the same gentlemen had been appointed special administrators in this Commonwealth on November 26, 1883. On March 7, 1887, the Probate Court of Suffolk County had admitted to probate a copy of the will proved in New Hampshire, and from this decree Julius Adams had appealed. This appeal was pending until October 5, 1887, when the decree of the probate court was affirmed, but letters testamentary were not issued to the plaintiffs until September 17, 1888. On the 8th of August, 1887, the plaintiffs were not executors in this Commonwealth. As executors of a foreign will they had no right to act here and to dispose of the estate here. In order that they should have this authority, it was necessary that the will should have been here admitted to probate and letters testamentary issued to them. *Campbell v. Sheldon*, 13 Pick. 8; Pub. Stat. chap. 127, § 7.

As special administrators whose duty is only to take care of and preserve property until it can be regularly administered, they certainly had no authority to pay legacies. While the plaintiffs acted, apparently, as executors appointed in the State of New Hampshire, describing themselves as co-executors before any appointment of them as such in this Commonwealth, the two sums deposited "were paid out of the personal estate of the testator in Massachusetts, which had come in the hands of the plaintiffs as special administrators." The probate court had never authorized or directed any transfer of any part of the property held by the plaintiffs as special administrators to themselves as executors in New Hampshire. In the account subsequently filed on November 23, 1888, by the plaintiffs as executors in this Commonwealth, they claim to be allowed for the payment of these sums. Adams was not called upon to deal with the plaintiffs while occupying so ambiguous a position, or to recognize them as having authority, as executors under the law of New Hampshire, to deal with property here while unauthorized to do so by the authority of this Commonwealth. Until in its discretion the probate court directed the personal estate here found to be transferred to the foreign jurisdiction, executors there could not rightfully deal with it. Many acts may, without doubt, be done by one as executor previous to his appointment, as such, which, if in themselves not illegal and such as an executor may properly do, might be validated by his subsequent appointment relating back to the time of doing the acts. No person, however, is required to deal with one who may thereafter be appointed as executor, trusting to the chance that he will be so, or to consent to appropriations made by him in the anticipation that they may thereafter be lawfully made. The case as here presented has also this peculiarity, that if the appropriation made by the plaintiffs while executors in New Hampshire is to be treated as authorized so as to bind Julius Adams, in whose favor the deposit was made, it is so because of their subsequent appointment in Massachusetts. Acts done in one capacity are thus treated as authorized by a subsequent appointment of the actors to another capacity. The plaintiffs are now attempting to administer the estate in Massachusetts,—this is the foundation of their

bill for instructions; yet the act, concerning which instruction is asked, was done while they were executors in New Hampshire only. At the time when the plaintiffs undertook to offer payment of the legacies to appropriate a sum therefor and to make a deposit thereof, they had no authority to do so in such manner that the rights of the legatees would be affected. Nor, irrespective of this matter of the plaintiff's authority, are we of opinion that legatees are bound to accept a payment by installments which should operate *pro tanto* to diminish their claims. That it is an exceedingly convenient mode often of administering an estate to make partial payments to creditors or legatees when the rights of creditors are satisfied, may be admitted. Orders to this effect are often made by courts, independently of statute authority, for the more convenient distribution of the estate; the funds accumulated in administration by the collection of debts or the reduction of securities into possession would otherwise be substantially idle. In this Commonwealth, the practice is recognized by statute, and the probate courts are authorized to order partial distribution of the funds of estates in the course of administration. Pub. Stat. chap. 186, § 21.

If such an order is obtained, there would be much force in contending that interest should not, after such an order, or proper information of such an order, be allowed except on the balance of the debt or legacy which would remain after the application of the partial payment was or might have been made. No such order was passed or applied for, and the legatee or creditor ought not to be expected to receive payment of his legacy or debt in such installments as the executor may, in his own discretion, see fit to apportion to him. The existence of the power in the court to order partial payments and its frequent exercise do not indicate that the executors have any such power, but rather otherwise. If the legatee or creditor should consent to receive partial payments, which, no doubt, are often made, without any order of court, it certainly would be right that interest on his claim should be diminished. In the case we are considering, the two sums offered to Adams, and deposited to his credit, were refused by him, and it is conceded that they did not equal, interest included, the amount of the legacies to which in his own right and that of his mother he was entitled. Even if the offer was made that Adams should receive these sums for the legacies, leaving the question of interest upon them open for further consideration or litigation, he was under no obligation thus to accept them.

These views render it unnecessary to consider several points which have been quite fully discussed, viz.: what was the true construction of the correspondence between the executors in some other respects, and whether Julius Adams might safely have accepted the offer of the executors without waiving his right to oppose the probate of his father's will in this Commonwealth, which he was then contesting, and certain other claims made by him.

It is urged, in connection with the claim for interest on these legacies, that the conduct of Julius Adams in opposing the probate of his father's will in New Hampshire, and in this

Commonwealth, was litigious and unreasonable. So far as the legacy to Mrs. Adams is concerned, her estate should certainly not be diminished by any acts done by her son in his individual capacity. The facts are not before us, upon which we could decide whether his conduct was litigious and his resistance to the probate of the will unwarrantable, even if we could hold that his claim for interest should be affected thereby. It is without doubt true that, where the settlement of an estate is delayed by legal controversy, and where funds are accumulated under such circumstances that they cannot be permanently invested, loss may be occasioned to the residuum of the estate. The contestant who disputes a will is still, however, in the exercise of his legal rights. It was held, therefore, in *Kent v. Dunham*, 106 Mass. 536, that the fact that legatees had caused delay by unjustifiable proceedings, embarrassing the executors in the settlement of the estate, was inadmissible for the purpose of defeating their claim to interest.

On the other hand we can perceive no ground for the claim on behalf of Julius Adams that interest should be computed on these legacies after the expiration of one year from the death of the testator, with annual rests, and thus that the legatees should receive compound interest.

The question remains to be determined at what rate interest shall be computed. It is urged on behalf of the residuary legatees, that it should be something less than the legal rate, and that certainly this should be so after the deposit made by the plaintiffs, upon which only 2½ per cent was to be allowed. In the view we have taken, the matter of interest is not affected by the deposit. That interest at the legal rate is payable after one year from the testator's death is well established as a general rule in Massachusetts and New Hampshire. *Loring v. Woodward* and *Kent v. Dunham*, *supra*; *Ogden v. Patten*, 149 Mass. 82.

Even where the estate could not have been reduced to money within that time, or where the administration had not been taken for a considerable time after the death of the testator, it would still be allowed to the legatee as an incident and accretion to the legacy. *Ogden v. Patten*, *supra*; *Lamb v. Lamb*, 11 Pick. 871; *Martin v. Martin*, 6 Watts, 67.

This allowance is made, not merely because it will be presumed that the estate will, after the year has expired, have actually made this sum, but also because, as it would be difficult, if not impossible, to investigate how much interest had been made in such cases, it is a reasonable rule to adopt that rate of interest which the law has fixed where none other is stipulated for. It is urged that it is a matter of public knowledge that no interest can now be obtained as high as six per cent on any safe investment, that such an allowance should no longer prevail, that the court should determine, either directly or with the aid of a master, what could reasonably have been obtained, and that this only should now be allowed. It is probable that the rate of interest does not so nearly represent now what can be earned by a safely invested fund as it did when it was originally established by statute as the legal rate, and that it would be difficult now to obtain it. But, as it is inferred that where no time is specified for

the payment of a legacy it is not to be paid until the end of a year from the death of a testator, so it is a reasonable inference that the testator intended, if the legatee did not receive it until sometime after that period, that he should then receive it with the interest allowed by law. His gift fairly imports this because that is the rate where a debt or payment which is due *in presenti* is deferred. This view is not in conflict with *Williamson v. Williamson*, 6 Paige, 298, 8 N. Y. Ch. L. ed. 994, and *Healey v. Toppan*, 45 N. H. 248.

The question in these cases was not between legatees of specified sums and the estate, but between those who were the legatees, one class of whom were entitled to an estate for life in the legacy, and the other to the remainder. As between them there was no doubt that the tenant for life, after the fund was actually formed, was entitled only to the interest or income which it produced. In determining what should be the basis of apportionment between them before the settlement of the estate and before it was actually formed and productive, it was determined that five per cent upon it as ultimately ascertained would be right as it represented the income which might have been obtained. It by no means follows that what is right as between legatees interested in different proportions in the same fund is a proper rule between a legatee of a definite sum and the estate of the testator.

It is urged that by the English rule less than the usual or legal rate of interest is often allowed, and that the amount of interest which legatees are entitled to recover is regulated by the court of chancery by reference to the amount which executors could have made, and that this rate has been diminished from time to time by reason of the change in the value of the interest upon money. *Beckford v. Tobin*, 1 Ves. Sr. 808, 811; *Guillam v. Holland*, 2 Atk. 843; *Wood v. Briant*, 2 Atk. 528; *Sinnell v. Bernard*, 6 Ves. Jr. 520.

The rule of the court of chancery appears from these cases to have been that it could determine at its own discretion how much interest should be allowed, and even without inquiry into the circumstances of any particular case. *Sitwell v. Bernard*, *supra*.

No action could have been brought at common law to recover the amount of a legacy which was treated only as a direction to the executor. The remedy of the legatee was only in the ecclesiastical courts or the court of chancery. These courts have always assumed the right to determine the terms on which the beneficiary should receive it. This is given as one of the reasons why an action at law should not be maintained for it. *Weeks v. Strutt*, 5 T. R. 690; *Allen v. Edwards*, 136 Mass. 188.

In this Commonwealth an action at law has long been the remedy to recover the amount of such a legacy. *Allen v. Edwards*, 136 Mass. 138, and authorities cited.

Such is the rule we believe in most if not all of the States of the Union. While in many cases interest has been recovered, none has been cited or is known to us where it has been at less than the legal rate. It has been recovered upon the same principle that it is awarded in any case where the payment of a debt due has been deferred. We have no reason to believe that
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the law of New Hampshire in this respect differs from that which prevails in this Commonwealth, and we do not feel authorized to change the rule so long as the statute remains unchanged which fixes a rate of interest. *Kent v. Dunham* and *Ogden v. Patten*, *supra*; Pub. Stat. chap. 77, § 8; *Wood v. Corl*, 4 Met. 208; *Loring v. Woodward*, *supra*; N. H. Gen. Laws, chap. 282, § 2.

The executors are therefore instructed that the legacies of \$5,000 and \$64,000 are payable with legal interest in a year from the death of the testator.

Instructions accordingly.

John V. SANDERS

v.

Samuel G. BRYER *et al.*

(....Mass....)

1. The description of property in an agreement for its sale as "One one-and-one-half-story frame dwelling-house with barn and out-buildings and all land now being used in connection therewith, being about seven acres more or less," situated on a certain street in a certain town, is sufficient to warrant a decree for specific performance where the bill particularly describes the property and alleges that it is the same referred to in the agreement, which is not denied by the answer, and the evidence in regard to the vendee's occupation and tender of purchase money refers to the premises described in the agreement.
2. That a lessee has cut down two or three scrub trees which shaded the garden, and permitted a family with which he boarded to occupy the house on the leased premises for the purpose of caring for them, is not a breach of covenants in the lease against committing waste and subletting, of which the lessor can avail himself after the lessee has tendered the purchase price for the premises in accordance with an agreement in the lease giving him an option to purchase them.
3. Depositing the purchase price of real estate in a bank after demanding a conveyance and making tender of the amount due will not relieve the purchaser from paying interest thereon until it is accepted by the vendor under a decree of specific performance, if he does not inform the vendor of such deposit nor place it at his disposal, and subsequently draws it out and uses it in his business, at the same time being in possession of the premises, receiving the rents and profits, without paying rent, although he is at all times prepared to pay the amount on demand.

(September 4, 1890.)

EXCEPTIONS by defendants to a judgment of the Superior Court for Essex County in favor of plaintiff in an action brought to compel specific performance of an agreement to sell certain real estate. *Sustained in part.*

Plaintiff had taken possession of the premises under a lease which contained an agreement that he might purchase them within three years at a certain price, and which also contained covenants against committing waste and subletting.

At the trial plaintiff admitted that he cut down two or three trees six inches in thickness

in the trunk and about twenty-five feet high, but denied that they were ornamental or shade trees, and claimed that they were scrubs which shaded the garden. He also admitted that a certain Mr. Cates and his family had lived in the house standing upon the premises, that he paid no rent but was there to take care of the premises during plaintiff's absence; that Mr. Cates' family did the cooking, and plaintiff, who was unmarried, lived with that family.

The facts further appear in the opinion.

Mr. Benjamin N. Johnson, for defendant:

The description of the property in the lease is too indefinite to justify a decree of specific performance of the agreement to convey.

Pray v. Clark, 118 Mass. 233; *Grace v. Denton*, 114 Mass. 16; *Lynes v. Hayden*, 119 Mass. 483; *Preston v. Preston*, 95 U. S. 200, 24 L. ed. 494.

If the contract is not too indefinite for enforcement if properly aided by extrinsic evidence, there was no such evidence.

Preston v. Preston, *supra*.

If any decree for specific performance was warranted by the evidence, the defendants should have been ordered to make a conveyance only upon payment by the plaintiff of the stipulated price, with interest at six per cent from October 27, 1887.

Eastman v. Simpson, 139 Mass. 848.

Messrs. William H. Niles and George J. Carr, for plaintiff:

If the plaintiff committed waste, the defendants might have entered to terminate the lease while the default continued, but a tender of the \$1,500 entitled the plaintiff to his deed.

Vincent v. Cornell, 18 Pick. 294; *Day v. Bassett*, 102 Mass. 445.

The plaintiff was not required to bring the money into court, his obligation to pay being upon condition that a deed was tendered him, and the defendants, by taking issue on the tender, excused any failure on the part of the plaintiff to bring the money into court.

Wood v. Rabe, 20 Jones & S. 479.

The plaintiff was obliged to keep as much as \$1,500 within ready reach at all times, and the defendants cannot put the plaintiff to that inconvenience, and deprive the plaintiff of the benefits that might have accrued to him under the deed, which the defendants ought to have given him, and put him to the cost of litigation and counsel fees, and have interest upon the \$1,500.

Oriental Bank v. Tremont Ins. Co. 4 Met. 1; *Wood v. Rabe*, *supra*.

Devens, J., delivered the opinion of the court:

The only exceptions insisted on are to the refusals of the court to rule that the bill could not be maintained upon the evidence, and that if entitled to a conveyance the plaintiffs are obliged to pay interest on the money tendered from the time of the tender.

It is contended that the description of the premises in the contract is indefinite, and is not aided by evidence. The description is, "One one-and-one-half-story frame dwelling-house with barn and out buildings and all land now being used in connection therewith, being about seven acres more or less situated

on Central Street in Saugus Centre, in said County of Essex." In the bill the premises are particularly described, with the allegation that they are the same described in the agreement by the words which are set forth above. The answer does not deny this. The evidence with regard to the occupation and the tender refers to the premises described in the agreement. We see no ground for this objection.

The agreement to convey is inserted as one of the provisions of a lease of the premises from the defendants to the plaintiff, and the defendants contend that the plaintiff lost his right to a conveyance by breaking covenants of the lease not to commit waste, and not to underlet the premises. The court might well have found upon the evidence that there had been no substantial breach of covenant by the plaintiff. It could not have found on the evidence that there was any breach of covenant or condition of which the defendants could avail themselves after tender of payment, under the agreement by the plaintiff. The whole evidence showed that the plaintiff was entitled to relief.

The remaining exception is to the refusal of the court to add interest to the \$1,500 to be paid by the plaintiff upon specific performance by the defendants of their contract by a conveyance of the premises. The lease of the premises from the defendants to the plaintiff was for years and contained the following provision: "It is also a condition of this lease that said lessor shall have the right to purchase said premises any time within three years from the date thereof for the sum of \$1,500." The lease was dated October 29, 1884, and on the 27th of October, 1887, the plaintiff, according to his own testimony, "offered and tendered" to the defendant Mrs. Bryer the sum of \$1,500, at Boothbay in the State of Maine, demanded a conveyance of the premises described, which the defendant refused. Thereupon the plaintiff deposited said sum of \$1,500 to his own credit in a bank near said Boothbay (where defendant was then residing) where said money remained a week or so and was afterwards sent to him by express to Lynn, Mass., according to his directions. The plaintiff further testified that shortly after making such tender he invested said \$1,500 in his business, and that while in his business and other investments he had said amount of \$1,500 so that he could have paid said sum to the defendants for a conveyance of said real estate whenever they should see fit to make such conveyance or in case of a decree in his favor, he had not deposited or set apart or paid into court said sum of \$1,500 or placed said sum in any way at the disposal of the defendants.

Although the plaintiff has been in possession of the premises up to the time of the decree rendered, he has paid no rent since November 1, 1887, and has enjoyed the rents and profits since that time. He claims the right so to do without any accounting therefor and also to be entitled to conveyance on payment of the sum of \$1,500 without any interest thereon. What the value of these rents and profits may be does not clearly ap-

pear but it may fairly be assumed that they exceed the amount of legal interest on \$1,500 as the rent of the premises reserved in the lease was \$100 a year and the plaintiff had made improvements thereon which rendered them more valuable for the uses to which he put them.

The question whether a vendee who has complied with his contract for the purchase of a parcel of real estate in offering to pay the purchase money at the time fixed therefor is entitled to the rents and profits thereof may arise in two ways where he is not in possession of the premises, and where, as in the case at bar, he is in possession; but in either case if he elects to treat the premises, and thus the rents and profits, as his own, it would not seem reasonable that he should treat the purchase money also as his own, deal with it as such, derive a profit therefrom and still be permitted to deny the claim for interest thereon. Even if he holds himself ready to obtain and pay the money when a conveyance is tendered, if he desires a decree which shall treat the land as his as of the date of the day when he made his offer of payment, the money should be treated as belonging to the vendor as of the same date. The vendee cannot be entitled to the use of both the land and the money, which is the consideration to be paid for it.

"The act of taking possession" it is said, in Sugden on Vendors, vol. 2, "is an implied agreement to pay interest, for so absurd an argument as that the purchaser was to receive the rents to which he had no legal title, and the vendor was not to have interest as he had no legal title to the money, could never be implied." *Madger v. Corker*, 12 Ves. Jr. 85.

To the rule that the vendee must continue to pay interest if he receives the rents and profits there is probably an exception, where the money which the vendee is to pay has been set aside and appropriated for the vendor and he has been notified of this, knows that the money is drawing no interest and is at his own disposal. "But even if a purchaser gave such notice, yet if the money was not actually and bona fide appropriated for the purchase, or the purchaser derived the least advantage from it, or in any manner made use of it, the court would compel him to pay interest." *Dyson v. Hornby*, 4 DeG. & Sm. 481.

In *Powell v. Martyr*, 8 Ves. Jr. 146, it is said by the Master of the Rolls, Sir Wm. Grant: "The rule is perfectly reasonable, that if a purchaser is let into possession and perception of the rents and profits he shall pay interest for his purchase money;" and in that case it was held that to excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient that the money was appropriated and unproductive, but the vendor must have notice of that. The English authorities establish the rule that even if the vendor is in fault, if the vendee would escape the liability to pay interest he must actually set aside the money and appropriate it for the vendor, must not in any way derive a benefit from it and must notify the vendor of these facts and that the money is thus lying idle.

Calcraft v. Roebuck, 1 Ves. Jr. 221; *Powell v. Martyr*, *supra*; *Roberts v. Massey*, 18 Ves. Jr. 561; *Dyson v. Hornby*, *supra*; *Kershaw v. Kershaw*, L. R. 9 Eq. 56; *Regent's Canal Co. v. Ware*, 23 Beav. 575.

This rule is also entertained by many American authorities. *Brockenbrough v. Blythe*, 3 Leigh, 638; *Selden v. James*, 6 Rand. 466; *Baxter v. Brand*, 6 Dana, 296; *Rutledge v. Smith*, 1 McCord, Ch. 399; *Hunter v. Bales*, 24 Ind. 299; *Walker v. Ogden*, 1 Dana, 247; *Hurdley v. Lyons*, 5 Munf. 842; *Stevenson v. Maxwell*, 2 N. Y. 408.

This precise question has not been decided in this Commonwealth, but two cases go far to settle it.

In *Davis v. Parker*, 14 Allen, 94, it was held that if one who has agreed to convey land for a certain price refuses to accept that price when duly tendered, he will not be entitled to receive interest thereon upon the entry of a decree in equity for a specific performance by him of his agreement unless he can show that the purchaser has made use of the money or gained some advantage from it of which that case afforded no evidence.

In *Davis v. Parker* the purchaser had not entered upon the land, which was timber land. Whether it had derived benefit from the delay in cutting or otherwise was in dispute, a question which the court declined to discuss as no evidence of any use by the purchaser of the money after his offer had been offered.

Eastman v. Simpson, 139 Mass. 848, presents the question now discussed, although inversely. It was a case where the obligor of a bond for the sale of certain premises, and who was thus in the position of a vendor, had remained in possession, and the question arose, upon a bill brought by the plaintiff representing the obligee who was entitled on certain terms to a conveyance, and who claimed to have made a sufficient tender to entitle him thereto, whether interest should be allowed in favor of the defendant on the sum which the plaintiff as vendee was bound to pay. The defendant had been charged with the rents and profits of the estate from the time it was his duty to have conveyed. An examination of the papers in the case shows that on the first report of the master, to whom the matter had been referred for an accounting, he had calculated interest on the sum to be paid by the vendee only up to the time of filing the bill.

The case was recommitted with an order to cast the interest on the sum to be paid by the vendee up to the date of the decree, which was done in a supplementary report. Upon this report and the computation so made a decree was entered which was the decree appealed from in the case as reported. The opinion of the court in terms deals with the question only whether interest should be cast in favor of the defendant from the date of the alleged tender to that of filing the bill (a considerable time having intervened), and holds that it should be so cast. The reasoning which follows this statement of the question justifies this charge of interest up to the date of the decree. It proceeds upon the theory that as the plaintiff was to

recover the rents and profits of the estate from the date of the tender to the date of the decree, and the property was thus treated as that of the plaintiff from the date of the tender, it was right that as against the plaintiff the defendant should be allowed interest on the sum he was entitled to have then received. No money had been set aside or kept by the plaintiff for the defendant. This interest was allowed in the words of the opinion, "not on the footing of the contract but as a corollary of crediting the plaintiff with the rents and profits." The decree appealed from, which included interest in favor of defendant on the sum to be paid up to the date of the decree, was (with the exception of a clerical error having no connection with the subject we are considering) affirmed. This case is therefore direct authority for the proposition that where a vendor has remained in possession after an offer or tender of payment to him he is to be charged with the rents and profits of the premises from the time it was his duty to have conveyed, but that the vendee is to pay interest on the sum to be paid by him, he not having set aside this sum for the vendor. It would seem to be equally an authority for the proposition that when the vendee obtains the possession and thus enjoys the rents and profits to the date of the decree he must pay interest to the vendor to the same date on the sum which it is his duty to pay, unless he shall have set aside that sum for the vendor.

In the case at bar the question whether it would be the duty of the vendor to show that the vendee had used the money tendered, or whether it is the duty of the vendee to show that he has not, but has set it completely aside, upon which there has apparently been some difference of opinion, does not arise. According to plaintiff's own statement he deposited the sum tendered in a bank near Boothbay, in which place Mrs. Bryer, the defendant, resided. But he deposited it in his own name, nor did he, so far as appears, give any notice of such deposit to the defendant or put her in any such position that she could have obtained the money on making the conveyance. In a few days he removed it and has since employed it in his own business. While he had this sum of \$1,500 in his business and other investments, and could have paid it at any time to the defendants on their making a conveyance, and held himself prepared to do so, no sum was deposited or set apart or placed at the disposal of defendant. While, therefore, he was of sufficient financial ability to have paid the \$1,500 at any time, the sum was treated as his own and dealt with by him as such. So long as he did this there is every reason why he should pay the interest upon it from November 1, 1887, when he ceased to hold as lessee, as money due from him to the defendant, he having enjoyed the rents and profits of the estate while he thus used it. It would be difficult, probably impossible, to determine how much interest or profit has been made by the plaintiff from the use of the money. Having treated the sum as his own it is a reasonable rule to adopt the rate of interest which the law has fixed when none

has been stipulated for. The decree should therefore be modified by requiring the plaintiff to pay interest on the sum of \$1,500 from November 1, 1887, to the date of decree on specific performance by defendants of their agreement to convey.

On this point the *exceptions are sustained*.

Mary KENT

Sylvester BOTHWELL,

(....Mass....)

An administrator may maintain replevin in his own name to recover possession of chattels belonging to his intestate's estate.

(October 24, 1890.)

EXCEPTIONS by defendant to the Superior Court for Worcester County to review a judgment for plaintiff in an action of replevin. *Overruled.*

The goods to recover which this action was brought were attached by defendant, a deputy sheriff, as the property of Peter White. Plaintiff brought this action to recover possession of the goods, claiming that they were a portion of the estate of her deceased husband, and that she was entitled to maintain this action for their possession, *inter alia*, under the title which she acquired as his administratrix. Defendant requested the court to direct a verdict in his favor, for the reason that plaintiff could not maintain the action in its present form by virtue of the title which vested in her as administratrix.

The court refused to so rule, and directed a verdict for plaintiff, whereupon defendant excepted.

Messrs. Blackmer & Vaughan, for defendant:

If plaintiff claimed title as administratrix or brought the suit in that capacity, the writ and pleadings should have shown that fact.

Chitty, Pl. 16th Am. ed. 226, 227; Williams, Exrs. 1872, *notes a, i*.

The plaintiff could not bring this suit both as an individual and as administratrix, because such an action would in effect join two separate parties as plaintiffs whose interests were not joint, and two distinct and incompatible grounds of recovery.

Williams, Exrs. *supra*; Turing v. Jones, 5 T. R. 402; Pugsley v. Atkin, 14 Barb. 114; Bulkley v. Andrews, 89 Conn. 523; Cassels v. Vernon, 5 Mason, 382; Frink v. Taylor, 4 Greene (Iowa) 196.

The plaintiff having alleged and introduced evidence of title in herself personally, and having claimed those facts as the ground of action, cannot afterwards change such action upon the court's ruling that she has failed to prove her title, by claiming title as administratrix.

Mason v. Lord, 20 Pick. 447-450; Yates v. Kimmel, 5 Mo. 87.

Mr. L. Emerson Barnes, for plaintiff:

The cause of action for which this suit was brought having accrued since the death of the

plaintiff's intestate, the plaintiff has a right to maintain it in her own name.

Crosswell, Exra. and Admra. § 636; *Hollis v. Smith*, 10 East, 298; *Hudson v. Hudson*, Latch. 214.

Proof of title in the plaintiff in her representative capacity properly supported the allegations of her declaration as against a wrongdoer.

Greenleaf, Ev. 10th ed. § 838; *Trask v. Donohue*, 1 Aik. 370; *Valentine v. Jackson*, 9 Wend. 302.

Knowlton, J., delivered the opinion of the court:

To maintain an action of replevin for goods, the plaintiff must prove his general or special property in them and a right to immediate possession.

Upon causes of action which accrued in the lifetime of the testator or intestate, an executor or administrator must sue in his representative capacity, but in general, upon those founded on transactions with himself, or on injuries to property occurring after his appointment, he may sue in his own name. The fact that he is accountable for the proceeds of the suit as assets of the estate does not necessarily preclude him from maintaining an action without reference to his official relation. The rule has generally been stated to be that for injuries to property committed after the death of the intestate, an administrator may and properly should sue as an individual; but if he chooses to make his claim in his official capacity the action will lie. 2 Greenleaf, Ev. 10th ed. § 838; *Carlisle v. Burley*, 3 Me. 250; *Foster v. Gorton*, 5 Pick. 185; *Bollard v. Spencer*, 7 T. R. 358; *Knox v. Bigelow*, 15 Wis. 415.

It has sometimes been held that to maintain trover the administrator must have had actual possession, but the great weight of authority is now otherwise, the action being made to rest on his right of property, which draws after it the right of possession. *Bollard v. Spencer*, *supra*; *Hollis v. Smith*, 10 East, 298; *Gray v. Swain*, 2 Hawks (N. C.) 15; *Carter v. Estes*, 11 Rich. L. 368; *Kerby v. Quinn*, Rice, L. 264.

Upon an appointment of an administrator, the property of his intestate immediately passes to him by relation from the time of the death. While he holds *in autre droit*, he has the legal title and may at any time make an absolute disposition of the property, for which he is accountable on his official bond. He holds both the possession and the property as an individual, although he holds them under a kind of trust. An unlawful interference with the property to its damage is a disturbance of his possession for which he may sue in his own name, although under his trust he is accountable for the damages recovered. In like manner it should be held, when a plaintiff must establish a title, that an administrator's right to the chattels of the intestate is a sufficient property for the maintenance of an action.

None of the cases which have been brought to our attention refer to any distinction between replevin and actions for injuries to property, in reference to an administrator's right to sue in his own name; and his right so to bring a suit in replevin has been sustained by direct adjudication in New York and in 9 L. R. A.

Florida. *People v. Judges*, 9 Wend. 486; *Patchen v. Wilson*, 4 Hill, 57; *Branch v. Branch*, 6 Fla. 314.

The property of the plaintiff as administratrix was sufficient to enable her to maintain her action, and the ruling at the trial was correct.

Exceptions overruled.

John CASEY, by Next Friend,
v.

Jabez N. SMITH.

(.....Mass.....)

1. **The negligence of the custodian of a child** too young to be capable of caring for itself, in permitting it to go improperly attended upon a public street, will be imputed to the child in a suit by it to recover damages for injuries inflicted upon it while there through the negligence of a third person.

2. **Permitting a child three years old to go upon a public street** crowded with vehicles to await the coming home of its father, which is not expected for at least fifty minutes, accompanied only by its brother between seven and eight years old and its sister about five years old, is such negligence as will preclude a recovery of damages by the child in case it is run over and injured by a third person, the circumstances being such that an adult in its place would have escaped unhurt.

(October 24, 1890.)

EXCEPTIONS by plaintiff to a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Overruled.*

The case sufficiently appears in the opinion. *Mr. J. A. McGeough* for plaintiff. *Messrs. Charles F. Gallagher and Hollis R. Bailey* for defendant.

Knowlton, J., delivered the opinion of the court:

The plaintiff at the time of the accident was three years and nine days old. He was run

NOTE.—That negligence of third party cannot be imputed to a child, see *notes* to *Cleveland Rolling Mill Co. v. Corrigan* (Ohio) 3 L. R. A. 385; *Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 128, where the doctrine of imputed negligence is discussed. See also *Wymore v. Mahaaka County* (Iowa) 6 L. R. A. 555, where it is held that the right of recovery in favor of the estate of a child killed by another's negligence is not affected by the fact that the parents who are entitled to his estate by inheritance contributed to the accident. In this case it was held that the contributory negligence or wrongful act of the parent, without volition on the part of the infant, is not imputable to him. The case, while it approves as a better rule the authorities which oppose the doctrine of the principal case, goes on to say that while such negligence would prevent a recovery by the parents in their own right, yet, where the child was free from fault, though the parents by their negligence contributed to its death, that would not be a sufficient reason to deny his estate relief.

over on a public street in a crowded part of the City of Boston, and the jury have found in substance that the accident was caused wholly or in part by his failure to exercise such care as an adult person of ordinary prudence would have exercised under like circumstances. That fact would not prevent his recovery if he was of such age and intelligence that he could properly be alone on the street, and if he used the ordinary care of boys of his age; but if he was too young to take care of himself, and was negligently permitted to be on the street, and if he was hurt when an adult in his place would not have been, the negligence whereby he came there would be held to have contributed to the accident. In such a case his presence there would be a cause, and not merely a condition, of the accident. If a child is too young to be capable of caring for himself, it is the duty of his proper custodian to care for him, and in a suit to recover for an injury caused by the negligence of another, if his custodian was guilty of negligence, that negligence is imputed to him. *Collins v. South Boston H. R. Co.* 143 Mass. 314, 2 New Eng. Rep. 649; *Gibbons v. Williams*, 135 Mass. 335; *Lynch v. Smith*, 104 Mass. 57.

In the present case the judge ruled, in effect, that the plaintiff was too young to be capable of taking care of himself on a street crowded with vehicles, and that his mother, who was his proper custodian, was negligent in allowing him to be there at the time of the accident.

His mother voluntarily permitted him to go upon the street attended by no one but his brother seven years and nine months old, and his sister five years and fourteen days old. It was on the thirteenth day of March, and the weather was clear and cold. She lived on a narrow street with narrow sidewalks, about forty-five feet from the corner of B. Street, which is about twenty-five or thirty feet wide between the curbstones, and has sidewalks about eight feet wide. She let the three children go out at about twenty minutes past five o'clock in the afternoon to await their father's coming home from work. Their father testified that he was accustomed to come home from his work by way of B. Street at about ten minutes past six o'clock, and that he had frequently met his children waiting for him on B. Street or Bolton

Street, and that he and the plaintiff's mother knew that B. Street "at this time of the day was usually crowded with teams of various kinds."

The question presented by the exceptions is whether on these facts, which were all undisputed, the jury could properly have been permitted to find that the plaintiff's mother was in the exercise of due care in allowing him to go upon the street. It is to be noted that he went out with his brother and sister fifty minutes before his father was expected to return. His mother must be presumed to have known the disposition and habits of children, and to have expected that they would occupy themselves for nearly an hour on the street as children would naturally do. What she did was equivalent to telling them to go out and play on the street until their father should come home. It was very different from a direction to them to go together to a designated place, and, after doing an errand, directly, to return. She knew they must occupy themselves in some way for fifty minutes, and that they were to be upon a street crowded with teams. It cannot be argued that the girl five years old could assist in the care of the plaintiff. Her presence would increase rather than diminish the probability of accident. There could have been no reasonable ground for expecting that the older boy, for so long a time, would exercise the constant and efficient supervision and control of the plaintiff which would be necessary reasonably to secure his safety in such a place. If the two older children had the plaintiff by the hand when they left the house, and if they might have been trusted to go in that way if sent on an errand a little distance along the street, the mother must have known that, if sent out to pass their time for an hour, each would soon insist upon having freedom of movement.

The case differs materially from all those cited by the plaintiff's counsel, and a majority of the court are of opinion that there was no evidence that the mother of the plaintiff was in the exercise of due care in permitting him to go on the street for so long a time without making better provisions to secure his safety.

Exceptions overruled.

RHODE ISLAND SUPREME COURT.

FIFTH NATIONAL BANK v. PROVIDENCE WAREHOUSE CO.

(....R. L....)

1. A warehouseman who has given a receipt for eggs in cases without any distinguishing marks, but which he can identify, and which are stated in the receipt to be subject to the order of a third person, who has made advances on them, as the warehouseman knows from the course of business, is liable to the third person in case he delivers them to the depositor without an order from such person, although he retains other eggs belonging to the depositor to answer the receipt.

9 L. R. A.

2. The measure of damages in assumpsit by the holder of a warehouse receipt, for eggs on which he has made advances, against the warehouseman who has delivered the eggs to the depositor, is the amount of the loan with interest, if this is less than the value of the eggs.

(July 12, 1890.)

ACTION to recover the value of certain eggs which had been deposited with defendant subject to plaintiff's order, and which were afterwards delivered to the depositor without an order. *Judgment for plaintiff.*

The facts are fully stated in the opinion.

Mr. James M. Ripley for plaintiff.

Messrs. Stephen A. Cooke, Jr., and Louis L. Angell for defendant.

Stiness, J., delivered the opinion of the court:

Alverson, a produce dealer in Providence, borrowed of the plaintiff the sum of \$1,950 upon a warehouse receipt of the defendant, which read as follows:

Providence Warehouse Co.
Providence, Sept. 28,
1888.

No. 5175.

Marks.

Stored in Section B.

Received on storage of O. F. Alverson & Co., subject to the order of the Fifth Nat. Bank, three hundred and ninety (390) ca. eggs. To be delivered according to the indorsement hereon, but only on the surrender and cancellation of this receipt, and on payment of the charge payable thereon.

S. J. Foster, Mgr.

There were no distinguishing marks on the cases of eggs, and none noted in the margin of the receipt; but the eggs were placed by themselves in the defendant's loft. Alverson had other eggs in the warehouse, some of which may have been stored with these; but this lot was specially known to the manager and servants of the warehouse from the fact that a portion of it got wet when the defendant was putting it into the warehouse. November 1, 1888, the defendant delivered these eggs to Alverson, describing them by the receipt number 5175, receiving the storage fees, and giving receipt therefor, afterwards. The plaintiff sues to recover the value of the eggs. The defendant contends that, having kept other cases of Alverson's eggs, subject to the plaintiff's order, it had the right, in the absence of distinguishing marks, to deliver the eggs stored under this receipt, and hence is not liable for such delivery without the plaintiff's order. To support this proposition the defendant cites the following cases: *Dole v. Olmstead*, 86 Ill. 150, 41 Ill. 344; *Preston v. Witherspoon*, 109 Ind. 457, 7 West. Rep. 71; *Rice v. Nizon*, 97 Ind. 99; *National Exch. Bank v. Wilder*, 84 Minn. 149.

These are cases where grain was deposited, according to usage, in common bulk, being necessarily indistinguishable; and the several depositors were held to be tenants in common of the common stock. Consequently, in the first case, loss by diminution or decay was to be borne *pro rata*; in the second, where there was a mingling with grain of the warehouseman, who was publicly selling and shipping from the common mass, an apparent ownership and authority to sell was conferred upon him, so that the depositor was estopped to assert title against an innocent purchaser in the usual course of business; in the third case, where the warehouseman sold in the same manner, leaving enough to supply the depositor, the bailment continued, and the warehouseman was not liable for loss from an accidental fire, without negligence. These cases are therefore quite different from the case at bar, and depend upon very different considerations, aside from the different point involved. It is obvious that grain in an elevator is practically incapable of distinction, and can hardly be stored without

commingling. But it is not so with merchandise packed in cases. Jones, Pledges, § 808.

The warehouseman can place them in separate lots, or he can mark them with the number of the receipt.

Gardiner v. Suydam, 7 N. Y. 857, cited by the defendant, was a suit in trover between two holders of receipts, which covered more flour than the depositor had in store, the defendant's receipt being prior in date. It was held, as there had been no delivery by separation, marks or otherwise, the plaintiff showed no title to the specific property sued for; and, treating the receipts as agreements to deliver, the defendant had as good a right to the flour as the plaintiff. *Judge Comstock*, who was counsel for the respondent in that case, afterwards held in *Kimberly v. Patchin*, 19 N. Y. 830, also a suit in trover between purchasers from a depositor, upon a sale of grain, that separation from a mass, indistinguishable in quality or value, was not necessary to pass title, when the intention so to do is otherwise clearly manifested. Neither of these cases, though growing out of warehouse receipts, throw any light upon the liability of a warehouseman.

In the case before us the eggs were delivered without an order from the plaintiff, with full knowledge that they were covered by the receipt, which stipulated they were subject to the plaintiff's order. It is urged in justification that these eggs were out of cold storage, and other eggs were kept in cold storage to answer the receipt. To this the plaintiff replies that the eggs covered by this receipt were fall eggs, fresher than the others, and of greater value. However this may have been, we think it is clear that the plaintiff, under this receipt, has the right of a bailor, and is not bound to receive other property of this description in place of its own, when the bailee has intentionally delivered it to another. The transferee has the right to suppose that the described property is held subject to his order. How is he to know that the warehouseman has mingled it with other like property, so as to be indistinguishable from it, if such were the case? Surely the warehouseman is bound to some degree of care and responsibility to enable him to deliver what he receives. If it is enough that he deliver anything answering the same general description, a warehouse receipt is indeed a precarious security. The delivery to Alverson, who deposited the eggs, is no defense, since by its contract the defendant assumed the obligation to deliver only upon the order of the plaintiff, knowing from the course of business that the plaintiff had advanced money upon the receipt. The case therefore differs in this respect from *Parker v. Lombard*, 100 Mass. 405, cited by the defendant. That was a suit in trover by the holder of a receipt against the purchaser of a warehouse, who, without notice or knowledge of the receipt, and upon information given by his predecessor, had notified the apparent owners of the cotton to take it away. It was held that he was not liable to the plaintiffs for a conversion of the property. He had no contract with the plaintiff, and had been guilty of no negligence in trying to ascertain the ownership of the property. The case, however, is instructive, because it recognizes the rule that delivery to a wrong person is in

itself a conversion by a bailee. Upon this point the opinion quotes the language of *Mr. Justice Buller in Sydes v. Hay*, 4 T. R. 280: "If one man, who is intrusted with the goods of another, put them into the hands of a third person, contrary to orders, it is a conversion."—which is the claim of the plaintiff in the case at bar.

Bank of Rome v. Hazelton, 15 Lea, 216, is nearer in point. There receipts had been given for iron, not identified, from which the warehouseman had allowed the depositor to take parts, and afterwards to restore the quantity taken. In a suit between the creditors of the depositor and the holders of the receipt, the latter claimed title to the whole, and the court allowed it upon the ground that, in effect, there had been an unauthorized loan of the iron, for which the receipt holders could have recovered the value, if it had not been replaced; having been replaced before the rights of others intervened, it inured to the benefit of the receipt holders, who had the right to ratify and adopt the unauthorized act.

Ferguson v. Northern Bank of Kentucky, 14 Bush, 555, is an elaborately considered case, which, like most of the cases on warehouse receipts, involves the question of title in the holder of the receipt. There it was held that a receipt for a number of bams, procured by the owner, who had a larger number in store, without separation or distinguishing marks, carried no title for want of delivery. In criticising *Kimberly v. Patchin*, *supra*, the court suggested that, as the vendor in that case thought he was selling all, the near approach to the entire quantity may have influenced the court in holding the defendant liable for conversion. The case differs from the one before us. Here there is no question of delivery; the receipt was not for part of a larger bulk, but for a specific lot, deposited at the time of the receipt, by acceptance of the bill of lading and removal from the cars by the defendant to its warehouse.

Stewart v. Phoenix Ins. Co., 9 Lea, 104, is almost identical with the case at bar. There receipts were given for forty bales of cotton, "Marks various," deliverable only upon the indorsement of the secretary of the Phoenix Insurance Company. Upon the failure of Vaughan, the depositor, the warehouseman notified the secretary that creditors of Vaughan were replevying the cotton then in store, and requested him to take forty bales, to secure the company, or to defend the replevin suit. The secretary inquired if he had the same cotton that was on hand when the receipt was given, and, upon being informed by the warehouseman that he had not, the secretary declined to have anything to do with the matter. At the maturity of the note, for which the receipt was security, the company demanded the cotton, or its value, and then brought suit. The court held that the receipt was a contract, vesting the right to the particular forty bales in the company. Parol testimony was offered to show that the receipt was not to cover any particular forty bales, but that the warehouseman was to keep on hand as much as forty bales, of the same value, belonging to Vaughan, subject to the receipt. This evidence was rejected upon the ground that its effect would be to show an independent, collateral agreement,

contradictory of the written contract, since both contracts could not stand. The company therefore recovered the value of the cotton.

So in *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, it was held that a warehouse receipt was a contract binding the receptor to safely store and deliver the same goods to the holder of the receipt, except in those cases where there is some express agreement or known usage of trade which shows that the parties otherwise intended. Dixon, *Ch. J.*, says: "The meaning of this [receipt] clearly is, that the same fifty-four barrels received in store, and described as 'mess pork,' are deliverable or to be delivered to the bearer of the receipt, on return of the same and payment of storage; and the warehouseman, not less than the ship owner or carrier, is bound to deliver the identical goods received in fulfillment of his contract." Consequently the warehouseman, having delivered the same barrels which he received, was held not to be liable, although they did not in fact contain mess pork, but only salt, as he acted in good faith, and was ignorant of the contents of the barrels.

In *Goodwin v. Scannell*, 6 Cal. 541, the court held that the defendants, being warehousemen, and having given their storage receipt for a specific number of barrels of pork, could not set up the want of segregation to avert their liability; that by their receipt they charged themselves, and were estopped; that, if a warehouseman would protect himself from liability in such cases, he could do so by describing the goods as part of a larger lot, and unseparated, or in bulk with the goods of others, which would give notice to any transferee of the warehouse receipt of the condition of the goods, and enable him to use necessary diligence in obtaining the title to specific property. See also *Lichtenhein v. Boston & P. R. Co.* 11 Cush. 70.

We think the plaintiff's claim in this case, to hold the defendant responsible for the same goods covered by the receipt, is sustained both by principle and authority. The contract is a plain one, which must be answered according to its terms.

A question is made upon the measure of damages. The action is *assumpsit*, setting out that the defendant agreed to keep and deliver on the order of the plaintiff three hundred and ninety cases of eggs; yet, unmindful of said promise, the defendant delivered the same to a person unauthorized by the plaintiff, whereby the plaintiff lost said eggs, and the defendant became liable to pay for the same on request. The suit is upon contract, and properly so, although the gist of the action is the wrongful delivery.

Judge Cooley (Cooley, Torts, 91) lays down the rule that where a tort is a breach of duty arising out of a contract, the action may be in tort or for the breach of the contract. Taking the case of a common carrier as an illustration, he says: "Thus, for the breach of the general duty imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought. Other bailees of property occupy a similar position; they assume certain duties in respect to the property by receiving it."

As to the damages, the defendant contends that the plaintiff should have made demand for

the eggs, and, having made none before suit, the measure of damages is the value of the eggs at the date of the suit, viz., March 11, 1889, at which time the eggs, if kept, would have spoiled. In action of tort the rule is that the plaintiff is entitled to the value of the property at the time of the conversion. It amounts to a conversion when one disposes of property of another without authority, or puts it out of his power to return it, or deals with it in a manner subversive of the dominion of the owner. *Donahue v. Shippee*, 15 R. L. 453, 15 New Eng. Rep. 866.

In such cases a demand is not necessary. When, therefore, the suit is in assumpsit, we see no reason for requiring a demand after proof of the fact of conversion, nor for making

the rule of damages depend upon a demand. Both the breach of the contract and the conversion were complete upon the unauthorized delivery of the goods. See *Jones, Pledges*, §§ 429, 574; *Lichtenhein v. Boston & P. R. Co.* 11 Cush. 70; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush, 658; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42.

The rule of damages should be substantially the same in either form of action. But in this case the plaintiff had only a special property in the eggs as pledgee; and, delivery having been made to the pledgor, the measure of damages is the amount of the plaintiff's loan, with interest, it appearing in evidence that the value of the property at the time of the conversion exceeded that amount.

MINNESOTA SUPREME COURT.

NATIONAL BANK OF COMMERCE,
Resp't.,

v.

-CHICAGO, BURLINGTON & NORTH-
ERN R. CO., *Appt.*

SAME, *Resp't.*,

v.

WISCONSIN CENTRAL CO., *Appt.*

-CHICAGO, BURLINGTON & NORTH-
ERN R. CO., *Resp't.*,

v.

L. T. SOWLE ELEVATOR CO., *Appt.*,

WISCONSIN CENTRAL CO., *Resp't.*,

v.

SAME, *Appt.*

(....Minn....)

1. A check on a bank is not payment, but is only so when the money is received on it;

*Head notes by MITCHELL, Ch. J.

and there is no presumption that a creditor takes a check in absolute payment arising from the mere fact that he accepts it from his debtor.

2. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods, even from an innocent subvendee for value, unless he has been guilty of such negligence or laches as would equitably estop him from so doing.

3. Bill of lading not conclusive. *Held*, also, in accordance with the decisions of the federal courts and the great weight of authority elsewhere, that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier even to an innocent consignee or indorsee for value, and that the carrier is not estopped by the statements in the bill from showing that no goods were in fact received for transportation.

NOTE.—Acceptance of check, not *pro facto* payment.

The giving of a negotiable security by the debtor only operates as a conditional payment, unless the parties expressly or impliedly agree to consider it as an absolute payment. *Brugman v. McGuire*, 23 Ark. 740; *Hunter v. Moul*, 28 Pa. 15; *McNeill v. McCamley*, 6 Tex. 123.

In England a negotiable security given for an existing debt is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. *Currie v. Misa*, L. R. 10 Exch. 123.

Prima facie it is to be considered as a collateral or additional security, but by express agreement it may be a satisfaction and a bar. *Day v. Thompson*, 65 Ala. 229; *Bill v. Porter*, 9 Conn. 23.

The mere acceptance of a negotiable instrument for a debt, whether on a negotiable instrument or not, is not per se, without a distinct agreement to receive it as such, payment of such debt. *Johnson v. Bank of North America*, 5 Robt. 590; *Porter v. Talcott*, 1 Cow. 384; *Oloott v. Rathbone*, 5 Wend. 490; *Cromwell v. Lovett*, 1 Hall, 58; *Lovett v. Cornwell*, 6 Wend. 399; *Vail v. Foster*, 4 N. Y. 312; *Kobbi v. Underhill*, 3 Sandf. Ch. 277, 7 N. Y. Ch. L. ed. 851.

The acceptance by a creditor of a certified check from his debtor does not *pro facto* constitute a

payment of the debt. *Born v. Indianapolis First Nat. Bank*, 7 L. R. A. 442, 123 Ind. 73.

On the assumption that the check would be paid, the treasurer of an asylum sent a receipt for the amount of the indebtedness. The check did not thereby become payment. *Thomas v. Westchester County Supra*, 115 N. Y. 51; *Burkhalter v. Second Nat. Bank of Erie*, 42 N. Y. 533.

A forged check received in payment for personal property sold will not prevent the seller from recovering the consideration. *Springer v. Hubbard*, 22 Me. 299.

Payment by check only a conditional payment of the debt. See note to *Born v. Indianapolis First Nat. Bank* (Ind.) 7 L. R. A. 442.

Bill of lading.

The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver. *Pollard v. Vinton*, 105 U. S. 7, 23 L. ed. 993.

Where a bill of lading was given by mistake for goods not actually shipped, there can be no lien for nondelivery of the goods. *King v. The Lady Franklin* ("The Lady Franklin") 75 U. S. 3 Wall. 325, 19 L. ed. 455.

4. The fact that goods were taken from the possession of the carrier by one having title paramount to that of the consignor is a good defense to an action by the consignee or indorsee of the bill of lading for the nondelivery of the property.

(August 6, 1890.)

APPEALS by defendants in the first two actions from judgments of the District Court for Hennepin County in favor of plaintiff in actions brought to recover damages for the nondelivery of certain wheat in accordance with defendants' bills of lading, and by defendant in the other two actions from orders of the same court denying its motion for new trials after verdicts directed against it in actions brought to recover damages for an alleged wrongful conversion of the same wheat. *Reversed.*

The cases are sufficiently stated in the opinion.

Messrs. Young & Lightner, for the Chicago, Burlington & Northern R. Co.:

The two prerequisites to a completed sale are, first, that the vendor put the goods into that shape in which the purchaser is bound to accept them, and second, that everything is done to the goods necessary to ascertain the price, as measuring, weighing and testing.

Benjamin, Sales, §§ 818, 819.

In this case these prerequisites to a completed sale existed. The buyer had, moreover, given his check for the price, obtained his receipted invoice, and assumed dominion over the property by taking out the bills of lading. The delivery was free on board cars, and the vendor was not bound to send the goods to the vendee, but delivery was complete on the cars at the elevator, on the giving of notice to the purchaser of the place of storage, which occurred on September 14.

Benjamin, Sales, Bennett's ed. pp. 649-654, § 679; *Illinois Cent. R. Co. v. Smyser*, 88 Ill. 860, 87 Am. Dec. 801; *Allen v. Agee*, 15 Or. 551.

If the wheat was delivered, the cases resolve themselves into a controversy between the Bank and the Sowle Elevator Company.

Story, Bailm. § 583; 2 *Parsons*, Cont. 204; *Sheridan v. New Quay Co.* 98 Eng. C. L. 618; *King v. Richards*, 6 Whart. 418.

If, however, the court should conclude that the wheat was never delivered to the Railroad Company, the Company cannot be held liable to the Bank of Commerce on the bills of lading.

Grant v. Norway, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Jessel v. Bath*, L. R. 2 Exch. 267; *McLean v. Fleming*, L. R. 2 Sc. App. Cas. 128; *Huddersley v. Ward*, 8 Exch. 330; *Meyer v. Dresser*, 16 C. B. N. S. 646; *Brown v. Powell D. S. Coal Co.* L. R. 10 C. P. 562; *Cox v. Bruce*, L. R. 18 Q. B. Div. 147; *Schooner Freeman v. Buckingham*, 59 U. S. 18 How. 183, 15 L. ed. 841; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *St. Louis, I. M. & S. R. Co. v. Knight*, 123 U. S. 79, 30 L. ed. 1077; *Friedlander v. Texas & P. R. Co.* 180 U. S. 416, 32 L. ed. 991; *The Lady Franklin*, 75 U. S. 8 Wall. 825, 19 L. ed. 455; *The Joseph Grant*, 1 Biss. 193; *Robinson v. Memphis & O. R. Co.* 9 Fed. Rep. 129, 141, 16 Fed. Rep. 57; *The Alice*, 12 Fed. Rep. 490; *Law v. Botsford*, 28 Fed. Rep. 651; *Fearn v. Richardson*, 12 La. Ann. 753; *Fellows v. Powell*, 16 La. Ann. 816; *Hunt v. Mississippi R. Co.* 29 La. Ann. 446; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11; *Seare v. Wingate*, 8 Allen, 103; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 880; *Dean v. King*, 23 Ohio St. 118, 186; *Second Nat. Bank of Toledo v. Walbridge*, 19 Ohio St. 419. See also *Hutchinson*, Carr. §§ 128, 124; *Schouler*, Bailm. 476, 477; 1 *Smith*, Lead. Cas. 8th ed. p. 1209.

Messrs. Lusk & Bunn for the Wisconsin Central Co.

Messrs. Jackson & Atwater, for the National Bank of Commerce:

The carrier cannot contradict the bill of lading as to the delivery to it of the goods described.

Bank of Batavia v. New York, L. E. & W. R. Co. 7 Cent. Rep. 832, 106 N. Y. 195; *Armour v. Michigan Cent. R. Co.* 65 N. Y. 111; *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.* 20 Kan. 519; *Brooks v. New York, L. E. & W. R. Co.* 108 Pa. 529; *Sioux City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556; *St. Louis & I. M. R. Co. v. Larned*, 108 Ill. 293. See Benjamin, Sales, § 781; *Coventry v. Great Eastern R. Co.* L. R. 11 Q. B. Div. 776.

A railroad company which has issued bills of lading in advance of the receipt of the goods is not liable thereon until the goods are actually received, and is not bound to refuse the goods when tendered, if they do not correspond in grade and quality with those described in the bills of lading. *St. Louis, I. M. & S. R. Co. v. Knight*, 123 U. S. 79, 30 L. ed. 1077.

A carrier is not precluded from denying that goods represented by a bill of lading were never received by it, where it accepted a warehouse receipt as evidence of the shipper's goods, in the faith that they would be delivered. *Hazard v. Illinois Cent. R. Co.* (Miss.) Feb. 3, 1890.

The agent of a railroad company at one of its stations cannot bind the company by the execution of a bill of lading for goods not actually placed in his possession, and by its delivery to a person fraudulently pretending, in collusion with such agent, that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. *Friedlander v. Texas & P. R. Co.* 120 U. S. 416, 33 L. ed. 901.

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A common carrier is not estopped from denying that it has clothed its agent with apparent authority to do the act, where he, having authority to sign bills of lading, has, acting by collusion with another person solely for a purpose of their own, issued a bill of lading for goods which never came into the possession of the carrier. *Ibid.*

A bill of lading covers goods subsequently delivered and received to fill it, and will represent the ownership of the goods. *Hents v. The Idaho ("The Idaho")* 93 U. S. 575, 23 L. ed. 973.

Bill of lading construed. *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 353.

Goods taken from carrier on legal process.

Property in transit seized upon legal process sued out against the owner is in the custody of the law, and the carrier is excused from liability for not delivering it. *Jewett v. Olsen*, 18 Or. 412.

When goods are taken out of the possession of the carrier by legal process, he should give notice forthwith to the parties interested. *Ibid.*

Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself the representation, the third person dealing with such agent in entire good faith pursuant to the apparent power may rely upon the representation, and the principal is estoppel from denying its truth to his prejudice.

New York & N. H. R. Co. v. Schuyler, 84 N. Y. 30; *Mechem*, Ag. § 717.

Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent while so employed, by his own wrongful act, occasions a violation of that duty and an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it.

McCord v. Western U. Teleg. Co. 89 Minn. 181; *Potulni v. Saunders*, 87 Minn. 517.

By the terms of the contract of sale between the Elevator Company and Moak & Co., the Railroad Companies were the agents or bailees of the vendee, and a delivery to them was a delivery to Moak & Co. If the wheat was in fact delivered to the defendants, the Elevator Company would have no right to retake it, as against the Bank, a bona fide purchaser for value, either as having a vendor's lien, or a right of stoppage *in transitu*, or on the ground of a conditional sale.

Benjamin, Sales, § 862; *Colebrooke*, Collateral Securities, § 405; *Gen. Stat.* 1878, chap. 89, § 15; *Kinney v. Cay*, 89 Minn. 210.

When the receipted bill was given to Moak & Co., that transaction was as effectual to transfer the possession as though a bill of sale or delivery order on the Railroad Companies had been given.

Benjamin, Sales, §§ 174, 175, 803. See *Webster v. Granger*, 78 Ill. 280.

The taking of the check and the giving of the receipted bill was a complete sale and delivery of the chattels.

Nash v. Brewster, 89 Minn. 530; *Hatch v. Standard Oil Co.* 100 U. S. 124, 25 L. ed. 554.

But, even if there be a doubt as to whether the Elevator Company had made a complete sale and delivery of the wheat, its acts went so far that it cannot now deny the title of the Bank, an innocent purchaser for value.

Colebrooke, Collateral Securities, § 487; *Jennings v. Gage*, 18 Ill. 611; *Brundage v. Camp*, 21 Ill. 837; *VanDuzer v. Allen*, 90 Ill. 602.

If the Elevator Company and the plaintiff are equally innocent, nevertheless, because the former intrusted Moak & Co. with the evidence of title to the property and placed in them the confidence which caused the loss, they should be responsible for it, and not the plaintiff.

Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; *Young v. Bradley*, 68 Ill. 553; *Peters v. Elliott*, 78 Ill. 821; *Dows v. Kidder*, 84 N. Y. 121; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Voorhis v. Olmstead*, 68 N. Y. 113; *Morse v. Chicago, R. I. & P. R. Co.* 73 Iowa, 226; *Burton v. Curryea*, 40 Ill. 320.

Meers, Hart & Brewer for L. T. Sowle Elevator Co.

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Mitchell, Ch. J., delivered the opinion of the court:

All of these actions grew out of the same transaction, and involve the same state of facts. They were all determined in the court below upon the same point, viz., the delivery by the defendant Elevator Company, as vendor, to Moak & Co., as vendees, of certain wheat, the value of which is the subject of the actions. All four appeals may therefore for convenience be considered together.

The first main question to be considered is whether there had been such a delivery of the wheat in question by the Elevator Company to Moak & Co. as to pass the title absolutely to the latter. The undisputed facts are substantially these: The defendant Elevator Company, which appears to have been in the business of buying, selling and shipping grain, owned and operated a grain elevator in Minneapolis. There were three tracks from the Manitoba Railroad to this elevator, designed for the use of the Elevator Company in its business. One of these ran through the elevator and was on the ground of the Elevator Company. The other two, outside the elevator, belonged to the Manitoba Company, which acted as agent of the other Railway Companies, in switching all their cars to and from the elevator, for which they charged a certain sum per car. The same person, one Dudgeon, acted as the agent of all three Railway Companies. The two outside tracks referred to were used exclusively for the business of the elevator, unless some special emergency temporarily required some other use. The usual and invariable course of business between the Elevator Company and the Railway Companies, as to all cars loaded out of the elevator and placed on these tracks, had been for the Elevator Company to "card" the cars and give the railway agent the "switch bills" or "shipping orders," and without such switching orders from the Elevator Company the agent never removed the cars from the Manitoba tracks. This had been the course of business as to all shipments by the Elevator Company for Moak & Co., the former giving the railway agent a "switch bill," after Moak & Co. had paid for the grain. The Elevator Company had made certain executory contracts with Moak & Co. for the sale of large quantities of wheat of a specified grade. By the express terms of these contracts, the sales were to be for cash on delivery of the wheat, free on board the cars at the elevator. Large deliveries had already been made on these contracts, in all of which the terms concerning cash payment on delivery had been strictly insisted upon and enforced.

On the occasion now under consideration, Moak & Co. notified the Elevator Company that they desired to ship four cars of the wheat contracted for—two by each of the Railway Companies, parties to these actions. Thereupon the Elevator Company ordered the four cars—two of each Company—to be switched into its elevator, and there loaded them with wheat of the specified grade (which was weighed and inspected by the

state officers), and then caused them to be moved by a Manitoba switch engine out from the elevator, and onto one of the tracks devoted to the use of the elevator business, and there left them standing. This loading was finished on September 14, and on the same day the Elevator Company sent written notice to Moak & Co. that they had loaded the cars on their account, giving the number of each car and the weight and grade of its contents. Nothing further appears to have been done until September 17, when the Elevator Company sent a bill of the wheat to Moak & Co., who gave a check for the amount on their bank, whereupon the Elevator Company receipted the bill, and delivered it to Moak & Co. On the same day Moak & Co. gave shipping orders to the railway agent, and obtained from him bills of lading of the wheat, naming themselves as consignors, and certain parties in Wisconsin and Illinois as consignees, and immediately, or at least the same day, drew their drafts on the consignees, which they sold to the plaintiff Bank for value, with the bills of lading attached as security. These drafts were duly presented but never paid. The Elevator Company never "carded" the cars or gave the railway agent any "switch bill" or "shipping orders."

The judge who tried the *Bank Cases* finds that Moak & Co. obtained the bills of lading from the Railway Companies upon presentation of the receipted bill of the wheat from the Elevator Company, but this is unsupported by evidence, as there is not a particle of testimony that the railway agent ever saw or knew of the existence of this receipted bill. So far as the Railway Companies were concerned, the first time Moak & Co. ever appeared in connection with this wheat was when they applied for and received the bills of lading. Why, or under what circumstances, the railway agent took shipping orders from Moak & Co., instead of from the Elevator Company, in accordance with the usual course of business, is left wholly unexplained. On the same day (September 17) on which the Elevator Company received the check from Moak & Co. it deposited it with its banker. This check, according to the usual course of business, passed through the clearing house, and on the 18th, near noon, was presented at Moak & Co.'s bank for payment, which was refused for want of funds. It appears that on the 17th Moak & Co. had in bank sufficient funds to pay the check, but that they had drawn them out on the morning or forenoon of the 18th before the check was presented. However, no claim is made that there was any undue delay in presenting the check. On being notified of the dishonor of the check, the Elevator Company immediately, and on the afternoon of the 18th, caused the four cars (which still stood where they had been placed on the 14th) to be run back into the elevator, and there unloaded them, claiming the right to do so as an unpaid vendor. The Bank, claiming the wheat under the bills of lading, sued the Railway Companies for its nondelivery and recovered, whereupon the Railroad Companies sued the Elevator Com-

pany for the wrongful taking of the wheat and also recovered.

In the *Bank Cases*, which were tried together, the court found that there had been a delivery of the wheat by the Elevator Company to Moak & Co., by which the title passed to the latter. In the cases against the Elevator Company, which were also tried together, the court directed verdicts for the plaintiffs, upon the ground, evidently, that in his opinion the evidence showed conclusively that there had been such a delivery. But as the facts are undisputed, and in our opinion present a mere question of law, the difference in the manner in which the cases were disposed of is unimportant. In the *Bank Cases* the court did not pass upon the question of the effect of the bills of lading upon the liability of the Railway Companies, but rested its decision entirely upon the delivery of the wheat by the Elevator Company to Moak & Co.

In the briefs of counsel it is stated that the question in the cases is whether there had been a "delivery" of the wheat by the Elevator Company to Moak & Co. So general a statement is, we think, both inaccurate and misleading. The word "delivery" is used in different senses; and acts and facts may be sufficient to constitute a delivery for one purpose and not for another purpose. It is not every kind of delivery that will deprive a vendor of the right to retake goods for non-payment of the purchase money. Where goods are sold for cash, delivery and payment are concurrent conditions, and a delivery in expectation of immediate payment is conditional only, and if payment is not made as agreed, the vendor may reclaim the goods. Hence, the real question in these cases is whether there was an unconditional delivery of the wheat to Moak & Co., or, otherwise expressed, did the Elevator Company waive the condition of cash payment on delivery, or accept the check as absolute payment? It had the undoubted right to waive this condition, also to waive payment in cash and accept the check as unconditional payment, but we fail to find anything in the facts to support any such conclusion. Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it, and if it is dishonored there is no accord and satisfaction of the debt. 2 Parsons, Cont. 623; Benjamin, Sales, § 781; *Brown v. Leckie*, 48 Ill. 497; *Woodburn v. Woodburn*, 115 Ill. 427, 3 West. Rep. 85; *Cromwell v. Lovett*, 1 Hall, 56.

Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only

conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may re-take the goods. *Hodgson v. Barrett*, 33 Ohio St. 63.

Conceding, for the sake of argument, that there was in this case a constructive delivery of the wheat contemporaneously with the receipt of the check, there is an entire absence of evidence to rebut the presumption that it was only conditional upon the check being paid on presentation. Therefore, upon the dishonor of the check the right of the Elevator Company to re-take the wheat still continued in full force. Much stress is laid by counsel, and apparently by the trial court, upon the facts that the Elevator Company had loaded the wheat into the cars of the carriers designated by Moak & Co., and had placed the cars upon the tracks of the Manitoba Company. It is urged that this amounted to a delivery of the wheat to the Railway Companies, who thereafter held possession as agents of Moak & Co., for transportation; that the matter of "carding" the cars and furnishing the railway agent with "switch bills" is not material upon the question of possession; that these things being done after the cars were on the tracks, their only purpose was to furnish the Manitoba Company with vouchers for its switching charges. But it seems to us that this is putting an erroneous interpretation upon the acts of the Elevator Company, in view of the customary manner of doing business between it and the Railway Companies. Undoubtedly, in furnishing cars to be loaded, and in furnishing these tracks on which to place them after being loaded, the Railway Companies anticipated that the grain would be delivered for transportation over their roads; and in loading the cars and setting them out on the tracks specially designed for its business, the Elevator Company doubtless anticipated the future delivery of this wheat to Moak & Co., and its shipment on their account, and had that end in view. But until the Elevator Company turned the wheat over to Moak & Co., or turned it over to the Railway Companies for transportation on account of Moak & Co., the property was still as much in its possession as when in the elevator. All that was done merely amounted to its storing its wheat in the railway cars and on the railway tracks, designed for that purpose, preparatory to its shipment or its delivery to the vendees. Until the Elevator Company turned over control of it to the Railway Companies for transportation, or to Moak & Co., no one but it, not even the Railway Companies, had any right to ship out the wheat. The business of the Elevator Company could not be safely conducted on any other basis.

It is clearly evident that the giving of "switch bills" by the Elevator Company to the railway agent had a double, or perhaps treble, purpose: *first*, to furnish the Manitoba Company with vouchers for its switching charges; *second*, to furnish the agent of the Railway Companies with evidence of authority of the Elevator Company to ship the wheat, and *third*, to furnish him with direc-

tions whither and to whom to ship it. It seems to us perfectly clear that, at least up to the 17th, this wheat was in the actual possession and control of the Elevator Company, and that if there was any delivery of any kind to Moak & Co. on that day, on the receipt of their check, it was only conditional on the check being paid on presentation; and therefore when the check was dishonored the Elevator Company had an undoubted right to re-take or retain the wheat, whichever it may be termed. It is urged that a different rule applies where immediately the property has been purchased by an innocent sub-vendee for value. The general rule is that a title, like a stream, cannot rise higher than its source, and it is difficult to see how a person can communicate a better title than he himself has, unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a sub-vendee, than as to the original purchaser, except perhaps that as to the former a waiver of the condition, as for example of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express but implied. See *Benjamin, Sales, Am. note, 269; Coghill v. Hartford & N. H. R. Co. 3 Gray, 545; Hirschhorn v. Canney, 98 Mass. 150; Armour v. Pecker, 123 Mass. 143.*

It is suggested that Gen. Stat. 1878, chap. 89, § 15, would apply, and that any condition attached to the delivery would be void, as against creditors and purchasers unless the contract is filed. This Statute may establish such a rule as to conditional sales, properly so called, where the condition is that the title is to pass, not upon delivery, but upon payment at some subsequent date. But it can have no application to a case like the present, where the terms of sale are cash on delivery, and the only condition attached to the delivery arises from the fact that payment by check is conditional. In such a case, if the check is dishonored, the vendor, if guilty of no fraud or laches which creates an equitable estoppel against him, may re-take the property even from an innocent sub-vendee for value. We are not called upon to decide what would have been the effect if anyone had dealt with the wheat in reliance upon the acknowledgment of the Elevator Company, in the receipted bill, that it had been paid for, for there is no evidence that such was the fact. But it is difficult to see how any negligence or laches can be ascribed to the act of a vendor, giving his vendee a receipted bill of the goods upon receiving his check on his banker, which the vendor has every reason to suppose will be paid on presentation. See *Zaehrmann v. Roberts*, 109 Mass. 53. The evidence did not therefore justify the conclusion of the trial judge in the *Bank Cases*, that there had been a delivery of the wheat so as to pass the title absolutely to Moak & Co., and *a fortiori* it did not justify the direction of verdicts for the plaintiffs in the cases against the Elevator Company. Whether the evidence would have

justified a finding that there was a constructive delivery at the time the check was taken and the bill receipted, it is unnecessary to decide, for if there was it could only have been, as already stated, a conditional delivery which did not deprive the Elevator Company of the right to re-take the wheat upon the dishonor of the check. There must be a new trial at least in the cases against the Elevator Company.

It only remains to consider, in the *Bank Cases*, the effect of the bills of lading upon the liability of the Railway Companies to the Bank, in case no wheat was in fact ever delivered to them for transportation. Of course if the wheat was delivered by the Elevator Company to Moak & Co., and by the latter to the Railway Companies for transportation, and the agent of the Railway Companies in good faith issued the bills of lading, the Railway Companies would not be liable, for it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title as was the title of the Elevator Company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently, or through mistake or negligence, issues a false bill of lading, which passes into the hands of a bona fide consignee or indorsee for value? There is an unbroken line of authorities in England that even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubberdy v. Ward*, 8 Exch. 380; *Brown v. Powell D. S. Coal Co. L. R.* 10 C. P. 562; *McLean v. Fleming*, L. R. 2 Sc. App. Cas. 128; *Coa v. Bruce*, L. R. 18 Q. B. Div. 147; *Meyer v. Dresser*, 15 O. B. N. S. 646; *Jessel v. Bath*, L. R. 2 Exch. 267.

And this has not been at all changed by the "Bills of Lading Act" (18 & 19 Vict. chap. 111, § 3). It is also the settled doctrine of the federal courts. *Schooner Freeman v. Buckingham*, 59 U. S. 18 How. 182 [15 L. ed. 841]; *The Lady Franklin*, 75 U. S. 8 Wall. 325 [19 L. ed. 455]; *Pollard v. Vinton*, 105 U. S. 7 [26 L. ed. 998]; *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79 [30 L. ed. 1077]; *Friedlander v. Texas & P. R. Co.* 180 U. S. 416 [32 L. ed. 991].

What was said on the subject in *Schooner Freeman v. Buckingham* was probably *obiter*, for in that case it was sought to hold the interests of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of *The Lady Franklin* did not involve the question of a bona

fide purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina and apparently Ohio. *Sears v. Wingate*, 8 Allen, 108; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11; *Fellows v. The R. W. Powell*, 16 La. Ann. 816; *Hunt v. Mississippi Cent. R. Co.* 29 La. Ann. 446; *Louisiana Nat. Bank v. Laclede*, 52 Mo. 880; *Williams v. Wilmington & W. R. Co.* 98 N. C. 42; *Dean v. King*, 22 Ohio St. 118.

The text-writers all agree that the overwhelming weight of authority is on this side. See 83 Am. Dec. 410, note to *Chandler v. Sprague*.

The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that this real and apparent authority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. The only States that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. *Armour v. Michigan Cent. R. Co.* 65 N. Y. 111; *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 7 Cent. Rep. 822; *Skous City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Brooks v. New York, L. E. & W. R. Co.* 108 Pa. 529.

The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in *McCord v. Western U. Teleg. Co.*, 89 Minn. 181.

It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was *res integra* we confess that it seems to us that this argument would be very cogent. But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property, and that, if the statement in the receipt part of bills of lading issued by any of their numerous station or local agents is to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same State, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long

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as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake. Of course this is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.

In each of the first two cases the judgment, and in each of the last two the order, appealed from is reversed, and in each of the four cases a new trial is directed.

Ordered accordingly.

Vandenburgh, J., did not sit.

A petition for re-argument was subsequently filed in the first two cases and on October 1, 1890, *Mitchell, Ch. J.*, delivered the following response on behalf of the court:

The plaintiff in these actions asks for a re-argument on the ground that counsel and the court overlooked § 17, chap. 124, Gen. Stat. 1878, which provides that bills of lading or receipts for any goods, wares, merchandise, etc., when in transit by cars or vessels, "shall be negotiable and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares or merchandise therein specified," etc. This Statute was not called to our attention upon the argument, but an examination of it upon this motion satisfies us that it has no bearing upon the questions involved in these cases. It was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the Statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself. See *Shaw v. Merchants Nat. Bank*, 101 U. S. 557 [25 L. ed. 892].

We cannot see that section 471 of the Penal Code, cited in the petition for re-argument, has any bearing whatever on the cases.

The petition for re-argument is therefore denied.

MICHIGAN SUPREME COURT.

F. J. DEWES BREWERY CO., *Appt.*,
v.

Edward H. MERRITT.

(....Mich.....)

1. A sale of goods, the right, title and interest therein to remain in the seller until sold by the purchaser, does not pass the absolute title at once to the purchaser so as to render the property subject to levy and sale upon an execution in favor of the latter's creditors, at least where the credit was not given because of the goods being in the purchaser's possession.
2. A sale of goods, the right and interest therein to remain in the seller until sold by the purchaser, is not void as against public policy.

(August 1, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Mecosta County in favor of defendant in an action brought to recover possession of certain beer alleged to belong to plaintiff, which defendant had taken under an execution against a third person. *Reversed.*

The case sufficiently appears in the opinion. *Mr. F. A. Mann*, for plaintiff, appellant:

There was no leivable title in the Lentz Brothers.

Wingler v. Sibley, 85 Mich. 281; *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217; *Rogers v. Whitehouse*, 71 Me. 222; *Armstrong v. Houston*, 88 Vt. 448; *Burbank v. Crooker*, 7 Gray, 158.

Mr. C. C. Fuller, for defendant, appellee:

Where the courts have upheld conditional sales, in cases in which the vendee was authorized to sell any portion of the property, it has been where the vendee was a retailer and he was authorized to put the goods in stock and sell at retail; but in all these cases the title was not to pass until paid for.

Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; *Rogers v. Whitehouse*, 71 Me. 222; *Burbank v. Crooker*, 7 Gray, 158.

In the case at bar a sale is invited either at retail or wholesale, a premium set upon the sale, and the rule governing conditional sales should not be extended to cover such a case.

See *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217; *Myres v. Yaple*, 60 Mich. 339.

A conditional sale and an unconditional delivery are utterly inconsistent with each other. *Adrianes v. Rutherford*, 57 Mich. 170.

Champlin, Ch. J., delivered the opinion of the court:

On the 18th of December, 1888, the F. J. Dewes Brewery Company and Lentz Bros. entered into the following agreement:

"Big Rapids, Mich., Dec. 18, 1888. It is hereby agreed by and between the F. J. Dewes Brewery Company of Chicago, Illinois, and Lentz Brothers, of the City of Big Rapids, Michigan: First, that the F. J. Dewes Brewery Company agreed to ship to Lentz Brothers all beer ordered by them at the following price, \$5.75 per barrel, F. O. B., at Big Rapids, and that the right, title and interest of said beer is to remain and rest in the F. J. Dewes Brewery Company
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until sold; and we, the said Lentz Brothers, agree to take the said beer, and pay for the same, on above conditions. Signed in duplicate.

"F. J. Dewes Brewery Company,
"Per Adolph Boundy, Agt.
"Lentz Brothers."

The F. J. Dewes Brewery Company, under the above contract, sent to Lentz Bros. two carloads of beer, which were received by them at Big Rapids. After they had sold about one and one-half carloads, the balance was levied upon by the defendant as sheriff of the County of Mecosta, and was taken away by him upon an execution in his hands, and issued upon a valid judgment in favor of a creditor of Joseph Lentz, one of the members of the firm of Lentz Brothers, as his property. The circuit judge instructed the jury that, under the terms of the foregoing agreement, the absolute title to the beer passed at once to Lentz Brothers, and was subject to levy and sale upon an execution in favor of the creditors of Lentz Bros., or either of them, and directed a verdict for the defendant.

This ruling raises the only question for our consideration. The writing contains an express condition that the right, title and interest of the property ordered was to remain and vest in the F. J. Dewes Brewery Company until sold. The learned judge was of opinion that this condition enabled Lentz Bros. to immediately sell the beer, and convey a good title, divested of any interest of the Brewery Company, and that the Company could not follow the property into the hands of purchasers; that there was a plain understanding contained in the instrument that Lentz Bros. should be permitted to sell, and the fact of sale terminated the condition. The court further considered that, if the contract could be upheld, it would simply put it in the power of Lentz Bros. to do an extensive business, apparently on their own account, thus giving to them a false credit, to which they were not entitled in dealing with others. There is no testimony before us showing how the credit arose in this case, nor when the indebtedness accrued. It evidently was not a credit which the firm had acquired by dealing in this way with the Brewery Company, for it appears as an indebtedness against one of the brothers only, and not the firm. Now, the contract was one which it was competent for the parties to make, unless it was void as being against public policy. The Brewery Company had a right to say: "I will fill your order for beer, which you may sell as you choose, but the title shall remain in me until you do sell, and then the title will pass to the purchaser, in which case we will trust to your personal responsibility to pay us, at the rate of \$5.75 a barrel." The effect of such contract was that the property not sold remained the property of the Company, and the firm owed them for all they had sold. What different is this from a sale of goods upon commission. The factor solicits goods to be sold on commission. The consignor says, "I will ship you all goods you may order, but you must sell so as to net me so much a bushel or

barrel or yard." Until sold by the factor the goods remain the property of the consignor, and are not subject to seizure at the suit of the commission merchant's creditors. The public are not defrauded in the one case more than in the other. As in the case of other agents, persons dealing with them must ascertain the extent of their authority at their peril. *Wright v. Solomon*, 19 Cal. 64.

They could not, any more than a factor who has possession of the goods and sells them in his own name, pledge the beer for their own debt. *Newson v. Thornton*, 6 East, 17; *Rice v. Cutler*, 17 Wis. 351; *Hirschhorn v. Canney*, 98 Mass. 149.

There is nothing illegal, immoral or corrupt in the contract. In effect, it creates a mere agency, in which Lentz Bros. are to take the beer, sell it and pay over proceeds to the amount of \$5.75 a barrel. They find their remuneration, if at all, in what they can sell it for above that price. This court has gone very

far in sustaining conditional sales, and has never declared them void, or different from what the parties have intended by their agreement. *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158; *Preston v. Whitney*, 28 Mich. 280; *Johnston v. Whittemore*, 27 Mich. 468; *Whitney v. McConnell*, 29 Mich. 12; *Smith v. Lazo*, 42 Mich. 6; *Marquette Mfg. Co. v. Jeffery*, 49 Mich. 288; *Edwards v. Symons*, 65 Mich. 348, 8 West. Rep. 784; *Kendrick v. Beard* (Mich.) 45 N. W. Rep. 887.

The authorities cited above show the principles upon which this court has proceeded in upholding such contracts, and it is unnecessary to restate them here, or to review the decisions of other courts holding a different view.

The judgment is reversed, and a new trial ordered.

Grant, J., did not sit; the other Justices concurred.

NEW HAMPSHIRE SUPREME COURT.

Franklin LOW

v.

Frank S. STREETER, Trustees, etc.

(....N. H....)

Where each of two adjoining land owners conveys to the other the land between his own building and the division line between their lands, "to be used as a common passway for our mutual benefit, and for no other purpose," neither has any interest in the land he has conveyed, except a right of way, and the grantor cannot complain of obstructions therein which do not impede him in its reasonable use as a passway, although created by a third person having a mere right of way over such passway.

(March 14, 1890.)

EXCEPTIONS by plaintiff to the Supreme Court for Merrimack County, to review a judgment for defendant, in an action to recover damages for the obstruction of a way. *Overruled.*

This action was case for obstructing a way, with a count in trespass, and a count in equity for removing and restraining the obstruction.

In 1835 Joseph Low owned a lot of land on the east side of Main Street, in Concord, on which was a brick building called "Low's Block," the southerly wall of which was eight feet northerly of the southerly line of the lot. South of Low's lot, and adjoining it, Isaac Hill owned a lot upon which was a building called "Athenian Hall," the north wall of which was about eight feet south of Hill's north line, thus leaving a strip of land between the buildings about sixteen feet wide, designed as a passway from Main Street to the rear of their lands. Low conveyed to one Brackett the south half of his building and lot, making the southerly line of the building the southerly line of the land conveyed, and describing the southerly boundary as "a cross-street laid out by said Low and Isaac Hill." July 24, 1844, Low con-

veyed by quitclaim deed to Isaac Hill his land south of Low's block, being the strip of land eight feet in width, above mentioned, "to be used as a common passway for our mutual benefit, and for no other purpose but a passway, meaning hereby to convey the land south of the brick block." At the same time Hill, by quitclaim deed, conveyed to Low his land north of his building, describing it as "all the land north of said Athenian Hall to land conveyed to me by said Low this day, and carrying the width of eight feet from the east corner of said hall," "to be used as a common passway, for our mutual benefit, and for no other purpose, but a passway." Defendant owns the land and rights conveyed by Low to Brackett. The south wall of the building is defendant's south line. He has a right of way over the passway on the south for access from the street to the rear of his building. Franklin Low, the son of Joseph Low, had, at the commencement of the suit, whatever rights remained in his father to the eight feet south of the Low block after his father's deed to Hill. Eight or ten years ago the owners of defendant's premises opened a doorway in the south wall of the block and built there some stone steps for an entrance into the basement. Around the doorway was built a brick projection from the wall into the passway four inches wide. The steps of the doorway into the basement extend into the passway about ten inches from the wall of the building, making an opening in the ground of the passway of that width. The brick projection and the opening of the doorway are claimed as obstructions by plaintiff, and their erection and maintenance as trespasses. Plaintiff objected at the time they were placed there, and demanded their removal before bringing suit.

At the trial the court found that plaintiff has a right of way in the passway, but that his reasonable use of it for that purpose has not been, and is not, obstructed by the things complained of; and that plaintiff has no sufficient title to

the land where the alleged obstructions are, to enable him to maintain trespass *quare clausum*. The court found defendant not guilty, dismissed the count in equity, and ordered judgment for costs for defendant. Plaintiff excepted.

Mr. Samuel C. Eastman, for plaintiff:

In the construction of deeds, the intention of the parties, as it can be learned from the language used, in the light given by the circumstances in which that language was used, is what the court always strives to ascertain.

Richardson v. Palmer, 88 N. H. 218; *Gardner v. Webster*, 6 New Eng. Rep. 894, 64 N. H. 520.

The scope of the grant "may often be limited and sustained by a recital stating the objects of the grant."

Woods v. Nashua Mfg. Co. 5 N. H. 467.

Like other cases of easements, the plaintiff is "entitled to a verdict for nominal damages upon proof of the infringement of his right, although no actual injury was shown."

Blodgett v. Stone, 60 N. H. 167; *Tillotson v. Smith*, 32 N. H. 90.

Messrs. Chase & Streeter, for defendant:

The court finds as a fact that the plaintiff's reasonable use of the sixteen-foot strip as a passway "has never been and is not obstructed by the things complained of."

Upon this finding the count in case cannot be maintained.

Hopkins v. Crombie, 4 N. H. 524, 525; *Graves v. Shattuck*, 35 N. H. 258; *Winship v. Enfield*, 42 N. H. 198, 217; *Chamberlain v. Enfield*, 43 N. H. 356, 361.

Bingham, J., delivered the opinion of the court:

The plaintiff owns the rights of Joseph Low in the eight feet south of the Low block after he conveyed to Hill. The defendant owns the land and rights conveyed by Joseph Low to Brackett, and the south wall of the Low block is to be taken as his south line. He also has a right of way over the passway between the Low block and Athenian Hall, from the street to the rear of the Low building. Neither party owns the eight feet of land immediately south of the Low block if Joseph Low conveyed it to Hill, but if the deeds of Low and Hill only dedicated the sixteen feet of land as a common

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passway to the parties, each retaining the ownership of his land, then the plaintiff is the owner of the northerly eight feet, subject to the defendant's easement, and may recover in trespass. A grant of a right of way over land does not convey the soil, or any corporeal interest in it, and it necessarily follows that such an owner cannot prevent even a trespasser from using the land, if his use does not impede the exercise of the right of passage. In other words, an owner whose land is burdened with a right of way has all the rights and benefits of the soil consistent with the reasonable use of the way. *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159, 163; *Richardson v. Palmer*, 88 N. H. 212, 220; *Welch v. Wilcox*, 101 Mass. 162, 164, 100 Am. Dec. 113, note, 115, 118; *Goddard, Easem.* 4.

The inquiry then is as to the legal effect of the deeds which passed between Low and Hill July 24, 1844, and especially of the deed of Low. The language in each is clearly sufficient to convey the land described, but it is claimed by the plaintiff that such was not the intention of the parties, and that the deeds should be construed as the parties understood them when they were executed. This is undoubtedly the law when the intention is found from competent evidence. In the present case, the deeds, the situation of the parties, and the purposes they had in view, are material. The parties could have accomplished their apparent purpose in a more direct way than the one they adopted. They desired to make the sixteen feet a passway common to both. This did not necessitate a conveyance of the fee in the land of one to the other, incumbered with the liability of legal controversies like the one now before the court. Still, it was a way which the parties could adopt, and the language used in both of the deeds is so direct and complete as to leave very little doubt that both Low and Hill intentionally adopted the method of each conveying his land in fee to the other, as a part of the transaction. After Joseph Low executed his deed he had no interest in the eight feet next to his block, except a right of way over it. This the plaintiff has, but it is found that he is not obstructed in its reasonable use by the things complained of.

Exceptions overruled.

Allen, J., did not sit; the others concurred.

WISCONSIN SUPREME COURT.

Re Application of C. E. Estabrook, Atty-Gen., Appt., for an Order Directing the OSHKOSH MUTUAL FIRE INSURANCE CO., Rept., to Show Cause why its Affairs Should not be Closed.

(....Wis.....)

1. **Mutual insurance companies are within the provisions of Rev. Stat., §§ 3213, 3219, authorizing the granting of an injunction at the suit of any creditor or stockholder of an insolvent insurance company to restrain it and its officers from exercising corporate franchises or interfering with corporate assets, and as incidental thereto the appointment of receivers and the closing of the corporate business.**
2. **The fact that a court has no jurisdiction to decree the dissolution of a corporation in accordance with the prayer of a bill will not prevent its taking jurisdiction of the suit for the purpose of granting other requested relief which is within its power, such as granting injunctions, appointing receivers and closing the corporate business.**
3. **The Attorney-General will not be permitted to maintain an independent action for the dissolution of an insolvent insurance corporation if all the ends which could be attained by such action may be accomplished by his becoming a party to an action, already pending against the corporation, brought by creditors and stockholders.**
4. **The dissolution of an insolvent insurance corporation as authorized by Rev. Stat.,**

§ 1968, may be decreed in an action brought against it by creditors and stockholders under Rev. Stat., §§ 3213, 3219, if the Attorney-General becomes a party to such action and asks for the dissolution in the name of the State, although such decree is not authorized by the sections under which the action is brought.

(September 23, 1890.)

APPEAL by the Attorney-General from an order of the Circuit Court for Winnebago County denying his application for an order directing the Oshkosh Mutual Fire Insurance Company to show cause why its affairs should not be closed. *Affirmed.*

The case fully appears in the opinion.

Messrs. C. E. Estabrook, Atty-Gen., Hicks, Phillips & Kliest, Stark & Sutherland, Weisbrod, Thompson & Harshaw and Gary & Forward, for appellant:

This proceeding is the only manner of effecting a dissolution of the corporation.

See *Reife v. Commercial Ins. Co.* 5 Mo. App. 178.

The proceedings instituted by the officers and board of directors against their company do not circumvent the operation of § 1968, Rev. Stat., because a dissolution of the company could not be therein declared. This is true because (1) we have no statute authorizing a court to decree a dissolution except § 1968, Rev. Stat.; (2) in the absence of statute a court of equity has no such authority, at a suit of a

NOTE.—Restraint exercise of corporate franchises; action by one in behalf of others.

A creditor of an insolvent corporation may bring action in behalf of all creditors to close up the business, and enforce the liability of its officers and stockholders, and it is not material that plaintiff was not a creditor when dividends were unlawfully declared and received. *Hurlbert v. Marshall*, 62 Wis. 560.

Any stockholder or creditor aggrieved by a proceeding against the corporation may file complaint and procure injunction and proceed to final settlement of its affairs. *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490.

A creditor without having obtained judgment at law against it might maintain the action jointly with the stockholders to reach and appropriate its assets and enforce the liability of the stockholders. *Cleveland v. Marine Bank*, 17 Wis. 545.

The action may be maintained by a judgment creditor whose judgment has not been docketed, and upon which execution has not been issued. *Merchants Bank v. Chandler*, 19 Wis. 434.

An injunction once granted cannot be dissolved. An irregularity or defect in the proceeding cannot be amended or disregarded, and if in the result of the action it appears that the corporation is clearly solvent, the receiver must nevertheless wind up the affairs and give the stockholders the surplus. *Ferry v. Bank of Central N. Y.* 15 How. Pr. 458.

On a bill by a minority of a lodge, in their individual names, in which they claim their proportionate share of a fund and ask for an injunction and an account, the court cannot dissolve the corporation, or forfeit its charter, or correct any supposed misuse of corporate powers. *Goodman v. Jedidjah Lodge of B'nai B'rith*, 8 Cent. Rep. 273, 87 Md. 117.

A corporation can only be dissolved in the statutory mode. *Ibid.* 9 L. R. A.

To effect a dissolution of a corporation there must be the judgment of a court of competent jurisdiction declaring it dissolved; and until such judgment, creditors may proceed by suit against the corporation, unless restrained by injunction. *Kincaid v. Dwinelle*, 59 N. Y. 552; *People v. Manhattan Co.* 9 Wend. 361; *Re Reformed Presbyterian Church*, 7 How. Pr. 476.

Proceedings to forfeit franchises.

The statute authorizes a public officer to bring the company before a judicial tribunal, which, after full opportunity for defense, may determine whether it is insolvent, or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions or conditions prescribed by law,—grounds which, if established, constitute sufficient reason why the corporate franchises and privileges granted by the State should be no longer enjoyed. *Chicago L. Ins. Co. v. Needles*, 113 U. S. 585, 23 L. ed. 1068; *Terrett v. Taylor*, 18 U. S. 9 Cranch, 51, 3 L. ed. 653; 2 Kent, Com. 804, 812; *Com. v. Farmers & M. Bank*, 21 Pick. 642; *Barolay v. Talman*, 4 Edw. Ch. 123, 6 N. Y. Ch. L. ed. 820; *Slee v. Bloom*, 5 Johns. Ch. 366, 1 N. Y. Ch. L. ed. 1111.

An information in the nature of a *quo warranto* is proper to forfeit the franchises of a corporation and dissolve it for doing acts which it is not authorized or is forbidden to do, or for failure to perform the duties which it was incorporated to perform. *People v. Dashaway Assn.* 84 Cal. 114.

An information against a corporation must be in the name of the attorney-general alone. It cannot be joined with one at the instance of private relations against officers in the corporation. *State v. Somers Point*, 9 Cent. Rep. 41, 49 N. J. L. 515.

Complaint or information must set forth the stat-

stockholder or member in his own behalf and in his own name.

High, Receivers, § 288, and cases cited; Cook, Corp. 700, note 5, § 630; *Strong v. McCagg*, 55 Wis. 624; Morawetz, Priv. Corp. § 282; *Wilson v. Central Bridge*, 9 R. I. 590; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 49; *Mechanics Bank v. Heard*, 87 Ga. 401; *Folger v. Columbian Ins. Co.* 99 Mass. 287; *Elizabethtown Gas-Light Co. v. Green*, 46 N. J. Eq. 118; *Chicago Mut. L. Indemnity Assn. v. Hunt*, 2 L. R. A. 549, 127 Ill. 257; Cook, Stock and Stockholders, § 629, and cases cited.

Only the Attorney-General in the name of the State can bring suit for the dissolution of a corporation.

Cook, Stock and Stockholders, § 632; Morawetz, Priv. Corp. § 1040; *Strong v. McCagg*, 55 Wis. 624; 2 Morawetz, Priv. Corp. § 282; *Wilson v. Central Bridge*, 9 R. I. 590; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 49; *Mechanics Bank v. Heard*, 87 Ga. 401; *Folger v. Columbian Ins. Co.* 99 Mass. 287; *Bradt v. Benedict*, 17 N. Y. 99; *Elizabethtown Gas-Light Co. v. Green* and *Chicago Mut. L. Indemnity Assn. v. Hunt*, *supra*; *New York Marble Iron Works v. Smith*, 4 Duer, 362; Taylor, Corp. §§ 230, 231.

The appointment of the receiver in the suit, in behalf of the officers and board of directors of the company, against the company, for the purpose of assisting them to close its affairs, was absolutely void, there being no statute regulating the case of a voluntary dissolution of a corporation, and providing for the appointment of a receiver even where proper grounds are laid.

ute under which the company was organized and present all material facts essential to the right to declare a forfeiture. *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 1 West. Rep. 247, 104 Ind. 97.

At common law "the absolute and unqualified dissolution of a corporation by a decree of forfeiture or legislative repeal extinguishes all debts to or from it, and puts an end to all its rights of action and property, and it can no longer sue or be sued or do any lawful act." *Pahquoque Nat. Bank v. Bethel First Nat. Bank*, 38 Conn. 334; *Wilcox v. Continental L. Ins. Co.* 56 Conn. 463, 475.

Continued existence till forfeiture declared.

There is a broad and fundamental distinction between the dissolution of a corporation and the loss of its franchise or legal right to exist and carry on business as a corporation, which continues indefinitely unless the time for its existence is expressly limited in the grant. Morawetz, Priv. Corp. § 1002. See *Commercial Bank v. Lookwood*, 2 Harr. (Del.) 8.

Although a corporation has ceased the prosecution of the objects for which it was organized, its corporate powers remain unimpaired for the collection of debts, the enforcement of liabilities and the payment of its creditors. *Glenn v. Liggett*, 125 U. S. 533, 34 L. ed. 262.

A corporation is presumed to exist for all purposes until forfeiture is declared in a judgment of a court in some proceeding to which the State is a party. *Williams v. Western Star Lodge*, 38 La. Ann. 620; *Pittsburgh & S. L. R. Co. v. Rothschild (Pa.)* 4 Cent. Rep. 103.

A railroad company is not to be deemed dissolved, under Minn. Gen. Stat. 1873, chap. 78, § 11, providing that the suspension of its business for one year shall be a ground of forfeiture until such forfeiture is judicially ascertained and declared. *State v. Minnesota Cent. R. Co.* 36 Minn. 246, 9 L. R. A.

Adler v. Milwaukee P. B. Mfg. Co. 13 Wis. 63; High, Receivers, § 288, and cases cited in note.

The jurisdiction of a court to appoint a receiver is statutory.

Beach, Receivers, § 408; Cook, Stock and Stockholders, 2d ed. § 629; Morawetz, Priv. Corp. § 1040.

Its power will not be enlarged by the court, to take the affairs of a corporation out of the management of its own officers, and place them in the hands of a receiver.

High, Receivers, 2d ed. § 288; *City Pottery Co. v. Yates*, 37 N. J. Eq. 543; *Hand v. Dexter*, 41 Ga. 454, 461.

Messrs. Finch & Barber and C. W. Felker for respondent.

Cole, Ch. J., delivered the opinion of the court:

It is claimed on the part of the appellant that the action instituted by R. McMillen and others, officers and board of directors of the respondent, and all the proceedings therein, were unauthorized and void. Is that position sound? That action was brought to adjust, settle and wind up the business of the corporation. The plaintiffs ask for an injunction, and the appointment of a receiver to take charge of the property of the corporation, convert its assets into money, collect its debts and close out its affairs under the direction of the court. A dissolution of the corporation is asked for. From the complaint and the amendment to the same, which we understand was allowed before the application

The nonuse or misuse of its franchises by a corporation, or its breach of the conditions on which its duration is, by the law of its creation, made to depend, is a cause of forfeiture. *Pierce, Railroads*, 11.

It is a tacit condition annexed to or implied in the charter of every private corporation, that the government may resume its corporate franchises for a misuser or a nonuser thereof. *State v. Minnesota Cent. R. Co.* 36 Minn. 246.

Although the condition is not expressed, it is necessarily implied, in every grant of corporate existence, that the privileges and franchises conferred thereby shall not be abused, or so employed as to defeat the ends for which it is established, and that, when so abused or misemployed, they may be withdrawn or reclaimed by the State in such way and by such modes of procedure as are consistent with law. *Chicago L. Ins. Co. v. Needles*, 112 U. S. 574, 28 L. ed. 1084.

A nonuser or misuser is a ground of forfeiture, although not expressly declared to be such by statute. *Pierce, Railroads*, 11.

Dissolution of corporation.

The old and well-established principle of law remains good, as a general rule, that a corporation is not to be deemed dissolved by reason of any misuser or nonuser of its franchises, until the default has been judicially ascertained and declared. *Georgia Import & Export Co. v. Locke*, 30 Ala. 334; *Peter v. Kendal*, 6 Barn. & C. 708; *Bex v. Amery*, 3 T. R. 515; *Murray v. Murray*, 5 Johns. Ch. 66, 1 N. Y. Ch. L. ed. 1013.

In an action brought for the purpose of dissolving a corporation, the relator, to maintain the action, must have some interest beyond that common to every citizen. High, Extr. Legal Rem. § 654; *Murphy v. Farmers' Bank of Schuylkill*, 30 Pa. 415;

of the Attorney-General was heard, it appears that in that case the plaintiffs were stockholders and creditors of the defendant. It also appears from the complaint that the defendant was insolvent, and unable to pay its debts, though that fact was questioned on the argument. But, without dwelling on the point, we must say that we can reach no other conclusion upon the matters set forth than that the corporation was in a failing condition, and was unable to meet its just debts. This, in brief, being the case presented, is it correct to say that the suit thus instituted by the officers and directors of the corporation for the purpose intended was entirely unauthorized by our statutes, and that all the proceedings taken thereunder were void? It seems to us that no such position is tenable or correct. It is true the defendant professes to be a mutual insurance company, and, it is said, is governed by different rules than those which are applicable to strictly stock companies. But it is undeniable that it is a corporation authorized by law, and organized to make contracts of insurance. The complaint filed by its officers shows that it had become insolvent, or was unable to pay its debts.

Now, § 3218, Rev. Stat., provides, in substance, whenever any corporation having banking powers, or authorized by law to make insurance, shall become insolvent or unable to pay its debts, or shall neglect or refuse to pay its notes or evidences of debt on demand, or shall have violated any of the provisions of its Act of incorporation, or any

law binding on such a corporation, any court having jurisdiction may by injunction restrain such corporation and its officers from exercising any of its corporate rights and privileges or franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering, to any person any of the money, property or effects of such corporation, until such court shall otherwise order. The next following section provides that the injunction may be issued upon the commencement of an action for the purpose of closing up the business of such corporation by the Attorney-General, in the name of the State, or by any creditor or stockholder of such corporation, at any time thereafter, upon proof of the facts required to authorize the issuing of the same. Rev. Stat. § 3219.

The court may, in any stage of such action, appoint one or more receivers to take charge of the property and effects of such corporation, to collect its debts and discharge the duties imposed upon receivers in other cases, subject to the control of the court. Here, as it appears to us, is ample power given the court to take jurisdiction of the cause, grant writs of injunction, and appoint receivers at the suit of a creditor or stockholder, and close the business of the corporation. But it is said the court in such a suit will have no power to decree a dissolution of the corporation. But this objection does not go to the jurisdiction of the court to proceed with the cause as far as authorized by the Statute. Because the court cannot grant all the relief

State v. Smith, 32 Ind. 213; State v. Stein, 13 Neb. 530; People v. Grand River B. Co. 13 Colo. 14.

An action to dissolve a corporation upon the ground that it had suspended its lawful and ordinary business for one year prior to the commencement of the action is required by statute to be brought by the attorney-general. Kelsey v. Pfaunder P. F. Co. 45 Hun. 10.

There is no provision of law which requires general corporation creditors to be made parties to an action by the attorney-general to dissolve the corporation. Herring v. New York, L. E. & W. R. Co. 7 Cent. Rep. 303, 105 N. Y. 340.

Proceedings in equity under § N. Y. Rev. Stat., p. 463, § 33, for the dissolution of a corporation, were unaffected by the Code of Procedure, and that section was not repealed until the year 1880,—Code Civ. Proc. and Repealing Act. *Ibid.*

If the unauthorized acts of a corporation affect merely stockholders and creditors who have an adequate legal remedy, the State will not interfere. State v. Minnesota Thresher Mfg. Co. 3 L. R. A. 510, 40 Minn. 213.

Dissolution of corporation. See notes to Chicago Mut. L. Ind. Asso. v. Hunt (Ill.) 2 L. R. A. 549; Snell v. Chicago (Ill.) 3 L. R. A. 858; People v. North River Sugar Ref. Co. (N. Y.) 9 L. R. A. 33.

Dissolution by terms in charter.

Where the Act of incorporation expressly limits the time during which corporate rights and privileges shall be exercised, or shall revert to the State, the failure to exercise the franchise as required operates *ipso facto* as a dissolution. Com. v. Lykens Water Co. 1 Cent. Rep. 219, 110 Pa. 361.

If the charter of a corporation limits its existence to a definite period of time, the franchise or right to exist would expire at the time limited. Morawetz, Priv. Corp. § 1003, 1008.

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By the exercise of the repealing power reserved by statute, a charter no longer exists; there can be no new transactions dependent on the special power conferred by the charter; such power is abrogated when the law granting it is repealed. Greenwood v. Union Freight R. Co. 105 U. S. 13, 23 L. ed. 961.

Neither the rights of the shareholders to the real and personal property of the corporation, nor rights of contract, nor choses in action, are destroyed by such repeal; and if the Legislature has provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power. Greenwood v. Union Freight R. Co. 105 U. S. 13, 23 L. ed. 961; Mumma v. Potomac Co. 33 U. S. 2 Pet. 231, 3 L. ed. 945.

Jurisdiction in equity.

Equity has no jurisdiction of a bill to determine whether a corporation *de facto* is legally organized. Keigwin v. Hamilton Drainage Comrs. 2 West. Rep. 304, 115 Ill. 347.

A proceeding to dissolve a mutual benefit society, or to remove its officers, for failure to make proper reports or for improperly conducting its business, instituted under Ill. Act 1883, § 10, is not a criminal prosecution within the meaning of Ill. Const., art. 4, § 33, which requires criminal prosecutions to be carried on "in the name and by the authority of the People of the State of Illinois," but is a civil proceeding to protect property rights, and may be brought in equity by the attorney-general in his own name. Chicago Mut. L. Indemnity Asso. v. Hunt, 3 L. R. A. 549, 127 Ill. 257.

Jurisdiction to decree the dissolution of a corporation may be conferred upon courts of equity by statute; and such jurisdiction is so conferred by the Illinois Act of 1883 (1 Starr & C. Stat. 1348), in reference to mutual benefit societies. *Ibid.*

A court of equity may hold trustees of a corpo-

asked it does not follow that it has no jurisdiction to grant any relief. Indeed, it seems almost too plain for argument, in view of the provisions above cited, that the suit of McMillen and others against the defendant corporation was one authorized to be brought, and that the proceedings in that action are not void, even if irregularities in the same have intervened. Whether the complaint in the action or facts proven justify the appointment of a receiver, is a question not before us. We have merely referred to the case to show that the court had jurisdiction of it, and had power to appoint a receiver in it on a proper case, and that the action was still pending. At this stage of that cause, the Attorney-General obtained an order from the circuit court directing the defendant to show cause why its business should not be closed, and that a receiver be appointed to take charge of its assets for the purpose of winding up its affairs. The application was made under section 1968, which authorizes the Attorney-General, when informed by the commissioner of insurance that he is satisfied, from an examination, that the assets of an insurance corporation are insufficient to justify its continuance in business, to apply to the circuit court of the county where the principal office of the corporation is located for an order requiring it to show cause why its business should not be closed. The Attorney-General bases his application for the order to show cause upon various exhibits, among which are the records and files in the case of McMillen and others against the defendant, which we have alluded to. On the hearing the court denied the application, and from that order this appeal is taken.

It does not appear upon what ground or for what reason the court below denied the application, nor is it very material to know. We think it was properly denied, because the suit by the Attorney-General was unnecessary. The Attorney-General might become a party to the pending action of McMillen and others against the defendant, and in that suit accomplish all the ends which could be attained in an independent action brought by him in the name of the State. What was the necessity of any other suit? Different suits brought to secure the same ends are always considered objectionable. It would

be especially so in this litigation to have different receivers appointed to take charge of the same estate, dispute and wrangle over its control, disposition and management, and increase the expense and costs of settling it for no useful purpose whatever. Confusion and conflict would inevitably arise between the receivers in the transaction and adjustment of the affairs of the corporation, and this is to be avoided, if possible. But it is said there can be no decree dissolving the corporation in the pending action, which is desired. But if the Attorney-General becomes a party to this suit, such a dissolution could be decreed, if consistent with the facts proven and the principles of equity. It will be noticed that the Attorney-General does not ask in his application that the court decree a dissolution of the corporation, but that the business of the company be closed. But still, in such a case, the court is expressly authorized, if it finds that the assets and funds of the corporation are insufficient, and the interests of the public so require, to decree a dissolution of the corporation. Rev. Stat. § 1968.

But the same relief may be granted in the pending action if the Attorney-General asks for it in the name of the State. So, in any possible view which we have been able to take of the question, we see no necessity for the Attorney-General instituting another independent suit to close up the business of the corporation, and settle and adjust its affairs. Besides, it appears that an injunction has been granted in the pending suit, restraining the corporation from carrying on the business of insurance, and a receiver has been appointed, who has employed attorneys under the authority of the court, and who has proceeded to collect payments and enforce claims, and much of this expense and labor might go for naught if the application of the Attorney-General were granted. And, as we cannot see that the public interests or the rights of any party concerned will be in any way promoted or subserved by instituting such a suit, when there is no obstacle to the Attorney-General's becoming a party to the pending action, and litigating all matters in that action which are undetermined, we think *the order of the Circuit Court should be affirmed. It is so ordered.*

ration accountable for breach of trust, but cannot divest it of its corporate character and capacity, unless under the circumstances and in the cases in which the court is specially empowered by statute. *Hardon v. Newton*, 14 Blatchf. 379; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, 6 N. Y. Ch. L. ed. 68, and *note*; *Slee v. Bloom*, 5 Johns. Ch. 368, 1 N. Y. Ch. L. ed. 1111.

Independent of the statute and at common law, a court of equity had no power to dissolve a corporation, and sell and divide its property at the suit of an individual stockholder, in his own behalf and in his own name. *Strong v. McCagg*, 55 Wis. 629. See *Bayless v. Orne*, 1 Freem. (Miss.) 161; *Slee v. Bloom*, 5 Johns. Ch. 368, 1 N. Y. Ch. L. ed. 1111; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, 6 N. Y. Ch. L. ed. 68; *Doyle v. Peerless P. Co.* 44 Barb. 230; *Gilman v. Green Point Sugar Co.* 61 Barb. 9; *Penniman v. Briggs*, Hopk. Ch. 300, 2 N. Y. Ch. L. ed. 429.

Although a court of equity may not decree a dissolution of a corporation, yet, in virtue of its general jurisdiction over trusts, and to afford remedies in cases where courts at law are inadequate to grant relief, it has jurisdiction to grant relief against a corporation upon the same terms that it might against an individual under similar circumstances. *Stamm v. Northwestern Mut. Ben. Asso.* 8 West. Rep. 771, 65 Mich. 316.

An insolvent corporation may be dissolved and its affairs wound up at the instance of a single stockholder, and this rule applies to a life insurance corporation organized under the laws of this State. *Masters v. Eclectic L. Ins. Co.* 6 Daly, 457; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438, 2 N. Y. Ch. L. ed. 979.

Where two or more winding-up petitions are presented, they will, in the absence of *malæ fidei*, take priority according to their dates of advertisement. *Re Building Soc. Trust*, L. R. 44 Ch. Div. 140.

VERMONT SUPREME COURT.

Charles A. WILLIAMSON.

v.

Gustavus JOHNSON and Caroline F. Johnson.

(....Vt....)

A gift by a man to a woman in expectation of marriage, of money to enable her to purchase her marriage wardrobe and to defray her expenses in going to his home to be married, is conditional so as to entitle him to recover the money back in case of her failure to fulfill the engagement, although he attached no conditions to the gift and had no expectation that the money, part of which was spent by her in purchasing clothes, would ever be refunded.

(July 21, 1890.)

EXCEPTIONS by plaintiff to a judgment of the Windsor County Court in favor of defendants in an action brought to recover money alleged to have been advanced by plaintiff to defendant Caroline, to assist her in carrying out a marriage contract with plaintiff which she afterwards refused to complete. *Reversed.*

At the trial in the lower court the court found the following facts: "The plaintiff and Caroline F. Johnson entered into a marriage engagement at Minneapolis, in August, 1878; and she was to come to Vermont, where the plaintiff resided, to consummate the engagement, as soon as she could get ready to come. In view of this arrangement the plaintiff sent to her from time to time the several sums of money set forth in the plaintiff's specification, for the purpose of buying her wardrobe, to the extent of \$275, in preparation for her marriage, it being left with her to write to him for any amounts needed for the purpose. She did write from time to time and stated the sum required to be \$275.

"We further find that the plaintiff let her have the money sent by him without any expectation that it would be refunded; that he intended, when he sent the money, it should be a gift to be used by her for the purpose named, to the amount of \$275. He also sent her in addition to that sum \$55, to be used by her in defraying her traveling expenses to Vermont, for the purpose of being married according to their engagement, and she knew that the \$55 were sent for that purpose. She used the \$275 in buying clothes in preparation for marriage, pursuant to the foregoing arrangement. She did not come east to be married as agreed, but in November, after, broke the engagement entered into, and subsequently in 1882 married the defendant Johnson. We do not find that she had any good and sufficient reason for breaking the engagement. She subsequently offered to send the clothes she had so bought to the plaintiff. In reply to said offer the plaintiff wrote her that he hoped she would re-

consider the matter and come to him in fulfillment of their engagement. The plaintiff never requested her to return the money until this suit was brought.

"Plaintiff intended in like manner that the \$55 should be a gift, to be used for her traveling expenses in coming east as above stated, but she never so used it. When she received and expended the money sent to her as above stated, she expected to marry the plaintiff.

"There were no conditions attached to the gift of the money, but it was given and received on the expectation of both parties that they were soon to be married; and was given to be used in the manner above stated."

The court entered judgment for defendants upon the above findings, and plaintiff excepted.

Messrs. Hunton & Stickney, for plaintiff:

An action may be maintained to recover back money received under a special contract abandoned or rescinded, or the performance of which has been prevented by the act of the party who has received the money.

Addison, Cont. § 1411; *Tyson v. Doe*, 15 Vt. 571; *Towers v. Barrett*, 1 T. R. 188; *Giles v. Edwards*, 7 T. R. 181; *Perkins v. Hart*, 24 U. S. 11 Wheat. 237, 6 L. ed. 463, pl. 2; *Griggs v. Austin*, 3 Pick. 22; *Danforth v. Dewey*, 3 N. H. 79; *Seipel v. International L. Ins. & T. Co.* 84 Pa. 47; *Lindon v. Hooper*, 1 Cowp. 414; *Cheongwo v. Jones*, 3 Wash. C. C. 359; *Rensens v. Mexican Nat. Const. Co.* 28 Blatchf. C. C. 19; *Weaver v. Aitchison*, 8 West. Rep. 764, 65 Mich. 285, 4 Am. Dig. p. 222, pl. 3; *Lamphere v. Cowen*, 42 Vt. 175.

In general bringing an action is sufficient demand for money.

Graves v. Ticknor, 6 N. H. 541; *Calais v. Whidden*, 64 Me. 249; *Stetson v. Howe*, 81 Me. 858.

A special demand is not necessary.

Lyon v. Annable, 4 Conn. 350, 351; *Dill v. Wareham*, 7 Met. 438; *Wiggin v. Foss*, 4 N. H. 294; *Rensens v. Mexican Nat. Const. Co.* 22 Fed. Rep. 522, 28 Blatchf. C. C. 19; *Farrand v. Hurlbut*, 7 Minn. 477; *Thompson v. Thompson*, 5 W. Va. 190.

To entitle a donee of personal property to claim the gift as irrevocable, and invest him with the right to the property, it must be shown that he has complied with certain conditions upon which the gift was made.

Berry v. Berry, 31 Iowa, 415, 416; *Stewart v. Phy*, 11 Or. 335; *Farrand v. Hurlbut*, 7 Minn. 477; *Norton v. Kidder*, 54 Me. 189; *Atty-Gen. v. Christ's Hospital*, Tam. 893; 1 Fonbl. Eq. 489, bk. 1, chap. 6, § 15.

A present made in prospect of marriage may be revoked, and demanded back, if the marriage does not take effect; especially if it sticks on that side to whom the present was made.

2 Mod. 141; 14 Vin. Abr. *Gift*, 19, pl. 7.

The same rule prevailed in the Civil Law (Dig., lib. 13, tit. 4; 2 Huber, *Prælectiones*, 394, 395; 2 Noodt, Com. 228).—and still prevails in the law of Scotland under the same title, *causa data non secuta*.

1 Lord Bracton, Inst. 215; 21 Erskine, Inst.

NOTE.—Gifts defined. See notes to *Beaver v. Beaver* (N. Y.) 6 L. R. A. 406; *Miller v. McMeachen* (W. Va.) 6 L. R. A. 515.

What necessary to complete gift. See notes to *Re Crawford* (N. Y.) 5 L. R. A. 71.

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444, 10; 3 Bl. Com. 152; 1 Comyn, Dig. *Trover*, D. p. 813; *Pasley v. Freeman*, 3 T. R. 64; *Milner v. Milner*, 3 T. R. 631; 2 Chitty, Index, p. 1262, pl. 7; 1 Kent, Com. 510.

If a person pay addresses with a view of marriage, and, on a reasonable expectation of success, give presents, and the lady deceives him afterward, the presents ought to be returned, or the value allowed.

Robinson v. Oumming, 2 Atk. 409; *Young v. Burwell*, Cary, 77.

Messrs. J. B. Phelps and W. E. Johnson, for defendants:

Gifts once fully executed by delivery, and subject to no condition precedent to the vesting of title, are as irrevocable as an executed contract of sale.

M'Kane v. Bonner, 1 Bailey, L. 118; *Doty v. Willson*, 47 N. Y. 580; *Gray v. Barton*, 55 N. Y. 68; *Betts v. Francis*, 30 N. J. L. 152; *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Kerrigan v. Rautigan*, 43 Conn. 17.

Tyler, J., delivered the opinion of the court:

It is a general rule of law that a gift by a competent party made perfect by a delivery and acceptance is irrevocable by the donor; that to constitute a gift *inter vivos* the donor must deliver the property, and part with all present and future dominion over it. It is a voluntary, gratuitous transfer of personal property by one person to another. A true and proper gift or grant is always accompanied by delivery of possession, and takes effect immediately; as, if A gives to B £100, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense, unless he were under a legal incapacity,—as infancy, coverture, duress or the like,—or if he were drawn in, circumvented or imposed upon by false pretenses, ebriety or surprise. 2 Bl. Com. 441.

In accordance with this rule it was held in *Stauffer v. Morgan*, 39 La. Ann. 682, that a donation by a man to his intended wife, on the eve of their marriage, of a check on a banking firm was revocable at any time before actual collection by the donee; but, after it had been presented and honored by placing the amount to her individual credit, the donation was complete; that the *locus penitentiae* continued until the delivery was perfected. In the note to *Drew v. Hagerty*, 81 Me. 231, 3 L. R. A. 230, it is said that, in order to render a gift of money by a grandmother to certain children and their father as their trustee effectual for any purpose, it is not only necessary to show an intention to give, but also an actual delivery of the thing given. There must be a parting with the possession and all control over the property, and a vesting of the possession in the donee or in a third person in trust for the donee. A gift of personal property made with intent to take effect immediately and irrevocably, and executed by complete and unconditional delivery, is binding upon the donor as a gift *inter vivos*. *Love v. Francis*, 68 Mich. 181, 6 Am. St. Rep. 290, and note. See also *Re Crawford*, 113 N. Y. 560, 5 L. R. A. 71.

All the definitions come to this: That to con-

stitute a valid gift it must be voluntary, gratuitous and absolute. Applying these tests to the facts relative to the gift of the \$55, it is apparent that they fall short of showing a perfect gift of that money in the donee. The court below found the facts that the plaintiff let the defendant Caroline have both sums of money without any expectation that they would be refunded, which was certainly quite natural in the circumstances of the case; that both sums were intended as gifts, and that no conditions were attached thereto. It is further found that the gifts were made in the expectation by both parties of marriage, and that they were given for specific purposes,—the \$275 for the purchase of the defendant's marriage wardrobe, and the \$55 to defray her expenses in coming to this State to be married. The court would have fully complied with the requirements of the Act of 1838 if it had stated the facts in the case without denominating the transaction. That Act requires that "in all cases hereafter tried in the county court where any question of fact shall be tried by the court instead of by a jury, and in which a jury trial might have been had by either party, before any bill of exceptions shall be allowed, the facts found by the court upon which judgment is rendered shall be reduced to writing, and signed by a majority of the members of the court and filed with the clerk." If the plaintiff had given or sent these sums of money to the defendant without any direction or designation as to their use, as gratuities, they would have been perfected, irrevocable gifts upon delivery. In a general sense they were gifts, but in a strict legal sense they were not gifts, though called so by the court, for the reason that they were made in expectation and under an arrangement that they were for specific purposes. The law is well settled that where money is delivered by one person to another for a particular purpose, to which the latter refuses to apply it, the depositor may recover it back in an action for money had and received. 2 Greenl. Ev. § 119; *De Bernales v. Fuller*, 14 East, 590, note.

In a valuable note to *Hauser v. Wallis*, 1 Salk. 28, it is said: "If one man takes another's money to do a thing, and refuses to do it, it is a fraud, and it is at the election of the party injured either to affirm the agreement by bringing an action for the nonperformance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use."

In *Berry v. Berry*, 81 Iowa, 415, a father gave to his son certain personal property upon the condition that he should keep sober and attend to his business. It was held that to entitle the donee to claim that the gift was irrevocable and invested him with a right to the property it must be shown that he had complied with the conditions on which the gift was made. And in *Stewart v. Phyl*, 11 Or. 835, it was held that assumpsit for money had and received would lie to recover money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when it was not so applied, and the obligation was otherwise discharged.

Several English cases cited by the plaintiff's counsel go beyond the rule above indicated, and hold that marriage gifts or their value are generally recoverable of the donee after breach

of the engagement by her. In *Fonbl. Eq.*, bk. 1, chap. 6, § 15, it is said: "But that which helps us most in the finding out the true meaning is the reason or cause which moved the will. And this is of the greatest force when it evidently appears that some one reason was the only motive that the parties went upon, which is no less frequent in laws than in facts. And here that common saying takes place, 'that the reason ceasing, the law itself ceases.' So a present made in prospect of marriage may be revoked and demanded back if the marriage does not take effect, especially if it sticks on that side to whom the present was made." "A made a present of a jewel to a lady whom he courted, but, the marriage not taking effect, he brought an action of detinue against her, and she, taking it to be a gift, offered to wage her law, but the court was of the opinion that the property was not changed by this gift, being to a specific intent, and therefore would not admit her to do it." 14 Vin. Abr. title *Gift*, pl. 7.

The case of *Young v. Burwell*, Cary, 77, is as follows: "The defendant confesseth by her answer the having of a tablet or pomander in gold, demanded by the plaintiff, and as to the twenty pounds likewise demanded by the plaintiff, by him left with the said defendant as a token at such time as he was a suitor for marriage to the defendant, she confesseth the same was left with her against her will, and she delivered the same over unto one Sydole, her brother, who was a dealer with her on the plaintiff's behalf, to the end he should deliver the same over to the plaintiff. It is ordered that the tablet be forthwith delivered by the defendant to the plaintiff, which was done presently in court, and as to the twenty pounds the plaintiff shall call in the said Sydole by process."

In *Robinson v. Cumming*, 2 Atk. 409, Lord Chancellor Hardwicke laid down the rule "that if a person has made his addresses to a lady for some time upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favor, I look upon such person only in the

light of an adventurer." See also 1 Com. Dig. 318.

The case of *Griggs v. Austin*, 8 Pick. 20, bears upon the same rule of law. There, freight had been paid in advance upon an agreement for the carriage of goods from Boston to Liverpool, and the goods were not delivered in consequence of the vessel being stranded. The court said: "It is certainly a clear principle of the common law that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded upon such consideration may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received."

The \$275 stands differently from the \$55 in this respect, that it was literally applied to the purpose for which it was given; yet it stands precisely like the \$55 in that it was to be applied by the defendant toward the consummation of the marriage engagement. She received both sums for a specific purpose, and when she broke the engagement the law raised a promise on her part to refund them. The plaintiff did not give them to her "as an adventurer" to help him win her favor, but in consideration of the engagement, and to enable her to perform it. When she broke it he was entitled to have his money refunded. We hold that the gifts were not absolute, but conditional, and that when the condition failed a right of action accrued to the plaintiff to recover the money. That it may be recovered in assumpsit for money had and received, is well established in *Wiseman v. Lyman*, 7 Mass. 288; *Calais v. Whidden*, 64 Me. 249, and *Bates v. Quinn*, 56 Vt. 49.

This action lies whenever one person has money in his hands which *ex aquo et bono* belongs to another. *Barnett v. Warren*, 82 Ala. 557.

The amendment brought no new party and no new cause of action into the suit, and was therefore properly allowed. *Myers v. Lyon*, 51 Vt. 272.

The judgment is reversed, and judgment for the plaintiff for both sums, and interest from November 30, 1878.

MASSACHUSETTS SUPREME JUDICIAL COURT.

APPEAL OF William A. DICKINSON,
Trustee under Deed of Trust of Lucius
Boltwood, from a Decree of the Probate
Court.

(....Mass....)

While trust funds may sometimes be properly invested in railroad stock,

yet a trustee under a deed of trust containing no specific directions concerning investments will be compelled to make good the losses sustained by investing in such stock after he has already invested between one fifth and one fourth of the entire trust fund in stock of the same road, where the road runs through a new and comparatively unsettled country, has required a great outlay of money, is heavily indebted and its continued

NOTE.—Investment by trustees.

Trustees loaning money must require adequate real security or resort to the public funds. *King v. Talbot*, 50 Barb. 433; *Ackerman v. Emott*, 4 Barb. 9 L. R. A.

637; *King v. King*, 3 Johns. Ch. 552, 1 N. Y. Ch. L. ed. 714.

What is due security for moneys loaned by a trustee appears to be a point not fully settled and

prosperity cannot be predicted, although he acted in good faith and upon the advice of persons whom he considered qualified to give advice upon the subject.

(September 5, 1890.)

REPORT from the Supreme Judicial Court for Hampshire County (C. Allen, J.), for the opinion of the full court of an appeal from a decree of the Judge of Probate disallowing in part an account of William A. Dickinson as trustee under a deed of trust, and charging him with the amount of certain investments. *Modified.*

The case sufficiently appears in the opinion.

Messrs. Wells & Barnes, for appellant:

The investment in Union Pacific stock, made

by the appellant, is fully supported by the authorities.

Harvard College v. Amory, 9 Pick. 446; *Loell v. Minot*, 20 Pick. 116; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 180 Mass. 263; *Re Hunt*, 141 Mass. 515, 2 New Eng. Rep. 94; *Miller v. Proctor*, 20 Ohio St. 442; *Peckham v. Newton*, 2 New Eng. Rep. 508, 15 R. L. 821; *Loell v. Thomas*, 81 Va. 245; *Robertson v. Wall*, 85 N. C. 288; *Green v. Roundtree*, 88 N. C. 164.

Messrs. Bond & Mason, for Lucius M. Boltwood, appellee:

The investment by the trustees of \$6,048.75 in the capital stock of the Union Pacific Railroad Company was not a proper investment for the trustee to make under the deed of trust.

established. It seems in general that personal security is not sufficient to shield the trustee from responsibility in case of loss. *Smith v. Smith*, 4 Johns. Ch. 281, 1 N. Y. Ch. L. ed. 840; *Nyce's Estate*, 5 Watts & S. 256; *Pim v. Downing*, 11 Serg. & R. 66; *Walker v. Symonds*, 3 Swanst. 61; *Adye v. Fenilletau*, 1 Cox, 28.

A loan without security would render the trustee liable as for a breach of trust, a violation of duty. *Lee v. Lee*, 55 Ala. 598; *Schultz v. Pulver*, 11 Wend. 365; *Clay v. Clay*, 3 Met. (Ky.) 548; *Boyett v. Hurst*, 1 Jones, Eq. 166.

His powers and discretion are not enlarged by the use of the words "best skill and judgment." *Kimball v. Reding*, 31 N. H. 332; *Lovell v. Minot*, 20 Pick. 116.

All that is required of a trustee, is that he shall conduct himself faithfully and exercise a sound discretion. *Re Hunt*, 2 New Eng. Rep. 94, 141 Mass. 515.

Such is the fluctuating character of all funds that it seems difficult, if not impossible, to lay down any rule at once just and practicable and broad enough to cover all the cases. *Lovell v. Minot*, 20 Pick. 119; *Calhoun's Estate*, 6 Watts, 185; *Knight v. Plymouth*, 3 Atk. 480; *Neff's App.* 57 Pa. 98.

The test must remain, the diligence and prudence of prudent and intelligent men in the management of their own affairs. *Re Weston*, 91 N. Y. 511; *King v. Talbot*, 40 N. Y. 78; *McRae v. McRae*, 8 Bradf. 199.

Where there is no just imputation of *mala fides*, and the fault is at most an error of judgment, and want of sharp-sighted vigilance, a trustee will not be held responsible. *Davis v. Harman*, 21 Gratt. 200; *Myers v. Zetella*, 21 Gratt. 759; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 5 N. Y. Ch. L. ed. 293.

Investments in bank or railroad stock have been held to be at the risk of the trustee, and it has been intimated that the only investments that a trustee can safely make, without an express order of court, are in government or real estate securities. *Lamar v. Micon*, 112 U. S. 476, 28 L. ed. 759; *King v. Talbot*, 40 N. Y. 78, affirming 50 Barb. 453; *Ackerman v. Emott*, 4 Barb. 626; *Mills v. Hoffman*, 26 Hun, 594; 2 Kent. Com. 416, *note b*.

So the decisions in New Jersey and Pennsylvania tend to disallow investments in the stock of banks or other business corporations, or otherwise than in the public funds or in mortgages of real estate. *Gray v. Fox*, 1 N. J. Eq. 259, 268; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Worrell's App.* 9 Pa. 608, 28 Pa. 44; *Hemphill's App.* 18 Pa. 313; *Ihmsen's App.* 43 Pa. 431.

The New York and Pennsylvania courts have shown a strong disinclination to permit investments in real estate or securities out of their jurisdiction. *Orniston v. Olcott*, 84 N. Y. 339; *Rush's Estate*, 12 Pa. 375, 378.

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Rule in other States.

Indiana.

Where it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape risk of being liable for the loss thereof only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate in some way that it is the principal's money. If he deposits it in his own name he will not, in case of loss, be permitted to throw the loss on his principal. *Naltner v. Dolan*, 5 West. Rep. 688, 108 Ind. 500; *Norris v. Hero*, 22 Ia. Ann. 605; *Jenkins v. Walter*, 8 Gill. & J. 218; *Mason v. Whitthorne*, 2 Coldw. 242; *Williams v. Williams*, 55 Wis. 300.

Where a person acting as trustee or receiver acts with ordinary care and in good faith, and lends money or deposits it in bank, and takes an evidence of the loan or deposit payable to himself as guardian, administrator, etc., he is not responsible for the loss of the money so loaned or deposited. *State v. Greensdale*, 4 West. Rep. 514, 106 Ind. 334; *Slanter v. Favorite*, 2 West. Rep. 639, 107 Ind. 291; *Norwood v. Harness*, 98 Ind. 124; *Marquess v. La Baw*, 82 Ind. 550; *Sanders v. State*, 49 Ind. 223.

Kentucky.

Trustees with general power to invest personal property and pay the income to their beneficiaries, without directions as to the character of the securities to be taken, if they deem it prudent, after making an investment, may sell the securities and reinvest in others. *Citizens Nat. Bank v. Jefferson* (Ky.) 11 Ky. L. Rep. 174.

Maine.

The investment of trust property should be made with the view of permanence, and not in a spirit of speculation. *Emery v. Batchelder*, 3 New Eng. Rep. 68, 78 Me. 233.

Maryland.

A trustee authorized to invest in landed securities has no authority to buy land with the funds, and the *cestui que trust* will not be estopped by his knowledge or acquiescence to question his power to do so. *Zimmerman v. Fralley*, 70 Md. 561.

Massachusetts.

In the absence of statutory prohibition, the issuing of time certificates of deposit is not illegal or irregular banking; and a trustee is not to be held responsible, in the absence of other circumstances showing a want of prudence, for loss resulting from investing trust funds in such a certificate. *Re Hunt*, 2 New Eng. Rep. 94, 141 Mass. 515.

It is the general rule that when investments are made in property of a permanent character, and not in terminable securities, the loss or gain in such

See *Kimball v. Rading*, 81 N. H. 353, 375; *King v. Talbot*, 40 N. Y. 76.

The trustee did not exercise the care, prudence and discretion which he was required to exercise by the law of this Commonwealth.

Harvard College v. Amory, 9 Pick. 446, 471; *Brown v. French*, 125 Mass. 410, 415; *Clark v. Garfield*, 8 Allen, 427, 428.

Field, J., delivered the opinion of the court:

The general principles which should govern a trustee in making investments when the creator of the trust has given no specific directions concerning investments have been repeatedly declared by this court. *Harvard College v. Amory*, 9 Pick. 446; *Lowell v. Minot*, 20 Pick. 116; *Brown v. French*, 125 Mass. 410; *Bouker*

investments is that of the corpus of the estate. *New England T. Co. v. Eaton*, 1 New Eng. Rep. 372, 140 Mass. 532.

Missouri.

It is not obligatory on persons acting in good faith and without knowledge of any breach of trust, to see whether or not the purposes of the trust have been fulfilled, before dealing with the trustee in relation to the property vested in him. *Orr v. Rode* (Mo.) June 18, 1890.

New Jersey.

Where trustees, though residing in another State, are to account in this State, ordinarily they should not invest the trust funds out of it. *McCullough v. McCullough*, 12 Cent. Rep. 337, 44 N. J. Eq. 813.

The trust must not through investment be complicated with the rights of strangers, or be required to share in the losses of other funds. *Fowler v. Colt*, 25 N. J. Eq. 203; *Salisbury v. Colt*, 27 N. J. Eq. 422; 1 *Perry*, Tr. § 463. See *Ormiston v. Olcott*, 84 N. Y. 339.

The rule that an executor or trustee residing in this State, and deriving his authority from a will executed and admitted to probate in this State, cannot invest trust funds in mortgages on real estate out of the State, is not universal and has its exceptions. *Denton v. Sanford*, 5 Cent. Rep. 785, 108 N. Y. 607; *Ormiston v. Olcott*, 84 N. Y. 339.

A clause in an instrument creating a trust, and exempting the trustee from liability except for willful and intentional breaches of trust, does not exempt from liability for losses arising from investments made without instituting proper inquiries and exercising reasonable judgment in respect to the value of the securities received; and the fact that he neither made nor intended to make any personal gain does not exonerate him. *Tuttle v. Gilmore*, 36 N. J. Eq. 618.

A note of hand, made by one having a contingent interest in remainder in a trust fund, secured only by an agreement between the maker and the person who has a life estate in the income of the fund, is a doubtful security. *Re Craven* (N. J.) 4 Cent. Rep. 144.

New York.

A trustee is liable for the loss of money deposited with a bank, which afterwards fails, notwithstanding a clause in the will declaring that executors shall not be responsible for unavoidable loss of money by reason of the insolvency of a bank. *Re Knight*, 21 Abb. N. C. 399; *Moyle v. Moyle*, 2 Russ. & M. 710; *Darke v. Martyn*, 1 Beav. 525.

The investment of trust funds in mortgage bonds of a horse railroad company will not be sanctioned by the courts. *Judd v. Warner*, 3 Dem. 104.

A trustee who is required to invest in real estate mortgages or in United States bonds is not personally

chargeable with the shrinkage in the latter investment because the direction named mortgages first in the will. *Valentine v. Valentine*, 3 Dem. 597.

North Carolina.

Where a person ordered by the court to invest money under the court's control, in safe securities, invests the money in unsafe securities and for his own profit, the one entitled to the money has the right to follow the fund and charge it against lands in which it has been invested. *McEachin v. Stewart*, 106 N. C. 393.

Pennsylvania.

The court will not direct the investment of trust funds in the Philadelphia City loan, in which, at ruling prices, \$20,000 will purchase only \$14,000 worth of security. *Shield's Estate*, 14 Phila. 307.

Where trustees purchased mortgages in good faith, and in the exercise of reasonable caution and business judgment, they will not be held liable for a depreciation in the value of the security. *Rawling's Estate*, 13 Phila. 397.

Rhode Island.

Trustees under a will must be prudent and vigilant and exercise a sound judgment, where they are empowered in their discretion to sell real estate and reinvest the proceeds; and if safety and profit can be combined, neither should be unnecessarily sacrificed by changing investments already made. *Peckham v. Newton*, 2 New Eng. Rep. 503, 15 R. I. 321.

Tennessee.

Where trust funds are invested in and subject to a lien, and the lien is enforced, the land being sold, the surplus after paying off the lien debt must be distributed in proportion to the amount of trust funds and the value of the land originally. *Williams v. Williams*, 16 Lea, 164.

Texas.

If a trustee deposits the trust funds in a private bank in which he is a partner, where the funds will draw interest, upon the request of one beneficiary and by the consent of the other, he will not be liable for the loss merely because the bank afterward failed, where there was no evidence that the money was not safe. *Mills v. Swearingen*, 37 Tex. 220.

Virginia.

Where the loss of money directed to be invested in United States bonds resulted from gross negligence of the trustee in depositing it with a bank known to be insolvent, and in disobedience of the decree of the court, he was responsible for the loss. *Whitehead v. Whitehead* (Va.) 13 Va. L. J. 215.

the investment is to be judged as of the time when it was made, and not by subsequent facts which could not then have been anticipated."

A trustee in this Commonwealth undoubtedly finds it difficult to make satisfactory investments of trust property. The amount of funds seeking investment is very large; the demand for securities which are as safe as is possible in the affairs of this world is great; and the amount of such securities is small when compared with the amount of money to be invested. Trusts frequently provide for the payment of income to certain persons during their lives, as well as for the ultimate transfer of the *corpus* of the trust property to persons ascertained or to be ascertained at the termination of the trust, and a trustee must, so far as is reasonably practicable, hold the balance even between the claims of the life tenants and those of the remaindermen. The life tenants desire a large income from the trust property, but they are only entitled to such an income as it can earn when invested in such securities as a prudent man investing his own money and having regard to the permanent disposition of the fund would consider safe. A prudent man possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking. A trustee whose duty it is to keep the trust fund safely invested in productive property ought not to hazard the safety of the property under any temptation to make extraordinary profits. Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations when the corporations have acquired by reason of the amount of their property and the prudent management of their affairs such a reputation that cautious and intelligent persons commonly invest their own money in the stocks and bonds as permanent investments. The experience of recent years has perhaps taught the whole community that there is a greater uncertainty in the permanent value of railroad properties in the unsettled or newly settled parts of this country than was anticipated nine years ago. Without, however, taking into consideration facts which are now commonly known, and confining ourselves strictly to the evidence in the case, and the considerations which ought to have been present to the mind of the appellant when in May and August, 1881, he made the investments in the stock of the Union Pacific Railroad Company, we think it appears that he acted in the entire good faith and after careful inquiry of many persons as to the value of the stock and the propriety of the investment. We

cannot say that it is shown to our satisfaction that the trustee so far failed to exercise a sound discretion that the investments should be held to be wholly unauthorized. Still it must have been manifest to any well-informed person in the year 1881 that the Union Pacific Railroad ran through a new and comparatively unsettled country; that it had been constructed at great expense, as represented by its stock and bonds, and was heavily indebted; that its continued prosperity depended upon many circumstances which could not be predicted, and that it would be taking a considerable risk to invest any part of a trust fund in the stock of such a road. In this case the whole trust fund appears by the first account to have been \$16,260.06. On May 9, 1881, the trustee bought thirty shares of the stock of the Union Pacific Railroad Company at \$119 per share, which with commissions amounted to \$3,573.75. This is an investment of between one fourth and one fifth of the whole trust fund in this stock, and is certainly a large investment, relatively to the whole amount of the trust fund, to be made in the stock of any one corporation. After this, on August 16, 1881, he purchased twenty shares more at \$123 per share, amounting with commissions to \$2,475. The last investment we think cannot be sustained as made in the exercise of a sound discretion. While we recognize the hardship of compelling a trustee to make good, out of his own property, a loss occasioned by an investment of trust property which he has made in good faith, and upon the advice of persons whom he thinks to be qualified to give advice, we cannot on the evidence hold that the trustee was justified in investing in such stock as this was, so large a proportional part of the property.

It appears by the report of the single justice before whom this cause was tried that "the time has now come for a final distribution of said trust fund." It does not appear that when the first account was allowed there was any adjudication of the questions now before us, and they are not therefore *res adjudicata*, and no assent to these investments is shown on the part of the persons now entitled to the trust property.

The result is that this last investment is disallowed, and that the trustee must be charged with the amount of it, to wit, \$2,475, and with simple interest thereon from August 16, 1881, and must be credited with any dividends therefrom which he has received and paid over, with simple interest on each from the time each dividend was received.

The decree of the Probate Court must be modified in accordance with this opinion.

Decree accordingly.

NEW HAMPSHIRE SUPREME COURT.

Thomas L. MORRISON

v.

CITIZENS NATIONAL BANK of Tilton
et al.

(....N. H.....)

1. Where a creditor brings suit on a note indorsed by a surety and attaches the
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principal's property therein, and afterwards brings another suit on unsecured claims against the same debtor in which he attaches the same property, and recovers judgment in both suits, the surety has no right to insist that the proceeds of the attached property shall be first applied in satisfaction of the debt on which he is liable, although the property was first attached in the suit on that debt; and if he pays that claim he is

not entitled to be subrogated to the creditor's rights under the first attachment as against his rights under the subsequent one.

2. A surety is not discharged from liability by reason of the creditor's failure to levy an execution upon a judgment obtained in an attachment suit against the principal for the collection of the debt, although the attachment is thereby dissolved and the security lost.

(March 10, 1890.)

BILL in equity brought by a surety to recover back from the creditor money paid in satisfaction of the principal's debt on the ground that he was discharged from liability because of the creditor's failure to apply the proceeds of an attachment suit in satisfaction of the debt. On demurrer to the bill. *Sustained.*

The facts sufficiently appear in the opinion, except as to certain ones set out in the answer of the Bank as follows: On April 12, 1881, defendant and the Iona Savings Bank held a large amount of Dearborn's paper, the total unsecured amount of which they found to be greater than the value of Dearborn's unincumbered property; that the two banks agreed together that each bank should collect for its separate use from the securities, personal or otherwise, held by each, the largest amount practicable; that suits should be brought, and all sums that could be realized by levy upon Dearborn's unincumbered property should be divided between them in proportion to the remaining indebtedness of Dearborn to each bank after the application of the amounts collected by each from any security held by it. A large number of suits were accordingly brought by each bank, all on the same day. The writs were all delivered to the officer, Lang, at the same time, without instructions as to the priority of any, and the attachment of the personal property made at the same time on all the writs; that the proceeds of the sale were divided between the banks, and the sum paid by the plaintiff to the defendant Bank retained by it in accordance with said agreement; that the banks still hold executions against Dearborn, obtained in said suits, which his property was insufficient to satisfy, to the amount of \$2,590; that if the returns of attachment and levy made by the defendant Lang are not such as properly to carry out the agreement between it and said savings bank, the defendant Bank asks that the defendant Lang be ordered to come in and amend his returns so as to correspond with said agreement, and give effect thereto.

Mr. Frank N. Parsons, for defendants, in support of the demurrer:

The judgment against Dearborn was not a payment, nor was the attachment a payment.

Folsom v. Chesley, 2 N. H. 432; *Churchill v. Warren*, Id. 298; *Dyke v. Mercer*, 2 Shower, 304; *Whiteoakes v. Hamkinson*, 8 Cro. Car. 75; *Prescott v. Perkins*, 16 N. H. 805, 810.

The holder of the note, being held to no vigilance in pursuing the maker to preserve his rights against the indorser, was under no obligation to levy upon the goods or proceeds thereof, which had been returned as attached. Its failure to do so could not operate as payment, or to release the indorser.

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Edwards, Notes and Bills, ed. 1857, 292, 298; *Story, Prom. Notes*, §§ 411, 417, 419; *Ross, Com. Law Bills and Notes*, *267, 272; *Sterling v. Marietta & S. T. Co.* 11 Serg. & R. 179; *First Nat. Bank of Buffalo v. Wood*, 71 N. Y. 406; *Converse v. Cook*, 25 Hun, 44; *Ross v. Jones*, 89 U. S. 22 Wall. 576, 588, 22 L. ed. 730, 784, and authorities cited; *Lenox v. Prout*, 16 U. S. 8 Wheat. 520, 525, 4 L. ed. 449, 450; *Concord Bank v. Rogers*, 16 N. H. 9, 18; *Barney v. Clark*, 46 N. H. 514, 516; *Prescott v. Perkins*, 16 N. H. 805; *Baker v. Davis*, 22 N. H. 27, 37; *City Bank v. Young*, 43 N. H. 457, 461.

The failure to levy the execution in the suit against Dearborn did not operate as a discharge of the judgment against the plaintiff.

Pole v. Ford, 2 Chitty, 125, 18 Eng. C. L. 545.

The most that the failure of the Bank to levy against Dearborn amounts to, is mere indulgence or forbearance, which will not discharge either surety or indorser, unless there be a binding agreement to give time to the debtor.

Clark v. Sickler, 64 N. Y. 281; *Second Nat. Bank of Oswego v. Poucher*, 56 N. Y. 348; *Strong v. Foster*, 17 C. B. 201, 84 Eng. C. L. 201; *Freeman's Bank v. Rollins*, 13 Me. 202; *Hoghead v. Williams*, 55 Ind. 145; *Jerauld v. Trippet*, 69 Ind. 123; *Sawyer v. Bradford*, 6 Ala. 572; *Hetherington v. Mobile Branch Bank*, 14 Ala. 68; *M'Kenny v. Waller*, 1 Leigh, 434; *Alcock v. Hill*, 4 Leigh, 622; *Newell v. Hamer*, 4 How. (Miss.) 684; *United States v. Simpson*, 3 Penn. & W. 437; *Mundorff v. Singer*, 5 Watts, 172; *Pickens v. Finney*, 12 Smedes & M. 468; *Union Bank of Tennessee v. Govan*, 10 Smedes & M. 333; *Farmers Bank of Canton v. Reynolds*, 18 Ohio, 84, 104.

The Bank had the right to do as it proposed, —take all of Dearborn's property upon their unsecured claims, and collect the remainder of their claims of the various sureties. Neither law nor equity requires that payment so collected shall be considered to be made for the benefit of all the sureties ratably.

Sheldon, Subr. § 117; *Harding v. Tift*, 75 N. Y. 461; *Hansen v. Rounsell*, 74 Ill. 238.

The holder of different notes, for which he has one security, may apply the whole proceeds of the security upon the notes last due, and continue to hold a surety upon the earlier ones.

Sheldon, Subr. § 117; *Mathews v. Switzler*, 46 Mo. 301.

Messrs. Chase & Streeter and C. O. Rogers, also for defendants in support of the demurrer.

Messrs. S. S. Jewett and E. A. & C. B. Hibbard, for plaintiff, *contra*.

Carpenter, J., delivered the opinion of the court:

The case comes on a demurrer to the plaintiff's bill, with an answer and an agreement that the allegations of the bill and answer are to be taken as facts, except where it is otherwise specifically agreed. It is considered as if all the undisputed facts were alleged in the bill. Upon the whole case some of the material facts are left in doubt. The view of them most favorable to the plaintiff is this:

April 12, 1881, the defendant Bank brought against Dearborn (1) an action to recover a promissory note on which the plaintiff was liable as indorser, and caused Dearborn's property to be attached; (2) several other actions on unsecured demands in which the same property was attached subject to the former attachment, and (3) an action against the plaintiff as indorser. The property attached was sold on the writs by consent of the parties, and the avails held by the officer for application according to law. Gen. Laws, chap. 224, §§ 19, 28.

October 5, 1881, the Bank obtained judgment in all the suits. The avails of the attached property were insufficient to satisfy the judgments. The Bank placed the executions issued on the judgments founded upon their unsecured demands in the hands of the officer, who, within thirty days after the judgments were rendered, and (as the plaintiff says) on the 3d day of November, 1881, by the Bank's direction, applied upon them the avails of the attached property, leaving unsatisfied a part of them, and the entire judgment on the note indorsed by the plaintiff. On the 25th day of March, 1882, the plaintiff, in ignorance of the foregoing facts, except of the action against himself, paid the judgment against him, and by his bill seeks to recover of the Bank the amount so paid.

It is assumed without inquiry that the plaintiff stands in the position and has all the rights of a surety, though, so far as appears, he indorsed the note, and procured it to be discounted by the Bank in the ordinary course of business. *Duncan v. North & South Wales Bank*, L. R. 11 Ch. Div. 88, L. R. 6 App. Cas. 1; *Hurd v. Little*, 12 Mass. 502; *Pitts v. Congdon*, 2 N. Y. 352.

A surety upon payment of the debt may take an assignment of the creditor's judgment and execution, or of his pending action against the principal, and for his own benefit prosecute the action against a defense made by the principal's subsequent attaching creditors, levy the execution upon the property attached, or, by suit in the attaching officer's name, recover it of the receptor. *Edgerly v. Emerson*, 23 N. H. 555; *Brewer v. Franklin Mills*, 42 N. H. 292.

In both of these cases the assignment was voluntarily made by the creditor, who, in neither case had any interest in or claim upon the property attached, except for the security of the debt paid by the surety. Though the question has never been determined in this State, it may be that equity would compel the creditor to make the assignment or subrogate the surety to his rights without an assignment in cases of this character. The subsequent attaching creditors and the receptor are not injuriously affected by the subrogation. They remain in the same position they would occupy if, without the intervention of the surety, the creditor pursued the action and made the levy, and no one else has apparently any cause to complain. Whether the surety on payment of the debt would be entitled to a like assignment, or to be subrogated to the rights of a creditor who has, on the same property, subsequent attachments for the security of other demands which it is insufficient to satisfy, so that either he or the surety must suffer loss, is a different question. The plaintiff has no reason to complain of

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the agreement between the two banks. As to him the case stands as if all the sued demands against Dearborn were the property of the defendant Bank. Dearborn's property was insufficient to satisfy all of them. As between him and the Bank it was immaterial which of the attachments was first. By them the Bank acquired the legal right to apply the attached property on their judgments, not merely in the order of the attachments, but in such order as they pleased. They could apply it on the judgment in the last as well as the first attachment suit, or *pro rata* on all their judgments, or in such other manner as in their judgment their interests required. This right of appropriation was a valuable part of their security. It is as if Dearborn had delivered the property to the Bank in pledge with express authority to sell it, and apply the proceeds in satisfaction of such of their claims as they might see fit; or as if he had given the Bank a mortgage of the property to secure all their demands without stipulating for its application on any one of them in preference to another. The plaintiff by paying the debt on which he was liable could not deprive the Bank of its right to apply the property at its election on the other debts. In order to entitle himself to the benefit of the security, he was bound to pay all the debts for the payment of which it was held by the Bank. *Gannett v. Blodgett*, 39 N. H. 150, 153, 154, and cases cited.

The assumption that the plaintiff had a lien on Dearborn's property superior to the Bank's second attachment has no foundation in law or fact. He had in truth no lien, by attachment or otherwise, but merely the equitable right to acquire by subrogation the security obtained by the Bank by attaching that property. If this right of acquisition could properly be called a lien, it had no priority over the attachment lien held by the Bank. The equitable right of the Bank to the application of Dearborn's property to the satisfaction of their unsecured claims against him was, at the least, equal to that of the plaintiff to have that property appropriated to the payment of the debt for which he was Dearborn's surety. By the attachment the Bank acquired in addition the legal right. "When two or more have equal claims in equity, and one has the legal title, the legal title shall prevail." *Eastman v. Foster*, 8 Met. 19, 29.

The surety's right of subrogation to securities held by the creditor is subordinate, and not superior, to the rights of the latter. His right is to be put in the same position as the creditor, not in a better one. He cannot have the benefit of the security without assuming the burden to which it is subject, without discharging the indebtedness for the payment of which it is held. His right rests, not upon contract, but upon principles of natural justice. *Hayes v. Ward*, 4 Johns. Ch. 123, 130, 1 N. Y. Ch. L. ed. 786, 789.

It would be unjust to permit him, on payment of part of a debt, or one of several debts, to appropriate to the satisfaction of such debt, or part of a debt, a security which the creditor holds for the satisfaction of the entire indebtedness. It would be putting him, not in the same position as the creditor, but in a better one. It would tend to "defeat the object and

end of suretyship," and might in some cases place the creditor in a worse position than he would occupy without a surety. *Gannett v. Blodgett*, 39 N. H. 150, 154, 155.

To hold that the plaintiff, on payment of his debt, only was entitled to be subrogated to the attachment, is to hold that he could compel the Bank to appropriate the attached property to the satisfaction of that debt, and deprive them of the right to apply it on the other debts. It is to hold that the vigilance of the Bank in obtaining the attachment security is to operate, not to their advantage, but to that of the plaintiff. If Dearborn had made to the Bank a general payment on their claims against him, without appropriating it to any particular debt, or had made it with express authority to the Bank to apply it on such of his debts as they chose, the plaintiff could as equitably ask that they be compelled to apply it on the debt for which he was liable. *Stamford Bank v. Benedict*, 15 Conn. 437, 445.

The Bank had the legal and equitable right to appropriate the attached property to the satisfaction of any of the claims secured by the attachments. The plaintiff could have acquired the Bank's interest in the property by paying what equity would require him to pay. An assignment to him of that interest would not be equitable until he paid the debts for the payment of which the Bank had obtained security by its attachment. *Brown v. Ray*, 18 N. H. 102, 104; *Gannett v. Blodgett*, 39 N. H. 150; *Kidder v. Page*, 48 N. H. 880, 882, 883; *Belcher v. Hartford Bank*, 15 Conn. 881; *Stamford Bank v. Benedict*, Id. 437, 444, 445; *Root v. Stow*, 13 Met. 5; *Becket First Cong. Soc. v. Snow*, 1 Cush. 510, 518; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Farebrother v. Wodehouse*, 28 Beav. 18.

But, assuming that the law were otherwise, assuming that the plaintiff on payment merely of his own debt, at any time during the life of the attachment, might, had he chosen to do so, have availed himself of the attachment lien, and might have levied the execution for his own benefit on the attached funds, the result is the same. The plaintiff did not pay the debt in the lifetime of the attachment, nor until long after it expired by operation of law. He did not refrain from paying, and from asserting a right to the lien, by reason of anything done by the Bank. It distinctly appears not only that he never acquired the right of subrogation to the attachment lien, but also that he never would have acquired it if the lien had continued in force as long as the law permitted. The question is whether upon these facts the plaintiff was discharged from liability by the Bank's failure to levy the execution founded on the note indorsed by the plaintiff on the attached property, or by their application of it on their other judgments. If the Bank was under no obligation to apply the funds on the indorsed note judgment, the plaintiff cannot complain because they were not so applied. On the other hand, if the Bank was bound to apply them on that judgment, the plaintiff, by its neglect to do so, was discharged from liability, and is entitled to recover the money paid on the judgment against him as paid by mistake. In either case it is not material to him that the funds were applied on other judgments in fa-

vor of the Bank. His complaint is not that the Bank rather than anyone else has got the funds, but that, by their action or by their non-action, he has been deprived of them. His injury, if any he has suffered, and the Bank's liability, are the same as they would have been if the funds had been lost by the Bank's negligence, or if the judgments on which the Bank applied them had been in favor of strangers instead of the Bank. The Bank's application was no wrong to the plaintiff, unless at the time of the application it was his right to have it made elsewhere. As against everybody except him, the Bank had an unquestionable right to apply the funds on the indorsed note judgment, or on their other judgments, at their election. The actual application was merely conclusive proof of their election to abandon the lien on the former, and to enforce it on the latter. The only ground on which the plaintiff can justly complain of the Bank's action is that it was his right to have the funds applied on the former judgment. The real question then is, Was the plaintiff discharged by the Bank's neglect to apply the avails of the attached property on the indorsed note execution, or by their failure to levy it upon them? The creditor may, without prejudice to his rights against the surety, decline to accept additional security offered by the principal. *City Bank v. Young*, 43 N. H. 457, 461.

He is under no obligation to pursue any of the remedies which the law gives him against the principal, though the surety requests him to do so. *Davis v. Huggins*, 3 N. H. 231; *Mahurin v. Pearson*, 8 N. H. 539.

He need not prove the debt against him in bankruptcy, exhibit the note to the deceased principal's executor, nor, if his estate is administered as insolvent, present it to the commissioner for allowance. *Sibley v. McAllister*, 8 N. H. 389.

In short, he is not required to take any active measures to obtain payment either directly from the principal or out of property which he holds as security. *Concord Bank v. Rogers*, 16 N. H. 9, 17, 19.

As between creditor and surety it is the surety's business to see that the principal pays. *Sibley v. McAllister*, 8 N. H. 390.

The creditor's chief purpose in requiring a surety is to avoid the necessity of resorting to legal remedies against the principal, to escape the vexation and expense of litigation, and cast that burden upon another. The surety's contract is that he will himself pay the note when it falls due, and not that he will pay it in case the payee or holder cannot, by due diligence, enforce payment by the principal. If he performs his contract, the creditor has neither cause nor opportunity to institute legal proceedings. A surety paying the debt is entitled to be subrogated to the securities and remedies held by the creditor at the time of payment. If the creditor, without the surety's consent, surrenders a demand placed in his hands by the principal as security for the payment of the debt, the surety is discharged to the extent of its value. *N. H. Sav. Bank v. Concord*, 15 N. H. 119; *Watris v. Pierce*, 32 N. H. 560.

It does not, however, follow that he is discharged by the creditor's abandonment of a lien which he has obtained on the principal's

property by process of law. The lien acquired by attachment differs from ordinary securities among other things in that it cannot be preserved without active diligence and continuous expense. It is dissolved by a failure to enter the action by its discontinuance after entry, by a judgment for the defendant, and expires by operation of law in thirty days after judgment for the plaintiff. Gen. Laws, chap. 224, § 86. In order to maintain and avail himself of the lien, the plaintiff must pursue the suit to judgment in his favor, and make a levy within thirty days thereafter. Both the prosecution of an action and the making of a levy are attended with trouble and expense. By a levy, if the property is in dispute, serious liabilities may be incurred. The creditor is under no obligation to subject himself to such expense or to such liability for the surety's benefit. The latter, by reasonable payment of the debt, may acquire the right to adopt and prosecute the action and make the levy for his own benefit at his own expense. He is not obliged to exercise the right. He may adopt the action or not as he sees fit. If he does not the creditor has no claim upon him for the expense of the suit. If he does he must take with the benefit of the action the burden of its cost. *Low v. Connecticut & P. R. Co.* 45 N. H. 870, 878, 879.

It would be unjust to permit him to avail himself of the security without paying what it cost the creditor to procure and preserve it. He must also indemnify the creditor against further costs. *Concord Bank v. Rogers*, 16 N. H. 9, 17.

It was (as for the purposes of the present question is assumed) the plaintiff's right, on payment of the debt for which he was liable, within thirty days after the judgment was rendered, together with the accrued expense of the Bank's action against Dearborn and indemnifying them against further expense, to levy their execution for his own benefit on the attached property. If he thus became entitled to and claimed the right, the Bank was bound to permit him to make the levy. This was the full extent of the plaintiff's right, and of the Bank's obligation. That the plaintiff did not exercise or claim the right was not the fault of the Bank. He stands no better than he would if, being present at the time of the application made by the Bank, he had protested against it, and had done nothing more. His non-acquisition of the attachment lien was due to his own neglect, and not to any fault of the Bank. What might have been his remedy if he had acquired and claimed the right to levy, and the Bank, by reason of a previous application of the funds on other judgments, or for any cause, had refused to permit him to make it, is a question not raised by the case. A surety is not discharged by the creditor's discontinuance of an action brought by him against the principal and the consequent dissolution of an attachment of the principal's property. *Concord Bank v. Rogers*, 16 N. H. 9; *Baker v. Davis*, 23 N. H. 87, 87; *Barney v. Clark*, 48 N. H. 514.

In the last-named case the action was discontinued after the defendants were defaulted. If a reason might be suggested (though none has been and none is perceived) for giving to the
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abandonment of an attachment after a default or after judgment a legal effect different from an earlier abandonment, there is no ground for claiming any greater effect for one made after judgment than for one made after a default. A defendant's liability and a plaintiff's right to the application of the attached property in satisfaction of the debt are as conclusively fixed by a default as by a judgment. It cannot be held that the plaintiff was discharged from liability by the Bank's failure to levy the execution and the consequent dissolution of the attachment by lapse of time without overruling *Barney v. Clark*.

A surety has no right in law or equity to require the creditor to satisfy his demand out of the principal's property rather than his own. For the purpose of his remedy for a breach of the contract the creditor is entitled to treat the surety as a principal. He may sue them jointly or severally; and if the contract is several, attach the property of each, and levy his execution upon that of either at his election. The position of the plaintiff cannot be sustained without depriving the creditor of this right. A creditor holds a note for \$100 against A, with B as surety, and a note of the same sum against A alone. He sues the former note, attaches and sells on the writ the property of each to the value of \$100, and also sues the latter note, and attaches the same property of A subject to the former attachment. He obtains judgment at the same time in both suits. Apparently both debts are fully secured. But the avails must be applied on one or the other of the judgments within thirty days or the security is lost. If the avails of A's property are applied on the judgment against A and B, the latter is discharged because the debt is satisfied. If they are applied on the judgment against A alone, B is discharged, says the plaintiff, because thereby the attachment in the suit against A and B is released. It is not material at what time within the thirty days the creditor makes the application. Its legal effect is the same whether made on the 29th or at the last moment of the 30th day after the judgment. The surety's discharge is certain. He has no occasion to pay the debt and assert his right to levy the joint execution on A's property. It is better for him to stand aloof, and do nothing. In effect, he is discharged by the attachment, or, at all events, by the attachment and judgment. If the creditor attaches the principal's property, and pursues the action to judgment, the surety is inevitably discharged. If he attaches land, he must take his pay in land, at its appraised value, instead of the lawful money which the surety as well as the principal agreed to pay. If such is anywhere the law, it is not the law here. The lien acquired by attachment is merely the right to levy the execution on the particular property attached. *Kittredge v. Warren*, 14 N. H. 509, 526.

It is a valuable right, but it is of no greater value than the right to levy on property not attached. The creditor has no better right, and is under no greater obligation to the surety, to levy on the attached property than on any other equally exposed to levy. The surety may be more injured by his failure to levy in the one case than in the other. If he is not

discharged by the creditor's refusal to levy at his request on a failing principal's unincumbered property which other creditors are about to seize, and which is pointed out to him by the surety with a request that he levy (*Davis v. Huggins* and *Mahurin v. Pearson*, before cited), no good ground is perceived for holding that he is discharged by a neglect to levy on property attached. In each case alike the surety may pay the debt, and levy the execution, for his own benefit. The doctrine contended for by the plaintiff is not necessary for the surety's protection. So far as it might tend to deter the creditor from bringing suit against and attaching the property of a principal, it would operate to his prejudice. He is chargeable with knowledge that the principal has not performed the contract, if such is the fact. The creditor is not bound to inform him that the debt is not paid. *Sibley v. McAlaster*, 8 N. H. 389, 390; *N. H. Sav. Bank v. Downing*, 16 N. H. 188.

The plaintiff might have had the full bene-

fit of the attachment by performing his contract, and paying the debt at any time while the lien subsisted. It is no sufficient answer for him to say that he did not know of the suit against Dearborn, or of the attachment. The Bank was under no obligation to sue Dearborn, to attach his property, or, upon doing so, to notify the plaintiff of the fact. Service of the writ upon the plaintiff was notice that the debt had not been paid. He was put upon inquiry touching all the facts relating to his liability. Ordinary care would have informed him of the suit against Dearborn, and of the attachment. His loss is caused, not by any act of the Bank, but (1) by his own breach of the contract in not paying the note when it fell due, and (2) by his subsequent negligence. The cited and conflicting decisions in other jurisdictions have not been overlooked.

Demurrer sustained.

Smith, J., did not sit; the others concurred.

Motion for a rehearing denied.

ALABAMA SUPREME COURT.

E. C. BROCK, *App't.*,

v.

M. A. BROCK.

(...Ala....)

1. No letter written by a grantor of property after he has made an absolute conveyance of it to a third party is admissible in evidence for the purpose of proving the existence of a trust in such property in favor of himself.

2. Correspondence between the grantor and grantee of property, though insufficient of itself to establish a trust therein in favor of the grantor, may be considered together with the oral evidence in the case, for the purpose of determining whether or not there was such fraudulent contrivance on the part of the grantee to secure title to the property as to render him a trustee *ex maleficio*.

3. Fraud, imposition or mistake in a transaction by which land is conveyed from one person to another may constitute the grantee a trustee *ex maleficio* for the benefit of the grantor, and enable equity to enforce the trust notwithstanding the statute requires a writing duly signed for the creation of a trust concerning land.

4. The mere breach of an oral agreement to re-convey lands on the happening of a certain contingency is not alone sufficient to establish such fraud on the part of the grantee in procuring the title as is required to render him a trustee *ex maleficio* and enable equity to enforce the trust in the face of a statute declaring that no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created except by instrument in writing, duly signed.

5. No parol trust will be ingrafted on a legal title which the instrument of conveyance makes absolute on its face, unless the fraud necessary to create it is established by clear and convincing proof.

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6. A parol promise by a wife on accepting from her husband, from whom she had separated on account of his intemperate habits, upon his solicitations and procurement, and against her will, an absolute deed to real estate, that on his return to her a sober and temperate man she would again live with him as his wife, in which event the deed should become null and void, is not enforceable, under the Statute of Frauds, in the absence of satisfactory proof that at the time the deed was accepted the wife entertained a fraudulent purpose not to carry it out.

(May 27, 1890.)

APPEAL by complainant from a decree of the Chancery Court for Calhoun County in favor of defendant in an action brought to enforce an alleged agreement by a grantee of real estate to re-convey the same upon the happening of a certain contingency. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Brothers, Willett & Willett, for appellant:

Respondent is a trustee *ex maleficio*, made so by her own fraud in acquiring the legal title to the lands by means of a false and fraudulent verbal promise, which she made with the intent at the time of not performing.

Fraud will withdraw a case from the grasp of the Statute against parol trusts, and the courts will convert the holder of the fraudulent legal title into a trustee *ex maleficio*.

Browne, Stat. Fr. 4th ed. pp. 433, 439; 2 Pom. Eq. §§ 853, 859; Story, Eq. 13th ed. p. 853; *Firestone v. Firestone*, 49 Ala. 128; *Meyer v. Mitchell*, 75 Ala. 475; *Patton v. Beecher*, 63 Ala. 579; *Manning v. Pippen*, 86 Ala. 357; *Barrell v. Hanrick*, 42 Ala. 60; *White v. Farley*, 81 Ala. 563; 1 Pom. Eq. § 430; 3 Pom. Eq. §§ 807, 1053, *et seq.*

Where a verbal promise of the defendant to make a certain disposition of lands was the means of his obtaining to himself the legal title to lands, so that in fact he practices a deception upon his grantor by so obtaining the

lands, and then holding and dealing with them as his own, a court of equity will compel him to perform his verbal agreement.

Browne, Stat. Fr. 4th ed. § 445 a; 2 Pom. Eq. Jur. § 1055.

The trust in such cases arises wholly from the fraud—the Statute of Frauds requiring a written declaration of trust does not apply, since trusts *ex maleficio* are excepted from its operation.

Hunt v. Roberts, 40 Me. 187; *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52; *Cameron v. Ward*, 8 Ga. 245; *Jones v. M'Dougal*, 82 Miss. 179; *Arnold v. Cord*, 16 Ind. 177; *Nelson v. Worrall*, 20 Iowa, 469; *Sandfoss v. Jones*, 85 Cal. 481; *Reeves v. Bass*, 39 Tex. 681; *Dowd v. Tucker*, 41 Conn. 197; *Eldredge v. Jenkins*, 8 Story, 181; *Stickland v. Aldridge*, 9 Ves. Jr. 516; *Byrn v. Godfrey*, 4 Ves. Jr. 6.

If the grant was made on the faith of a promise and induced thereby, the breach of the promise is a fraud, and as such has been made ground of equitable relief.

Browne, Stat. Fr. § 95; *Haigh v. Kaye*, L. R. 7 Ch. Div. 469; *Hoge v. Hoge*, *supra*; *Barrell v. Hanrick*, 42 Ala. 60.

The principle announced by this court in *Pattin v. Beecher*, 62 Ala. 579, has been criticised in the following cases:

Manning v. Phippen, 86 Ala. 357; *Hoge v. Hoge*, 1 Watts, 163; *Oliver v. Oliver*, 4 Rawle, 141, 26 Am. Dec. 123; *Hults v. Wright*, 16 Serg. & R. 345, 16 Am. Dec. 575; *Pierce v. Robinson*, 18 Cal. 116, 128; *Russell v. Southard*, 53 U. S. 12 How. 189, 18 L. ed. 927; *Oreus v. Threadgill*, 85 Ala. 384; *Campbell v. Dearborn*, 109 Mass. 180.

Parol evidence is admissible to show the fraudulent use of a deed, or that a party receiving an absolute deed upon a promise that he would dispose of the property conveyed by it in a particular manner, refused to perform his promise.

Kennedy v. Kennedy, 2 Ala. 571.

If between parties to a conveyance, absolute in terms, there was an agreement that the grantees would hold the property conveyed in trust for the grantor during his life, the subsequent repudiation of that promise would be a fraud, against which relief would be granted in equity.

Lott v. Kaiser, 61 Tex. 665; *Reeves v. Bass*, 39 Tex. 681; *Thomson v. White*, 1 U. S. 1 Dall. 424, 1 L. ed. 206, 1 Am. Dec. 252; *Wolford v. Herrington*, 74 Pa. 311; *Shields v. McAuley*, 37 Fed. Rep. 302; *Eldredge v. Jenkins*, 8 Story, 182; *Gilpatrick v. Glidden*, 2 L. R. A. 662, 81 Me. 187; *Laing v. McKee*, 13 Mich. 124; *Dowd v. Tucker*, 41 Conn. 197; *Peck v. Baldwin*, 1 Root, 455; *Arnold v. Cord*, 16 Ind. 177; *Cameron v. Ward*, 8 Ga. 245; *Newell v. Newell*, 14 Kan. 202; *Murray v. Dake*, 46 Cal. 644; *Taylor v. Gilman*, 25 Vt. 412; *Stone v. Wood*, 85 Ill. 603.

The confidential relations between the parties to this case entitle complainant to relief.

Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189; *Wood v. Rabe*, 96 N. Y. 426, 48 Am. Rep. 640; *Young v. Peachy*, 2 Atk. 254; *Schouler*, Dom. Rel. 3d ed. § 194; *Case v. Colter*, 66 Ind. 326; *Stone v. Wood*, 85 Ill. 603; *Tucker's App.* 75 Pa. 354; *Schouler*, Husb. and Wife, §§ 889, 403; *Perry*, Tr. 8d ed. § 204; 2 Pom. Eq. Jur. § 1055.

§ 956; *Story*, Eq. Jur. § 808; *Billage v. Southey*, 9 Hare, 584; *Smith v. Kay*, 7 H. L. Cas. 750; *Corley v. Stafford*, 1 DeG. & J. 238; *Turner v. Turner*, 44 Mo. 535; *Coulson v. Allison*, 2 De G. F. & J. 521; *Bivins v. Jarnigan*, 3 Baxt. 282; *Lambert v. Lambert*, 2 Bro. P. C. 18; *Price v. Price*, 1 De G. M. & G. 308; *Page v. Horne*, 11 Beav. 227; *Garvey v. M'Minn*, 9 Ir. Eq. 526; *Boney v. Hollingsworth*, 23 Ala. 690; *Thompson v. Lee*, 31 Ala. 292; *Leater v. Mahan*, 25 Ala. 445.

Messrs. Knox & Bowie, for appellee:

When it is proposed to overturn an absolute conveyance of real property by setting up an independent parol agreement, the terms of the agreement must be clearly stated and fully established.

Kelly v. Karsner, 72 Ala. 106; *Harris v. Barnett*, 8 Gratt. 339; *Davis v. Wetherell*, 11 Allen, 19, *note*; *Freeman v. Kelly*, 1 Hoffm. Ch. 92, 6 N. Y. Ch. L. ed. 1076.

The strength of the parol evidence required is of the highest degree, and great caution is used that the proof shall be clear and positive. 2 Reed, Stat. Fr. § 838.

A trust in lands, not arising by implication or construction of law, cannot be created by parol; a writing signed by the party creating or declaring the trust is indispensable to its existence. Fraud, imposition, mistake in the original transaction may constitute the purchaser, or donee, a trustee *ex maleficio*. It is fraud then, and not subsequent fraud, if any exist, which justifies a court of equity in intervening for the relief of the party injured by it.

Pattin v. Beecher, 62 Ala. 579.

In every case where an absolute conveyance made in consideration of a parol promise to hold in trust for the grantor or such persons or uses as he may designate, has been held to create an enforceable trust, it may be said that the promise induced the execution of the deed, and without the making of the promise the deed would never have been made.

Mobile Sav. Bank v. McDonnell, 87 Ala. 736.

The principle asserted in *Pattin v. Beecher*, *supra*, is reaffirmed in *Ross v. Gibson*, 71 Ala. 35; *Whaley v. Whaley*, 71 Ala. 159; *Kelly v. Karsner*, 72 Ala. 106. See also *Stringfellow v. Ist*, 73 Ala. 209; *Bibb v. Hunter*, 79 Ala. 351; *Williams v. Higgins*, 69 Ala. 517; *White v. Farley*, 81 Ala. 567; *Manning v. Phippen*, 86 Ala. 357.

The construction of our present Statute adopted by our court is in entire accord with the decided weight of authority, and leading text-writers in this country.

Morrall v. Waterson, 7 Kan. 199; *Rasdaal v. Rasdaal*, 9 Wis. 379; *Marshman v. Conklin*, 21 N. J. Eq. 546. See also *Perry v. McHenry*, 18 Ill. 227; *Walter v. Klock*, 55 Ill. 863; *Robertson v. Robertson*, 9 Watts, 32; *Porter v. Mayfield*, 21 Pa. 263; *Perkins v. Cheairs*, 2 Baxt. 198; *Sprinkle v. Hayworth*, 15 Am. L. Reg. 86; *Harper v. Harper*, 5 Bush, 176; 2 Reed, Stat. Fr. §§ 822, 823; 2 Pom. Eq. Jur. § 1007, *note* 1.

Somerville, J., delivered the opinion of the court:

The bill is one filed by the appellant, Brock, against his wife, seeking to establish in his behalf a trust in certain lands in the City of Aniston, which had been conveyed to her by

him, and afterwards sold, the proceeds being retained by the wife. The husband had conveyed the lands to the respondent in September, 1880, after a separation between them, brought about by his own intemperate habits, and his unkind treatment of her. The deed was in fee simple, free on its face from any words of condition or of trust. The land was probably worth about \$2,000 when the deed was made. It was sold some seven years afterwards for \$56,000. It is *first* insisted that the correspondence between the parties by letter establishes an express trust, the recognition of which will be enforced by a court of equity; and, *secondly*, that, failing in the first contention, still the parol evidence establishes such fraud on the part of the grantee in obtaining the legal title as to constitute her a trustee *ex maleficio*. The original bill alleged that the deed was accepted by Mrs. Brock upon the verbal condition or promise that, if the complainant, who proposed going abroad, "returned home a sober man, free from his habits of dissipation," his said wife would "return to him, and live with him as his wife," and the deed in such event was to become "null and void, and of no effect;" otherwise the property was to be the wife's absolutely. A demurrer being sustained to the original bill, which, as we shall see, was manifestly without equity, it was amended by charging that "the promises made by his said wife, which led to the execution and delivery of said deed, conveying said land to her, were false and fraudulent at the time they were made, and were made by her with the intention of never complying with them at the time they were made." The answer of respondent explicitly denies the alleged promises, and all the averred facts from which any trust, express or constructive, could be inferred. The Statute of Frauds is also specially pleaded.

We propose, for the sake of brevity, and we trust without any sacrifice of clearness, to consider the two contentions of the appellant measurably together. It is so clear to our mind that the letters of the parties fail to contain anything from which an express trust can be inferred, that we do not deem it necessary to dwell at any length on this feature of the case. The letter of September 8, 1880, written by Brock to his wife, delivered by one Sloan, and which accompanied the delivery to her of the deed, contains no allusion to the alleged promise or condition, but affirms, in effect, an unconditional delivery. "I send you," he writes, "the deed to the Woodstock place. You keep it yourself." There is nothing in the subsequent letters which furnishes any written evidence of such a trust. It is not declared, as we have said in the deed itself. It does not appear in the letter accompanying the deed. No subsequent letter of the wife furnishes evidence of it. No subsequent letter of the husband, the alleged *cestui quo trust*, would be competent to prove it. An interested party cannot be permitted by his own subsequent declarations, in writing or otherwise, to incorporate an express trust in an absolute conveyance previously executed by him. 2 Pom. Eq. Jur. § 1007.

No such letters, moreover, are produced, nor are their contents satisfactorily proved,

even by secondary evidence. The correspondence can, however, be considered in connection with the oral evidence, relied on to show the alleged fraudulent contrivance on the wife's part to secure the legal title to the property. It is clear to us that, under the testimony in this case, the chancellor's ruling in dismissing the bill is justified by the principles declared by this court in *Patton v. Beecher*, 62 Ala. 579. If the conclusions reached in that case be correct, that, in our judgment, is an end of every plausible contention urged by the appellant in this case. Section 1845 of the present Code declares: "No trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereunto in writing." This section corresponds with the 7th and 8th sections of the English Statute of Frauds, and is identical with § 2190, Ala. Code 1876, which was construed in the case of *Patton v. Beecher*, *supra*. The clearly-announced doctrine of that case is that the mere parol promise by the grantee in a deed that he will hold for the use of and reconvey to the grantor on request or on a specified contingency, is a trust which is required by the Statute to be created or declared in writing; and that, if it is not so created or declared, in the absence of some clear evidence of fraud, imposition or mistake at the time of the execution of the conveyance, the grantee's subsequent repudiation of the alleged parol promise is not a fraud against which a court of equity can relieve. The contrary doctrine, which seems to have been broadly announced in *Barrell v. Harriett*, 42 Ala. 60, was repudiated. We can add nothing to the exhaustive argument embodied in the opinion of Chief Justice Brickell in that case. The summary of it is contained in the following extract: "The plain meaning of the Statute is that a trust in lands, not arising by implication or construction of law, cannot be created by parol; that a writing signed by the party creating or declaring the trust is indispensable to its existence. Fraud, imposition or mistake in the original transaction may constitute the purchaser or donee a trustee *ex maleficio*. It is a fraud then, and not subsequent fraud, if any exist, which justifies a court of equity in intervening for the relief of the party injured by it, as it is the payment of the purchase money at the time the title is acquired which creates a resulting trust, and not a subsequent payment, whatever may be the circumstances attending it. *Barrett v. Dougherty*, 32 Pa. 871.

"When the original transaction is free from the taint of fraud or imposition, when the written contract expresses all the parties intended that it should, when the parol agreement which is sought to be enforced is intentionally excluded from it, it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a basis for a similar imputation whenever any promise or contract is broken. *Wilson v. Watts*, 9 Md. 356-436."

"It is an annihilation of the Statute," forced

bly continues the chief justice, "to withdraw a case from its operation because of such violation or repudiation of an agreement or trust it declares shall not be made or proved by parol. There can be no fraud if the trust does not exist, and proof of its existence by parol is that which the Statute forbids. In any and every case in which the court is called to enforce a trust there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud which justifies interference in opposition to the words and spirit of the Statute, the sphere of operation of the Statute is practically limited to breaches from accident, and no reason can be assigned for the limitation." *Patton v. Beecher*, 62 Ala. 579.

The soundness of this reasoning seems to us unanswerable. The question involved has many times been argued before us, and the authority of this decision has frequently been challenged at the bar; but we have, without doubting the correctness of the principles stated, adhered to and reaffirmed the construction of the Statute thus adopted in many subsequent deliverances more or less analogous. *White v. Farley*, 81 Ala. 563; *Kelly v. Kerner*, 72 Ala. 106; *Rose v. Gibson*, 71 Ala. 85; *Whaley v. Whaley*, Id. 159; *Manning v. Phippen*, 86 Ala. 357.

The basis of this decision is the settled principle that a trust will never be raised by the breach of a mere verbal promise to purchase lands and convey them on request. Or, as stated by a learned author: "The fraud which suffices to lay a foundation for such a trust is not simply that fraud which is involved in every deliberate breach of contract." "The true rule," he adds, "seems to be that there must have been an original misrepresentation by means of which the legal title was obtained, and an original intention to circumvent, and get a better bargain, by the confidence reposed." Browne, Stat. Fr. 8d ed. § 94.

"But in no case will the grantee be deemed a trustee if he used no fraud or deceit in getting his title, although he verbally promised to hold the land for the grantor." Section 95.

A like rule was long ago declared in *Montacute v. Maxwell*, 1 P. Wms. 618, where Lord Chancellor Parker said, in reference to the English Statute of Frauds: "In cases of fraud, equity would relieve even against the words of the Statute; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the Statute making those promises void, equity will not interfere." As said by Mr. Browne, in reference to this case, if there be not some distinction such as this "there is an end of the Statute of Frauds, so far as courts of equity are concerned."

The doctrine of *Patton v. Beecher*, *supra*, is fully approved and sustained by Mr. Pomeroy in his work on Equity Jurisprudence, §§ 1055, 1056: "In order," he observes, "that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal; otherwise the Statute of Frauds would be virtually abrogated. There must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not

pretend to enforce verbal promises in the face of the Statute. It endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." The true philosophy of this doctrine is thus succinctly stated by the same author in a note to the case of *Glass v. Hulbert*, 102 Mass. 24, criticised by him: "The principle is unalterably fixed in the foundation of the jurisprudence that equity will not suffer a statute passed for the purpose of preventing fraud to be used as an instrument for accomplishing fraud. The Statute will be uplifted when necessary to prevent such a result." 2 Pom. Eq. Jur. § 867, p. 841, note. Or, as said by Lord Westbury, in *McCormick v. Grogan*, L. R. 4 H. L. 82: "The court does not set aside the Act of Parliament, but it fastens upon the individual who gets the title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud."

In the case of *Manning v. Phippen*, 86 Ala. 357, *supra*, the principle declared in *Patton v. Beecher* was applied to the case of a grantee in a deed procuring his title by a fraudulent promise to execute a will. It was said: "If there was a fraudulent intent in obtaining the deed, without intention to make the will, and, pursuant to it, the will was not made, then the question of the Statute of Frauds becomes immaterial." In such case, it was said, the court would hold the grantee to be a trustee *ex maleficio*.

The main point which we wish to emphasize is that the mere breach of an oral agreement, standing alone, though often a moral wrong, is not sufficient to establish that fraud in procuring the title which is requisite to render the grantee or devisee a trustee *ex maleficio*, although the fact of such breach may, of course, be looked to, in connection with the other circumstances of the case, as sometimes constituting one of several links in a chain of facts going to prove fraud. If this were not so, the Statute of Frauds would practically be repealed, because no case can arise in the courts under it except where such a breach is charged other than cases of fraud, either positive or constructive. And hence "it seems to be requisite," as said in the often-quoted words of Chief Justice Gibson in *Hoge v. Hoge*, 1 Watts, 168, "that there should appear to have been an agency, active or passive, on the part of the devisee [or grantee] in procuring the devise [or deed]". The same view, in effect, is taken in *Williams v. Freeland*, 83 N. J. Eq. 784. "Parol evidence," it is there said, "is not admissible to vary a will. The ground upon which such trust is set up is simply that of fraud practiced by the party on whom the trust is sought to be fastened, and nothing short of this can ever be held sufficient. For the prevention of fraud the trust is ingrafted on the gift by admitting parol testimony, in order to prevent the donee from appropriating property to a purpose different from that for which he undertook to hold it." The great point of difficulty in the adjudged cases bearing on this subject seems to me to arise from the differences of opinion as to what facts additional to a mere breach of promise by a grantee or devisee are requisite in

order to establish such fraud as will constitute the promisee a trustee *ex maleficio*. But we need pursue this discussion no further. We are satisfied with the rule announced in *Patton v. Beecher*, 62 Ala. 579, although there are many authorities which ably maintain the opposite view. The following may be consulted with profit, some of which support, and others of which are opposed to, the foregoing view: 2 Pom. Eq. Jur. §§ 1055, 1056; *Chambless v. Smith*, 30 Ala. 366; 8 Am. & Eng. Encyclop. Law, 737, 788; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418 (in connection with 2 Pom. Eq. Jur. § 867, note); *Morrall v. Waterson*, 7 Kan. 199; *Rosdall v. Rosdall*, 9 Wis. 379; *Box v. Stanford*, 13 Smedes & M. 93, 51 Am. Dec. 142, note, 145, 146; *Marshman v. Conklin*, 21 N. J. Eq. 546; 2 Reed, Stat. Fr. §§ 822, 823; 2 Story, Eq. Jur. § 781; *Levy v. Brush*, 45 N. Y. 589; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Ross v. Hayden*, 35 Kan. 106; *Ryan v. Doz*, 34 N. Y. 807, 90 Am. Dec. 696; *Johnson v. Hubbard*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Brisson v. Brisson*, 75 Cal. 525, and the many other cases cited in the excellent briefs of counsel.

In applying the above-declared principles to the facts of this case, we need scarcely add that it must be done in full recognition of the rule of equity governing the character of proof required in cases of this nature. No parol trust will be ingrafted on a legal title, which the instrument of conveyance makes absolute on its face, unless with the greatest caution, and where the fraud necessary to create the trust is established by clear and convincing proof. The salient facts are: The deed in question was made to the wife without any suggestion or procurement whatever on her part, and during the period of separation, when there was to some extent a suspension of that mutual confidence incident to the marital relation. The idea of the conveyance originated with the husband, unsolicited by the grantee, it matters not whether in a motive to rescue the property, then worth only about \$2,000, from the hazard of financial wreck nearly always incident to drunken habits, or to make some slight reparation for the wrongs against marital loyalty, or to enable a struggling wife to put bread in the mouths of her four children, to whom the grantor owed the high duty of maintenance and education. More than this, the wife at first refused to accept the deed, and persisted in declining to do so, until she finally yielded to the persuasion of her father and the further solicitations of the husband. It is an important fact that even according to the averments of the bill the deed created in the wife an interest which was to be absolute until the alleged verbal condition was fulfilled. The property was to be hers in fee-simple, unless the grantor (1) reformed his intemperate habits, and (2) returned to live with her, so as to resume his marital relations. These alleged conditions were conditions subsequent, and were verbal. The evidence shows that on a former occasion,

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after a like separation, originating in like unfortunate causes, Mrs. Brock had been forced by cruel treatment to leave her husband's home, but had returned at his solicitations, and on the faith of his assurances of repentance and promises to reform. This experiment at reconciliation proved a failure through his fault. He again fell a victim to his tyrannical habits of intemperance. He again abused and maltreated her, and she was forced to seek refuge for protection in her father's household. These facts are pertinent to the question of her good faith (1) in yielding to the husband's solicitations to accept the deed, and (2) in refusing to again make the experiment of resuming with him the closest of possible relations to which human affection or confidence can give origin. The evidence possibly does not furnish such clear and convincing proof of the alleged oral promises we could desire, even were the question of its existence regarded as material to the decision of this case; but, conceding that it was implied from the facts, there is no satisfactory proof that at the time the deed was accepted the wife entertained any fraudulent purpose not to carry it out. We have not failed to scrutinize the evidence adverted to by appellant's counsel as tending to prove this contention, but it falls far short of convincing us, when viewed in connection with the other pregnant facts of the case bearing on this issue. If there was such a verbal promise, the subsequent failure to observe it was a mere breach of contract, the proof of which would be excluded by the very terms of the Statute. The effort is nothing more than an attempt to qualify an absolute title in fee simple by oral evidence of an alleged extrinsic agreement by the grantee to reconvey on a condition subsequent not included in the writing. This is not permissible. It has often been said that courts of equity will not sit to take jurisdiction of mere questions of morality involved in breaches of contract untainted with fraud, imposition or mistake. When sitting as courts of conscience they do so to enforce the virtue of honesty in accordance with the settled principles of a system of jurisprudence, not according to vague ideas of what may be considered morally as opposed to what is legally right or wrong.

We entertain no doubt of the proposition that the answer sufficiently presents the issue upon which the decision of this case is made to turn. Section 1845 of the Code, above construed, is commonly understood to be a part of our Statute of Frauds, though not so technically arranged in our Code under this statutory nomenclature, corresponding as it does with the analogous sections 7 and 8 of the English Statute of 29 Charles II. That, however, is not material. The facts are pleaded which bring the present case within the influence of this section, and that is all that is necessary.

The rulings of the chancellor are all in accordance with the views above presented, and his decrees must be affirmed.

TEXAS SUPREME COURT.

BEXAR BUILDING & LOAN ASSOCIATION, Appt.,
v.

ROBINSON.

(....Tex....)

Payments of interest in excess of the highest legal rate may be recovered back although they were voluntarily made, and although the contract has been fully executed, and there is no statute authorizing such recovery.

(June 17, 1890.)

A PPEAL by defendant from a judgment of the District Court for Bexar County in favor of plaintiff in an action brought to recover back interest alleged to have been paid upon a usurious contract. *Reversed.*

Statement by Hobby, J.:

The appellee instituted this suit on the 15th day of August, 1887, against the appellant, to

recover back from it the sum of \$1,440 paid by her as interest on a contract alleged to be usurious, and also the further sum of \$276 as interest on that sum. The petition states that she, joined by her husband, now dead, did on the 23d day of March, 1883, enter into a contract with the appellant, in form and under the device of a builder's contract, which contract was attached to, and made a part of, the petition. In this contract it is stipulated that the appellant shall erect a house for appellee for the sum of \$4,800, with interest at 10 per cent per annum on that sum, which amounts to \$40 per month; that this monthly sum was paid for each and every month from the said 23d day of March, 1883, up to and including the 5th day of April, 1886; that said contract was not a builder's contract, but was a fraudulent device for evading the Usury Laws, and that the same was one for the loan of money; and that, under said contract, she received as a loan from the appellant only the sum of \$3,292, upon which she paid interest at the rate of \$40

NOTE.—Usury.

To constitute usury, there must be: (1) a loan, express or implied; (2) an understanding between the parties that the money shall be returned; (3) that a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned. *Balfour v. Davis*, 14 Or. 47; *Lloyd v. Scott*, 29 U. S. 4 Pet. 205, 7 L. ed. 333.

To constitute usury there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. *Ruffner v. Hogg*, 66 U. S. 1 Black, 115, 17 L. ed. 38; *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414, 16 L. ed. 154.

There can be no usury in a transaction for the sale and repurchase of securities, where there is no loan. *Struthers v. Drexel*, 122 U. S. 457, 30 L. ed. 1216.

To constitute usury, there must either be a loan upon usurious interest, or the taking of more than legal interest for the forbearance of a debt. *Rice v. Hassenpflug*, 11 West. Rep. 233, 46 Ohio St. 377.

Where there is a negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending within the spirit and meaning of the Statute, and whatsoever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is to be made out of the necessities or improvidences of the borrower or otherwise, the contract is usurious. *Brakeley v. Tuttle*, 8 W. Va. 138; *Colton v. Dunham*, 3 Paige, 267, 2 N. Y. Ch. L. ed. 901.

There must be an intention knowingly to contract or to take usurious interest; for if neither party intend it, but act bona fide and innocently, the law will not infer a corrupt agreement. *Sherwood v. Roundtree*, 32 Fed. Rep. 113; *Condit v. Baldwin*, 21 N. Y. 219; *Nourse v. Prime*, 7 Johns. Ch. 87, 2 N. Y. Ch. L. ed. 230; *Miller v. Burroughs*, 4 Johns. Ch. 436, 1 N. Y. Ch. L. ed. 394; *Cutter v. Rathbun*, 3 Hill, 579.

A "corrupt intent" to charge usury is an intent to get more money than the law allows; and where the act is unlawful and the lender did it or is responsible for it, the corrupt intent is sufficiently shown. *New England Mortg. Secur. Co. v. Gay*, 38 Fed. Rep. 686.

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Usury vel non is ordinarily a question of intent, to be determined by the stipulations of the contract, the attendant circumstances and the acts of the parties, contemporaneous and subsequent; but when the contract is usurious on its face, or when it appears that a greater rate of interest than the statute allows was knowingly taken, though taken through ignorance or mistake of law, the unlawful intent is presumed, and the form of the contract is immaterial. *Van Bell v. Fordney*, 79 Ala. 76.

Money paid above the legal rate for forbearance of an existing debt is usury. *Hathaway v. Hagan*, 4 New Eng. Rep. 123, 59 Vt. 75.

A bonus above legal interest retained by the lender from the amount secured by mortgage, or taken with his assent by another, taints the contract with usury. *Pfenning v. Scholer*, 9 Cent. Rep. 196, 43 N. J. Eq. 15.

What not usury.

The taking of interest in advance upon the discount of a note, in the usual course of business, by a banker, is not usury. *Thornton v. Bank of Washington*, 26 U. S. 3 Pet. 36, 7 L. ed. 594; *Fleckner v. Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

Where there is a loan, although the profit to the lender exceeds the legal rate, yet if that profit is contingent or uncertain, the contract, if bona fide and without any design to evade the statute, is not usurious. *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414, 16 L. ed. 154; *Conard v. Atlantic Ins. Co.* of N. Y. 26 U. S. 1 Pet. 386, 7 L. ed. 180; *Conard v. Nicoll*, 29 U. S. 4 Pet. 291, 7 L. ed. 862; *Fellows v. American L. Ins. & T. Co.* 1 Sandf. Ch. 206, 7 N. Y. Ch. L. ed. 297, 2 N. Y. Leg. Obs. 423; *Colton v. Dunham*, 3 Paige, 267, 2 N. Y. Ch. L. ed. 901; *Hall v. Haggart*, 17 Wend. 230.

There can be no usury in a transaction for the sale and repurchase of securities, where there is no loan. *Struthers v. Drexel*, 122 U. S. 457, 30 L. ed. 1216.

It is not usury where there is a consideration entirely separate and distinct from the forbearance. *Mooser v. Chapin*, 12 Wis. 511.

A loan wherein the lender has exacted only the lawful interest is not usurious, because his agent, without his knowledge or consent, has received of the borrower for his own benefit an additional sum which, with the interest contracted for, exceeds

per month, or at the rate of about 14½ per cent per annum. The petition further alleges that the appellee, prior to the institution of the suit, and before the maturity of the contract, paid in addition to said sum of \$1,440 as interest, the said sum of \$3,292. The appellant filed a general demurrer to the petition, and excepted to it specially that the petition and the exhibit showed the contract to be a building contract, and showed a final settlement between the parties, and that it contained no allegations of fraud, deceit or mistake to authorize the court to reopen said settlement. The demurrer and exceptions were overruled by the court. The appellant filed an answer admitting the execution of the contract attached to the petition, and alleging that the same was what it on its face purported to be, a contract for the building of a house for the sum of \$4,800, and that it was such a contract as, under its charter and by-laws, it was permitted to make; that it fully complied with said contract, and that appellee accepted the building erected under said contract; that the appellee was a stockholder in the appellant Association, and as such she had the right, on a final settlement, to have applied to said indebtedness of \$4,800 the value

of her shares of stock in the appellant Association; that on the 5th day of April, 1886, and long before the maturity of the indebtedness under the contract, the appellee made a full and final settlement with the appellant of all demands arising out of said contract; and that in said final settlement she was credited with the value of her shares of stock, including the profits which her said shares of stock had earned; and appellant therefore pleaded an accord and satisfaction; also the Statute of Limitations of two years to the recovery of \$1,440 paid as interest. A trial by the court without a jury resulted in a judgment rendered for the appellee for \$1,102.95, with interest from September 16, 1897.

Messrs. Mason & Summerlin and P. H. Ward for appellant.

Messrs. Tarleton & Keller for appellee.

Hobby, J., filed the following opinion:

The controlling question in the case raised by the assignments of error is whether interest voluntarily paid upon an alleged usurious contract can be recovered after the contract has been executed, in the absence of a statute au-

the amount permitted by law to be demanded for the use of the money. *Williams v. Bryan*, 68 Tex. 508.

So commissions paid by the mortgagor to a third party do not make the loan usurious. *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 105, 30 L. ed. 906.

The fact that an agent for borrowers of money was promised by the borrowers a sum for his services in indorsing the original note for the borrowed money will not taint the transaction with usury. *Davis v. Sloman* (Neb.) Nov. 20, 1889.

Recovery back of excess paid as interest.

If the borrower pays up the amount of his usurious debt, and afterwards sues to recover it back in an action for money had and received, he can only recover the usurious excess, since *ex aequo et bono* he ought not to recover back the money really advanced and the legal interest thereon. *Zeigler v. Scott*, 10 Ga. 389; *Dey v. Dunham*, 2 Johns. Ch. 191, 1 N. Y. Ch. L. ed. 344; *Palmer v. Lord*, 6 Johns. Ch. 95, 2 N. Y. Ch. L. ed. 66; *Clarkson v. Garland*, 1 Leigh, 147; *Fitzroy v. Gwillam*, 1 T. R. 153; *Jones v. Barkley*, 2 Doug. 697.

Equitable relief, when granted.

Equitable relief will be granted against usurious contracts, whether executed or executory (1 Pom. Eq. Jur. 462), and though equity will not assist a party in carrying into effect his own intentional violation of the law. *Kuhner v. Butler*, 11 Iowa, 419; *Hart v. Goldsmith*, 1 Allen, 146; *Smith v. Robinson*, 10 Allen, 180; *Union Bank v. Bell*, 14 Ohio St. 300; *Sporrer v. Eifler*, 1 Heisk. 633; *Fanning v. Dunham*, 5 Johns. Ch. 122, 1 N. Y. Ch. L. ed. 1030; *Mason v. Gardiner*, 4 Bro. Ch. 459; *Spain v. Brent*, 68 U. S. 1 Wall. 604, 17 L. ed. 619.

Yet, from considerations of public policy, the parties to a usurious contract are not regarded as standing *in pari delicto*. 1 Pom. Eq. Jur. 462.

Relief in equity will be granted only upon condition that the plaintiff himself does equity by repaying to his creditor what is justly and in good faith due,—that is, the amount actually advanced, with lawful interest. *Rogers v. Torburt*, 58 Ala. 525; *Riets v. Foeste*, 30 Wis. 695; *Cole v. Savage*, 10 Paige, 557, 4 N. Y. Ch. L. ed. 1101; *Wilhelmsen v. Bentley* (Neb.) Oct. 18, 1889.

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A party seeking relief in equity from a usurious contract must propose to do equity by offering to pay what is justly due. *Wilhelmsen v. Bentley*, *supra*; *Fanning v. Dunham*, 5 Johns. Ch. 414, 1 N. Y. Ch. L. ed. 1037; *Rogers v. Rathbun*, 1 Johns. Ch. 367, 1 N. Y. Ch. L. ed. 174; *Eagleson v. Sholwell*, 1 Johns. Ch. 593, 1 N. Y. Ch. L. ed. 237; *Post v. Bank of Utica*, 7 Hill, 399; *Fulton Bank v. Beach*, 1 Paige, 433, 2 N. Y. Ch. L. ed. 706; *Livingston v. Harris*, 3 Paige, 533, 3 N. Y. Ch. L. ed. 264; *Williams v. Fitzhugh*, 37 N. Y. 453; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508.

In cases of usury, courts of equity will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent, with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. *Tiffany v. Boatman's Sav. Inst.* 85 U. S. 13 Wall. 375, 21 L. ed. 363; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Stanley v. Gadsby*, 35 U. S. 10 Pet. 531, 9 L. ed. 518.

Under a Usury Law which does not avoid the securities, but only forbids the taking a greater interest than six per cent per annum, a court of equity will not refuse its aid to recover the principal. *De Wolf v. Johnson*, 23 U. S. 10 Wheat. 367, 6 L. ed. 343.

But equity will not aid in the recovery of usurious interest. *Nelson v. Betts*, 3 West. Rep. 408, 21 Mo. App. 219.

As a general rule, a party cannot come into a court of equity for that species of relief against a usurious obligation, if he has a perfect remedy at law. And if there are any circumstances in the case by reason of which it is difficult or impossible for him to obtain complete and perfect relief against the usurious contract, or instrument, at law, he must state them in his complaint in which such relief is sought. *Williams v. Ayrault* 21 Barb. 369; *Folsom v. Blake*, 8 Edw. Ch. 443, 6 N. Y. Ch. L. ed. 719.

There is no relief for one who has voluntarily fulfilled a usurious contract. *Dykes v. Wyman*, 11 West. Rep. 216, 67 Mich. 236.

But if he has been compelled by threats to pay usury, he can recover. *Ibid*.

thorizing such recovery. The contract in this case, upon its face, is a building contract, providing by its terms for the erection of a building described, for appellee, in consideration of the sum of \$4,800, to be paid by appellee at the maturity of certain stock owned by appellee in the Building Association.

There are, no doubt, cases which deny the party paying usurious interest the right to maintain an action or suit for its recovery, upon the principle that the parties are equally in the wrong, and that the injury, if any, is the result of a voluntary act. Under the Statute of Missouri regulating this subject, it was held that no provision was made by which the borrower could recover back money paid voluntarily as usurious interest. The opinion in the case is largely influenced by the peculiar Statute of that State. It appears that where the answer in that State raises the issue as to usury, and the judgment finds it to be established, the interest is forfeited to the school fund; and to hold that a party can institute a suit to recover back such interest when voluntarily paid would have the effect to discourage such defense, as the recovery would, where he brings suit, inure to his benefit, but it would not where it is pleaded as a defense. *Ransom v. Hays*, 89 Mo. 449.

In Iowa also the policy of the Statute (which "regards the parties to such a contract *in pari delicto*, holds them alike obnoxious to its animadversions, and makes the school fund the recipient of the forfeitures") would be defeated by allowing the borrower to recover usurious interest voluntarily paid. *Nicholls v. Skeel*, 13 Iowa, 302.

In Georgia it has been held, in substance, that upon the settlement of a transaction which embraces an item or feature of usurious interest, and the attention of the party paying such interest is distinctly called to it, and it is then knowingly included in the final adjustment, a recovery cannot be subsequently had for such usurious interest. *Parker v. Fulton L. & B. Assn.* 46 Ga. 166.

The inference deducible from this case is that if the party's attention be not distinctly directed to the obnoxious feature of the transaction a recovery could be had. Under the Statute of Maryland, a recovery is not allowed where no compulsion is used, and an excess of lawful interest is paid with full knowledge. *Awall v. Eutaw Bldg. Assn.* 34 Md. 435.

We believe it will be found that in the States mentioned the above rule obtains generally by reason of some peculiar policy or language of the Statute, neither of which exists in this State. An eminent writer says, on the other hand, that "equitable relief is granted against usurious contracts, whether executory or executed, since, from considerations of public policy, the two parties are not regarded as standing *in pari delicto*." 2 Pom. Eq. Jur. § 987. At an early date Lord Mansfield denied that the parties were equally wrong. *End. Bldg. Associations*, § 359.

"Equity," says the author first mentioned, "will never assist a party to carry into effect his own intentional violation of the law. It is well settled that courts of equity will go further, and give all the affirmative relief which is just to the borrower. . . . If the contract is 9 L. R. A.

executed, he may recover back the usurious amount paid in excess of the sum actually borrowed, and legal interest thereon." 2 Pom. Eq. Jur. § 987.

Such contracts being declared void by the Statute against usury, equity will follow the law in the construction of the Statute. . . . If the borrower seeks relief against the usurious contract, the terms upon which the court will interfere are that the plaintiff will pay the defendant what is really due, etc., deducting the usurious interest." 1 Story, Eq. Jur. §§ 801, 802.

"Nor is the payment of the usurious interest such a voluntary payment as entitles the receiver to retain it." *End. Bldg. Associations*, § 359.

Our Statute declares that "all written contracts whatsoever which may in any way, directly or indirectly, violate the article prohibiting a stipulation for interest at a rate greater than 12 per cent per annum, shall be void and of no effect for the whole rate of interest only," etc. *Rev. Stat.* art. 2979.

There is nothing in our Statute which indicates a purpose to destroy the common-law or equitable right to recover, by affirmative action, such interest. Article 2981 provides that "no evidence of usurious interest shall be received on the trial of any case unless the same shall be specially pleaded and verified by affidavit of the party wishing to avail himself of such defense." It is claimed that this does not authorize an independent action for the recovery of usurious interest. We do not think that it was the intention of this article to preclude a party from asserting his right to recover in the capacity of plaintiff. The article last referred to applies to those who "wish to avail themselves of this defense," not to one seeking affirmatively relief at law or in equity. Under our laws regulating limitation it is provided that "the laws of limitation shall not be made available to any person in any suit, in any of the courts of this State, unless it be specially set forth as a defense in the answer." Article 3220, *Rev. Stat.*

This is certainly as restrictive as article 2981, *supra*. But this we apprehend would not preclude a party from establishing affirmatively his right by limitation in the capacity of plaintiff. *Winburn v. Cochran*, 9 Tex. 125; *Moody v. Holcomb*, 26 Tex. 719.

We think a suit like the present may be maintained. "The essential elements of a usurious contract consist of a loan with the understanding that the money loaned is to be returned, and that a greater rate of interest is paid than the Statute allows. Whether this be done directly or indirectly, or whatever may be the form or phase the contract assumes, is altogether immaterial." *End. Bldg. Associations*, § 358.

The evidence in the case shows that the amount of interest agreed to be paid by Mrs. Robinson, under the contract with appellant, was usurious, as it exceeded the highest rate recognized by our law, to wit, 12 per cent. But in contracting to pay this rate she necessarily contracted to pay 12 per cent. Hence we think the appellant would be entitled to recover the amount of the loan made to her on March 3, 1883, together with 12 per cent interest per annum thereon, and that she is entitled to credit

for the amounts paid by her at the different times shown by the evidence, and that the rights of the parties may be adjusted under the well-recognized rules applicable to partial payments. We think the judgment should be reversed, and the cause remanded.

Stayton, Ch. J.:

Report of the commission of appeals examined, their opinion adopted, and the judgment reversed and the cause remanded.

O. T. LYON, *Appt.*,

v.

McDONALD.

(78 Tex. 7.)

1. A statutory condemnation of lands for depot and station grounds does not pass the fee to the railway company.
2. A railroad company cannot permit a particular merchant to use vacant portions of its depot grounds as a yard in which to store goods, received over the road, until sold, and as a general place of business, when such permission is not granted to the public generally, although by so doing its cars are more quickly unloaded and its business facilitated; and if the grounds are so used the owner of the fee may recover from the merchant the rental value thereof.
3. The measure of damages recoverable by the owner of the fee, when a railroad company permits land condemned for its use to be put to other uses, is the rental value of the property for such uses, where there is no injury to the realty.

4. A plaintiff in an action to recover real property, in whose favor a consent decree is entered, will, in favor of the decree, be presumed to have had the superior title, although the source of his title does not appear.
5. One who acquires an invalid title to the fee of lands which have been condemned for railroad purposes and afterwards applied to other uses, and who subsequently brings suit upon such title and recovers a judgment for the land against the holder of the legal title, can recover rent for such premises only from the time his suit was brought, and not from the time he first claimed title.
6. The owner of the fee in land used for depot grounds, who occupies an adjoining lot, has no right of passage over such grounds except at a public crossing.
7. The mere fact that a view is obstructed from one point to another does not of itself import an injury; and a petition in an action to recover damages for such obstruction which does not show what advantage or benefit there was in the view, or in what way damage resulted from its obstruction, does not state a cause of action.
8. Damages cannot be assessed in an action for injuries not set out in the complaint.

(June 24, 1890.)

A PPEAL by defendant from a judgment of the District Court for Hill County in favor of plaintiff in an action brought to recover compensation for the use of certain land which had been condemned for railroad purposes and subsequently devoted to other uses. *Reversed.*

The facts sufficiently appear in the commissioner's opinion.

NOTE.—Appropriation of land for depots for use of railroads.

A railroad company may be authorized to condemn land for all appurtenances necessary to the convenient and proper operation of its road, such as depots, etc. *New York Cent. & H. R. Co. v. Kip*, 46 N. Y. 544; *Ra New York Cent. & H. R. Co. v. N. Y.* 248; *Giesey v. Cincinnati, W. etc. R. Co.* 4 Ohio St. 308.

Lands necessary to furnish proper, convenient and safe approaches to a railroad track may be acquired by proceedings for condemnation. *New York Cent. & H. R. R. Co. v. Metropolitan Gas Light Co.* 5 Hun, 301, 68 N. Y. 326; *Cother v. Midland R. Co.* 2 Phill. 469.

A railroad company may acquire and hold land other than that occupied by its tracks. *Pfaff v. Terre Haute & I. R. Co.* 6 West. Rep. 415, 106 Ind. 144.

Whatever is essential to its construction, its maintenance and operation, may be taken by it. *Re New York & C. R. Co. v. Gunnison*, 1 Hun, 496.

A statute authorizing a railroad company to condemn property for its use will authorize the taking of necessary depot grounds. *New York Cent. & H. R. R. Co. v. Kip*, 46 N. Y. 544; *Hannibal & St. J. R. Co. v. Muder*, 49 Mo. 165.

A building at the junction of two railroads, for the accommodation of passengers, is to be regarded not only as a convenience but as a necessity. *Hamilton v. Annapolis & E. R. R. Co.* 1 Md. 553.

The Statute limiting the extent that may be taken for railroad depots and grounds does not limit the amount that may be taken from individuals. *Virginia & T. R. Co. v. Elliott*, 5 Nev. 353.

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Where, under the law as it was at the time, land could not be condemned for depot grounds, and yet it was actually wanted for that purpose, but it was condemned ostensibly for purposes contemplated by the Statute, an injunction would lie to prevent its appropriation and use. *Forbes v. Delashmunt*, 68 Iowa, 164.

Where a railroad company, without consent of the owner or color of title, enters upon and occupies land and builds thereon a depot and hotel, and afterwards seeks to appropriate the land under authority of law, the value of the land and improvements at the time of the legal appropriation constitutes the amount for which the company is liable. *Graham v. Connersville & N. C. J. R. Co.* 38 Ind. 463.

What estates may be taken.

It rests with the Legislature to declare what estate in lands shall be taken for public use. *Challias v. Atchison, T. & S. F. R. Co.* 16 Kan. 117; *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 384; *Edgerton v. Huff*, 26 Ind. 85; *Dingley v. Boston*, 100 Mass. 544; *Sweet v. Buffalo, N. Y. & P. R. Co.* 79 N. Y. 238; *Haleigh & G. R. Co. v. Davis*, 2 Dev. & B. L. 451; *De Varaigne v. Fox*, 2 Blatchf. 95.

Where an easement is sufficient, as for a highway or a railroad, no greater estate can be taken. *Prather v. Western U. Teleg. Co.* 89 Ind. 501; *Shawnee County Comrs. v. Beckwith*, 10 Kan. 608; *Henry v. Dubuque & P. R. Co.* 2 Iowa, 288; *Taylor v. Baltimore*, 45 Md. 576; *Clark v. Worcester*, 123 Mass. 226; *Washington Cemetery v. Prospect Park & C. I. R. Co.* 68 N. Y. 591; *Malone v. Toledo*, 84 Ohio St. 541; *Quimby v. Vermont Cent. R. Co.* 33 Vt. 367.

Messrs. Foster & Wilkinson for appellant.

Messrs. W. L. Booth and B. D. Tarlton for appellee.

Collard, J., filed the following opinion:

Appellant contends that where lands are condemned by right of eminent domain, under the Statute for depot and station grounds for railroad purposes, the fee is taken. We think the fee remains with the original owner. *Mills*, Em. Dom. §§ 58, 59, 208; 2 Wood, *Railway Law*, 770, 771, and *note 2*; *Lance's App.* 55 Pa. 24; *Pierce, Railroads*, 159, 160; *Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Brooklyn*, 68 N. Y. 1; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. 28.

Articles 4210, 4211 and 4212 of the Revised Statutes refer to lands acquired by purchase by railroad companies, and are not applicable to the question before us. We are not called on at this time to construe these articles. They authorize a railway company to sell lands voluntarily conveyed to it, when no longer required for use by the company. It does not follow from this that it could sell or own a fee in lands condemned for its uses; nor that it could sell the fee, when the fee was not conveyed to it. It is provided by Statute of this State, enacted February 7, 1861, and re-enacted in the Revised Statutes, art. 4206, that the right of way secured to a railroad in the manner provided by law, that is, by condemnation, shall not be so construed as to include the fee; but it cannot be argued from this that land condemned for depot grounds passes the absolute fee-simple estate. The Act allowing a railway company to take land from the owner for depots, machine shops or material thereon, for the purposes of its incorporation, was passed in 1876. It would not be reasonable to conclude that, because it was silent as to the fee, it was intended the fee should pass, merely because the Act of 1861, then in force, reserved the fee to the owner in case of condemnation of the right of way. The reason is on the other side. Rev. Stat. arts. 4179, 4206.

It becomes necessary to know what use the defendant by permission of the railway company put the vacant depot grounds to, in order to ascertain whether the owner's rights in the fee were interfered with or not. The agreement of the parties and the findings of the court furnish us the facts in this respect as follows:

"About the 15th of February, 1882, the defendant, O. T. Lyon, who was an extensive dealer in lumber and building materials, and shipper of same in large quantities over the said railroad, was permitted by said Missouri Pacific Railroad Company to use a portion of the premises so condemned for depot grounds, but not immediately needed, the same being south of the depot, and immediately adjoining its side track, for the purpose of unloading and storing lumber shipped to him over its railroad. The permission given was verbal, and for no particular time, and no rent or compensation was promised or to be paid, the permission given being for the accommodation of both parties, and no compensation being received or required by the said railroad company, except the increased convenience and facility af-

forded for the unloading of its cars of lumber, and the avoidance of delay in such unloading by reason thereof. Defendant has ever since continued to occupy on the same terms a portion of said grounds, about 300 feet north and south, and 70 feet east and west, of and adjoining the side track of said railroad, by unloading and piling lumber thereon from the cars of said railway company, and loading the same therefrom on the wagons of purchasers as sold, and adjoining the west line of said track has erected an office 16 by 16 feet, and a shed 220 feet long, for sheltering dressed lumber. The number of carloads of lumber received and unloaded there during the first ten months was 847, and during the twelve months following 261 cars, and defendant has been constantly receiving and selling lumber during the time he so occupied, and, by being permitted to unload and store lumber on these grounds, defendant has been enabled to receive and unload the cars of said railway company more rapidly than he could if compelled to haul the lumber to a yard in some other place, and thereby said railroad company has avoided much delay of its cars for unloading." The meaning of this is that the railway company permitted Lyon to use its grounds as a lumber-yard for his private business as a lumber dealer, the company being benefited thereby only in having its cars more conveniently unloaded of lumber hauled there for him. It was an exclusive license to him alone, and not to the public generally, that he should carry on his trade of lumber dealer on grounds condemned for depot purposes. The company would certainly have had the right to permit the public to so use the grounds in unloading its cars, and in receiving freight; but the permission here was to a particular person to so receive his freight bought and sold in his business, to store the same on the grounds, to erect sheds for the protection of his property, and to use the premises as a place of business. Such uses were inconsistent with the purposes for which the land was condemned, as much so as if it had been used as an ordinary warehouse or grocery store.

It has been held that a railway company might grant a license for the erection and use of buildings on its right of way for convenience in delivering and receiving freight. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 488 [23 L. ed. 361].

And it has been held that where "the premises were occupied as a station, furnishing food, lodging, horse-keeping and horse-hire, and allowing buildings upon it to be used for a boarding-house and a stable, and some of the land to be cultivated, all for the convenience of passengers and others, in order to increase the business of the road," such uses "were incident to its business as a passenger carrier, and consistent with its occupation for the purposes for which the land was taken, and with a claim to occupy for those purposes." *Pierce v. Boston & L. R. Corp.* 141 Mass. 481, 2 New Eng. Rep. 408.

The doctrine was applied in the foregoing case to show that such an occupation and use would not dispossess the owner of the fee, and entitle him to recover the premises because of improper use. These cases, however, do not

go the extent of holding that to use the premises taken for warehouses, shops, trades, etc., by private persons, it would not amount to such an abandonment by the corporation of the easement as would give the owner of the fee a right to damages for such use. If the doctrine could be stretched to this extent, there would be nothing to prevent a railroad corporation from having its right of way, and all its grounds not in use, occupied by warehousemen, store-keepers and all kinds of traders, they paying rent therefor, and plead as an excuse that it was more convenient to the company in receiving and delivering freight. The correct doctrine is laid down in *Lane's App.* 55 Pa. 25, where it is said "that the right of the Commonwealth to take private property without the owner's consent exists in her sovereign right of eminent domain, and can never be exercised but for a public purpose, supposed and intended to benefit the public, either mediately or immediately. The power arises out of that natural principle that private convenience must yield to public wants. The public interests lie at the basis of the exercise of the power, or it would be confiscation and usurpation to exercise it. This being the reason for the exercise of such power, it requires no argument to prove that, after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking. . . . Hence it is that no one can pretend that a railroad company may build private houses and mills, or erect machinery not necessarily connected with the use of their franchise, within the limits of their right of way." It was also held in the case that the "fee remained with the owner, and outside of the authorized use which must be public, or incidental to public use, the proprietary right is in the original owner."

The right of eminent domain does not extend beyond "the reasonable necessities of the corporation in the discharge of its duties to the public." *Re New York Cent. & H. R. R. Co.* 77 N. Y. 248.

A railway may take private property upon compliance with the Statute, paying the damages assessed for railroad purposes, or it may permit others to do so, but for no other purposes. It cannot take more land than is allowed by the law or its charter, or any except for the legitimate purposes of its franchise. *Cumberland Valley R. Co. v. McLanahan, supra.*

If it acquire the right of easement for public purposes and its own necessities, by proceedings of condemnation, and change the use to private purposes, such change will amount to "an abandonment," and the owner will have his remedy. It was decided in *Proprietors of Locks and Canals v. Nashua & L. R. Co.*, 104 Mass. 8, that a change of use to purposes of rent to persons engaged in business of their own "did not put an end to the right of use for the legitimate purposes of the franchise," and authorize a writ of epty by the owner, but that, in such form of action, the owner could establish his right to the fee, and recover mesne profits for the use of it. *Ibid.*

These questions were discussed in the case of *Odneal v. Sherman* (Tex.) 14 S. W. Rep. 81 (decided at the present term by the commission of 9 L. R. A.

appeals), and the following principles clearly announced: (1) that the fee continues in the owner after land is condemned for public uses; (2) "where land is condemned for a special purpose on the score of public utility, the sequestration of the land is limited to that particular use; and (3) if the property be put to a wholly different use, though for public purposes, a new assessment will be required.

In the case before us, it is impossible to say that the railroad could have used the premises in question as a wagon-yard under the right of easement, and it is equally certain that what it could not do itself it could not license another to do. Appellant contends that the court erred in finding that plaintiff was entitled to recover as damages the rental value of the premises as a lumber yard. We have already seen that mesne profits may be recovered in such cases. *Proprietors of Locks and Canals v. Nashua & L. R. Co.* 104 Mass. 8; *Odneal v. Sherman, supra*; *Sedgw. Dam.* 251.

The land was used as a lumber-yard, and the value of such use would be the correct inquiry on the subject of damages, there being no injury to the realty. Appellant also contends that "the court erred in finding that plaintiff was the owner of the fee during the time the premises had been used by defendant, and especially in finding that he was such owner prior to the 2d day of March, 1893 (the day plaintiff recovered judgment for the land against the heirs of Johns), and in awarding him damages for injury to his rights as owner of the fee during all that time." The petition alleged that plaintiff was the owner of the premises on the 16th of August, 1882, and laid the trespass on that day, which is alleged to have been continuous. It is admitted that Thomas Johns, who died in 1867, owned the land (eight acres, including the land in controversy), in 1866; that he had lived with a negro woman in the Town of Hillsboro, by whom he had two children, Watson and Dock Johns; that in October, 1867, eight acres of land, including that in controversy, was set aside by an order of the Probate Court of Hill County as a homestead to said Watson and Dock; and that on August 5 and 16, 1882, plaintiff acquired deeds from Watson and Dock Johns. The true white legal heirs of Johns took possession of the eight acres, including the land in controversy, about July, 1879, the same being then unoccupied. The land in controversy was condemned by legal proceedings for that purpose against the real heirs of Johns for depot grounds and right of way in Hillsboro on the 20th day of July, 1881, and on the 25th day of September, 1882, the plaintiff brought suit in the District Court of Hill County against the white heirs of Johns to recover the eight acres, and on the 2d day of March, 1883, a decree was rendered by consent in his favor for the land. The negro children could not have inherited the land, and the only right they obtained in the premises was the homestead right granted them by decree of the probate court. They had no fee-simple estate, and conveyed none to plaintiff, and by their sale to him the homestead right was extinguished. The record does not show what title he recovered on in the suit against the white heirs of Johns. He did, however, recover the land from them on the 2d of March,

1888, and in favor of this judgment it will be presumed that he had title superior to that of the heirs at the time his suit was brought, to wit, on the 22d of September, 1882. Their ancestor being the admitted owner, the judgment against them would constitute a link in plaintiff's title, and would invest in him the paramount title to the fee; but it would not in any way interfere with the easement previously acquired by the railroad. This suit is not intended to contest the right of the railway to the easement. We find plaintiff with title to the fee, then, on the 22d day of September, 1882, by virtue of his judgment, and not on the 16th day of August, 1882. He was only entitled to the rental value of the fee from the 22d of September, 1882, and not from the 16th day of August, 1882, as found by the court.

Appellant, in his last assignment of error, complains of the ruling of the court in failing to sustain his exceptions to plaintiff's petition as to damages to his lot adjoining the right of way, and in holding defendant liable for damages by reason of obstructing the view of plaintiff from the lot. The petition alleged that plaintiff had the right of free passage through the land occupied by defendant, and by such occupancy he was deprived of this privilege; and that the view from his lot was obstructed by the houses, sheds, etc., erected by defendant. The court sustained the exception to the petition setting up the right of plaintiff to free passage over the grounds; but held the petition good as to the averments of obstruction to the view from the lot. Plaintiff had no right of passage over the grounds of the railway company, and was not entitled to damages because he was deprived of such use. He was not prevented from passing at any public crossing. *Pierce, Railroads*, 159, 160.

The petition does not show what advantage or benefit there was in such a view, or in what way any damage could result by obstructing it. The mere fact that a view is obstructed from one place to another does not of itself import an injury. We think the exceptions to this part of the petition should have been sustained. The court's finding of damages on this branch of the case was not only on account of obstructing the view from this lot, but because of deprivation of use in crossing the railroad grounds, because the lot was valuable, or would be, for a cotton-yard; and the proximity of the lumber-yard increased the danger of fire to cotton that might be stored on the lot, and enhanced the rate of fire insurance. After sustaining the exceptions to the petition holding that plaintiff had no right to free passage over these grounds, there was nothing left in the petition, upon which the claim for damages rested, but the averment as to obstructing the view. Had this allegation been good, no damage could have been assessed for other injuries not alleged, and it was error to award such damages. Our conclusion is that the judgment of the lower court should be reversed, and the cause remanded.

Stayton, Ch. J.:

Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

9 L. R. A.

GAINESVILLE, HENRIETTA & WEST.
ERN R. CO., *Appl.*,

v.
HALL.

(....Tex....)

1. **Damages are recoverable for the diminution in the value of property** by reason of the noise, smoke and vibration incident to the operation of a railroad passing near it, although no part of it was taken for the construction of the road, which at that point was built entirely on lands taken from private citizens, under a constitutional provision that no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.

2. **The measure of damages to property** arising from the operation of a railroad near it cannot be shown by asking a witness what in his opinion is the depreciation in value of the property by reason of the operation of the road, excluding from consideration all damages sustained in common with the community at large; he must be required to state the value of the property before the road was built, and its value afterwards, and the cause of the depreciation, if any.

3. **Permitting a witness to be asked a question improper because calling for an opinion** upon a matter involving a mixed question of law and fact will not cause a reversal of the case if the answer is not directly responsive to the question, but is the same in effect that it would have been had the question been properly asked.

(June 24, 1900.)

NOTE.—*Condemnation of land for railroad purposes; diminution in value.*

In estimating the damages by the diminution of the value of land by the condemnation of a strip thereof taken by a railroad company for railroad purposes, the ringing of bells, sounding of whistles, rattling of trains, jarring of the ground and the smoke should be considered. *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Brand v. Hammersmith & C. R. Co.* L. R. 2 Q. B. 223; *Re Penny & S. E. R. Co.* 7 EL. & BL. 660. See note to *Vanderlip v. Grand Rapids* (Mich.) 8 L. R. A. 247.

In estimating the damages the true rule is to take into consideration all the disadvantages which are appreciable. *Alton & S. R. Co. v. Carpenter*, 14 Ill. 190.

Damages to be estimated on the whole land as a unit.

In estimating the damages to a tract of land where the plaintiff owned a quarter-section, and the road was all on one forty-acre tract thereof, the diminution in value of the whole quarter-section should be considered. *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478.

So on an eighty-acre subdivision, where this was only part of the owner's farm all in one inclosure, evidence of damage to the entire farm is competent. *Chicago, K. & W. R. Co. v. Brunson*, 48 Kan. 371.

The damages should be assessed regarding all of a proper portion of the land as a unit. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500.

In the condemnation of lands the just compensation which the land owner is entitled to receive for his land and damages thereto must be limited to the tract a portion of which is actually taken. *Currie v. Waverly & N. Y. B. R. Co.* (N. J.) June 21, 1900.

A PPEAL by defendant from a judgment of the District Court for Cooke County in favor of plaintiff in an action brought to recover damages alleged to have resulted to property by reason of the operation of a railroad near it. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. R. C. Foster and A. E. Wilkinson for appellant.

Messrs. C. C. Potter and Stuart, Bailey & Harris for appellee.

Gaines, J., delivered the opinion of the court:

This action was brought by appellee against the appellant corporation to recover damages to certain real estate alleged to have been caused by the construction of the defendant's railroad, and the operation of its trains. The plaintiff's property consists of a lot in the suburbs of the City of Gainesville, upon which he resides with his family, and has a dwelling-house and other improvements appropriate to a place of residence. The dwelling-house stands twenty-six feet from the south boundary line of the lot. The defendant Company took no part of plaintiff's land, but constructed its road parallel to such line at a distance from it of about thirty-seven feet. The damages were claimed by reason of the vibration, noise, smoke and noxious vapors and cinders incident to the running of trains over the road. The court charged the jury in effect to find for the plaintiff if his property had been damaged by the construction and operation of defendant's road, provided such damage resulted from the vibration, smoke, noxious vapors and the noise of passing trains; and that they should not take into consideration any damage plaintiff had

suffered in common with the community generally. The defendant asked the court to give the following charge, which was refused: "The mere construction and operation of the railroad of defendant upon land adjoining plaintiff's premises, and in the proper and usual manner in which railroads are built and operated, was not an unlawful act, nor could it be denominated a nuisance, and the inconvenience to plaintiff or the owner of the premises from such vibration, noise and smoke as were incident to the ordinary operation of the railroad, by running from four to six trains per day past plaintiff's premises, does not give him a cause of action for damages, for depreciation in the value of his premises occasioned thereby. You are therefore instructed to return a verdict for the defendant."

The giving and refusal of these instructions, respectively, present the fundamental question in the case, and involve the construction of that portion of our present Constitution which provides that "no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Article 1, § 17.

The precise question made by the facts of this case is one of the first impression in this court. In *Gulf, C. & S. F. R. Co. v. Fuller*, 68 Tex. 487, damages were allowed the plaintiff for an injury to his property resulting from the construction and operation of the defendant's railroad along a street in front of his lots. The plaintiff having an easement in the street peculiarly essential to the full enjoyment of his property, the court held that the appropriation of the street was a taking within the meaning of the Constitution. But the court also

The mere platting of land upon a map, without more, is not such a division of it into separate tracts that the owner's damages must be limited to the particular block a portion of which, as shown on the map, is actually taken. *Ibid.*

In determining the question of damages, advantages and disadvantages from the appropriation are considered, and are to be estimated upon the land as a whole. *Baltimore & P. R. Co. v. Springer*, (Pa.) 11 Cent. Rep. 686.

Elements of damages.

The words "injured or destroyed," in Pa. Const. 1874, art. 18, § 8, were not designed to change, alter or limit the nature and effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages. *Edmundson v. Pittsburgh, M. & Y. R. Co.* 1 Cent. Rep. 870, 111 Pa. 816.

Prior to Ill. Const. 1870, damages for lands injured but not actually taken could not be allowed. *Chicago & E. I. R. Co. v. Loeb*, 5 West. Rep. 387, 118 Ill. 203.

The introduction of the word "damaged" into the Illinois Constitution, providing that "private property shall not be taken or damaged for public use without just compensation," shows a purpose to abolish the old test of direct physical injury to property. *Chicago v. Taylor*, 125 U. S. 161, 81 L. ed. 688.

The depreciation in the value of land lying along the highway, due to the construction of a railway next to the highway on the opposite side thereof, gives the owner a right to compensation, under a constitutional provision that private property § 1 L. R. A.

shall not be taken "or damaged" without just compensation. *Lake Erie & W. R. Co. v. Scott*, 8 L. R. A. 390, 132 Ill. 439.

It is proper, in estimating the damages to that part of an owner's land not taken, to consider the danger by fire from passing engines, and the liability of having stock running on the land killed or injured by trains. *Chicago, P. & St. L. R. Co. v. Aldrich* (Ill.) June 13, 1890.

Change in insurance, while not an item of damages to be recovered for, may be considered as an element in determining the depreciation of value of property caused by the proximity of a railroad. *Ealich v. Mason City & Ft. D. R. Co.* 75 Iowa, 443.

Where land is taken by a railroad company for its right of way, the owner cannot recover for damages to the drives around and about his premises, or inconveniences and danger in crossing the railroad track, or annoyance in the way of smoke from engines, or noise of engine whistles and passing cars, and increased exposure to fire, as independent items of damage. The true question is the difference in salable value. *Lafin v. Chicago, W. & N. R. Co.* 38 Fed. Rep. 415.

Inconveniences arising, not only from the construction, but from the operation, of the railroad,—such as noise, ringing of bells, smoke and ashes,—may be included in the estimate of damages for land taken; but danger to children and others should not be included. *Re Scott*, 6 Manitoba L. Rep. 193; *Turner v. Sheffield*, etc. R. Co. 10 Mees. & W. 426; *East & West India, D. & B. J. R. Co. v. Gattke*, 30 L. J. Ch. (N. J.) 217; *Stack v. East St. Louis*, 85 Ill. 377; *Brand v. Hammersmith & C. R. Co.* 1 L. R. 1 Q. B. 120, L. R. 3 Q. B. 223; *Drucker v. Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 157.

says: "If, however, there has been no taking of the property of the appellee within the meaning of the Constitution, there can be no doubt that it has been damaged, if the evidence offered to support the averments of the petition be true. The word 'damaged' is evidently used in the sense in which the word 'injured' is ordinarily understood. By 'damage' is meant every loss or diminution of what is a man's own, occasioned by the fault of another, whether this results directly to the thing owned or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto,—that is, if an injury, not suffered by that particular property or right in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted,—then such property may be said to be damaged."

In *Gulf, U. & S. F. R. Co. v. Eddins*, 60 Tex. 656, the same question was decided in the same way. The cases cited differ from the case before us in the respect that in each of them the street in front of the property damaged was appropriated, while in this the road was not constructed along or over any public highway adjacent to the plaintiff's lot. We think the language quoted from the opinion in the *Fuller Case* lays down the true rule. The use of the disjunctive conjunction in the provision of the Constitution under consideration indicates clearly that it was not necessary that there should be a taking to entitle the owner of property to compensation for any special damage that might result to it from the construction of a public work.

In *Texas & S. R. Co. v. Meadows*, 73 Tex. 82, this subject came up for consideration, and the court says: "If a railroad company condemned or otherwise acquired for its purposes a right of way over land, and in constructing its road did an act injurious to an adjacent or neighboring proprietor, for which, if done by the original owner, he would have been responsible at common law, the company should be held liable to compensate the proprietor so injured. We do not understand that it was intended to give an action against those constructing public works for acts which if done by persons in pursuit of a private enterprise would not have been actionable."

There is high authority for holding that the charter of a railroad company, even in the absence of a statutory or constitutional law allowing compensation for incidental damage, does not exempt it from suits by persons whose property is injuriously affected by its works, although it be properly constructed, and carefully operated, at least in cases where in pursuance of its charter the works of the corporation could have been so located as to avoid the injury. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817 [27 L. ed. 739].

The doctrine as above qualified may be sustainable; but the great weight of authority is to the effect that in the absence of constitutional restrictions the legislative grant legalizes all acts done in strict pursuance of the power

conferred, and that persons whose property has been damaged, but not taken, must suffer the loss. If the power does not confer authority to do the act despite the damage, it would be the right of an owner whose property was injuriously affected by the operation of a railroad, to enjoin such operation as a nuisance, and thus defeat the grant. We think that the intention of the words "damaged or destroyed" in the provision of the Constitution under consideration was at all events intended to obviate any question of exemption from liability to the owner for property injuriously affected by a public work, and to provide a remedy for any damage which in such cases the Legislature might authorize to be inflicted. It is sufficient for the determination of this case to say that it was certainly intended that the Legislature should not authorize a corporation to do an act for a public use which, if done by an individual without legislative sanction, would be actionable, and at the same time exempt it from liability to respond in damages to the owner whose property had been injured. Such was the opinion expressed in the case of *Texas & S. R. Co. v. Meadows*, previously cited.

We are then brought to the inquiry whether or not the carrying on of any business by a natural person upon his own land, which by reason of the noise, smoke and vibration caused by the operation of powerful machinery materially diminished the enjoyment of the property of another, and rendered it less desirable as a residence, and depreciated its market value, is a nuisance at common law. The doctrine announced in *Burditt v. Swenson*, 17 Tex. 489, leads inevitably to the conclusion that it is. In that case the court quotes Blackstone, who says: "If one does any . . . act in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance." That a nuisance may be created by smoke, noise, noxious vapors or other physical disturbance of the enjoyment of property is a proposition in accordance with sound principles, and is well supported by authority. *Baltimore & P. R. Co. v. Fifth Baptist Church*, *supra*; *Wood*, Nuis. § 611, and cases cited; *Jeffersonville, M. & I. R. Co. v. Esterle*, 18 Bush, 667; *Bangor & P. R. Co. v. McComb*, 60 Me. 290.

There was evidence in this case tending to show that by reason of the noise, smoke and vibration produced by the operation of the defendant's road the plaintiff's property had been greatly diminished in value. The following is the rule laid down by an eminent English judge as applicable to cases like this: "When by the construction of any works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property, as property, is lessened in value." *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243.

The charge of the court was in accordance with those principles, and was not erroneous. The charge requested was based upon contrary principles, and was properly refused. We

deem it proper before leaving this subject to comment briefly upon the case of *Hammermith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, upon which appellant seems mainly to rely for a reversal of the judgment. In its decision a great amount of labor and a great wealth of learning were expended. The plaintiff's claim in that case was precisely like the claim in this. The Court of Queen's Bench held that the plaintiff was not entitled to recover. *Brand v. Hammermith & C. R. Co.* L. R. 1 Q. B. 180.

This judgment was reversed in the Exchequer Chamber (L. R. 2 Q. B. 223), but upon final appeal to the House of Lords was sustained. Four of the five judges who were cited to advise the lords were of the opinion that the plaintiff was entitled to recover; and in that opinion one of the law lords concurred. Two of the law lords held the contrary opinion, and the House gave judgment accordingly. The important fact, however, is that the decision of the case turned upon the construction of the Acts of Parliament which allowed compensation to owners where lands were taken or injuriously affected by the construction of public works. The question was whether compensation was intended to be allowed only for damages accruing from the construction of the works, or whether it included also such damages as resulted from the operation of the trains after the works had been constructed. The damages in the case were clearly of the latter character, and each of the judges who gave an opinion against the right of compensation placed it distinctly upon the ground that the Acts of Parliament commonly called the "Land Clauses Act" and the "Railway Clauses Act" gave compensation only for such damages as resulted from the construction of the railroad, and not from the operation of its trains. The decision of the case was made to depend purely upon a matter of verbal construction. All the judges conceded that the plaintiff's property had been injuriously affected, and that if the language of the Statutes had been broad enough to embrace damages resulting from the operation of the works the plaintiff would have been entitled to recover.

In the case of *Metropolitan Board of Works v. McCarthy*, above cited, the damages claimed resulted from the construction of the works, and the right of recovery was maintained in the Common Pleas, in the Exchequer Chamber and in the House of Lords. *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P. 508, L. R. 8 C. P. 191, and L. R. 7 H. L. 248. The question was again considered, and the doctrine of the case last cited affirmed, in *Caledonian R. Co. v. Walker*, L. R. 7 App. Cas. 259. There is no such difficulty under the provision of our Constitution as was presented in the construction of the English Statutes. The language, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made,"—is sufficiently comprehensive to include damages

resulting from the operation of public works, as well as those which are inflicted by their construction merely. The property in this case was damaged for a public use by the operation of the railroad, and the damage comes as clearly within the provision of the Constitution as damages which result immediately from the construction of the road. The property is subjected to a perpetual servitude for the benefit of the public, and the owner is entitled to his compensation for his damage. The following American cases bear upon the question we have been considering, and support the conclusion we have announced: *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Chicago v. Taylor*, 125 U. S. 161 [31 L. ed. 638]; *Egney v. Chicago*, 102 Ill. 64; *Reardon v. San Francisco*, 66 Cal. 492; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Hot Springs R. Co. v. Williamson*, 45 Ark. 429.

During the progress of the trial the following question was propounded to plaintiff on his behalf while being examined as a witness, as well as to his other witnesses: "To what amount, if any, is your property depreciated in market value by reason of the construction and operation of defendant's railroad, taking into consideration the physical disturbances to said property only, if any, such as noise, smoke, noxious vapors and vibrations, and excluding from your consideration all damages and inconveniences sustained in common with the community at large?" The question was objected to by the defendant on the ground that it called for the opinion of the witnesses upon a matter involving a mixed question of law and fact. We think that the question was improper, and that the objection should have been sustained. But in so far as the answer of the plaintiff was concerned no harm resulted to the defendant. He did not give a direct response to the question, but answered that the market value of the place was almost totally destroyed; that without a railroad it would be worth at a low estimate \$4,000, and its value was decreased from the causes enumerated from one half to three fourths of that amount. The result was the same as if the witness had been asked the value of the property before the railroad was built and its value afterwards, and the cause of the depreciation in value, if any, and had answered it was worth, before the construction \$4,000, but since the construction was not worth more than \$1,000 or \$2,500, and the cause of the decrease was the noise, smoke and vibration caused by the moving trains. Neither the bill of exceptions nor the statement of facts shows the answers of the other witnesses to the question, and without knowing what the answers were we cannot say whether the defendant was prejudiced or not. They may have answered that in their opinion there was no damage.

We find no reversible error in the record, and the judgment is affirmed.

NEVADA SUPREME COURT.

Caroline GRUBER, *Recept.*,
v.
W. H. BAKER *et al.*, *Appls.*

(....Nev.....)

1. **The grantor in a deed given only as security** is not a necessary party to a suit involving the title after the grantee has conveyed to a third person who had no notice of the rights of the original grantor.
 2. **A grantee is estopped from denying his grantor's title** to the property at the time of the conveyance as well as his right to make the deed conveying the same.
 3. **A deed intended as a security** is an absolute deed as regards third persons, and when recorded without any defeasance a bona fide purchaser will take the land discharged of the equity of redemption.
 4. **A party is estopped from asserting title** to property when his declarations have induced another who was about to purchase it to believe that it was owned by a third person.
 5. **An attorney cannot disclose communications** made to him by parties who employed him to draw up a deed and mortgage in a suit between such parties, or either of them, and third persons.
 6. **An assignee of the right of action to set aside a deed for fraud**, although receiving also a conveyance from the assignor, who is a co-tenant, under agreement to maintain the action for their joint benefit, is not, as to the interest assigned, entitled to maintain the action under a statute requiring actions to be prosecuted in the name of the real party in interest.
 7. **The assignment of a bare right to file a bill** in equity for a fraud committed upon the assignor will be held void as against public policy, and as savoring of the character of maintenance.
 8. **The fact that an assignor and assignee are tenants in common** of the property in question does not change the rule prohibiting the assignment of a right of action to set aside a conveyance for fraud.
- (Bellmap, J., *dissent.*)
9. **Evidence to prove fraud** should be so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.
 10. **A purchaser of the interest of one person in a mine**, knowing that a fraud was being perpetrated on the seller by concealing the fact of a rich discovery of ore in the mine, cannot avail himself of the benefits thereof, but the conveyance will be set aside for fraud.
 11. **The true measure of damages** in an action to set aside a conveyance for fraud is the profit derived from the property while in the purchaser's possession.

(April 2, 1890.)

APPEAL by defendants from a judgment of the District Court for Lyon County in favor of plaintiff in an action brought to set aside a conveyance of property alleged to have been obtained by fraud. *Affirmed in part.*

9 L. R. A.

The facts are fully stated in the opinions.

Messrs. W. E. F. Deal, M. N. Stone and Trenmor Coffin, for appellants;

To authorize the cancellation of a conveyance on the ground of fraud, pecuniary loss or damage sustained by the plaintiff at the time of the sale must be shown.

If the market value of the mine was no greater at the time of the sale than the price paid, or if there was no inadequacy at the time in the price paid, judgment should have been for defendants.

2 Pom. Eq. § 898, p. 431, *note*, and cases cited; *Batty v. Lloyd*, 1 Vern. 141; *Hale v. Wilkinson*, 21 Gratt. 87; *Cornelius v. Molloy*, 7 Pa. 296; *Marriner v. Dennison*, 78 Cal. 202; *Purdy v. Bullard*, 41 Cal. 448; *Garrou v. Davis*, 56 U. S. 15 How. 279, 14 L. ed. 695; *Clarke v. White*, 87 U. S. 12 Pet. 198, 9 L. ed. 1054; 1 Sugden, Vendors, pp. 8, 420, 421; *Southern Development Co. v. Silva*, 125 U. S. 249, 81 L. ed. 680; *Haywood v. Cope*, 25 Beav. 149; *Henry v. Everts*, 29 Cal. 610; *Graffam v. Burgess*, 117 U. S. 193, 29 L. ed. 839; *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. ed. 112; *Coples v. Steel*, 7 Or. 494; *Morrison v. Loda*, 89 Cal. 885; *Jennings v. Broughton*, 5 DeG. McN. & G. 127; *Pasley v. Freeman*, 8 T. R. 53; *Christmas v. Spink*, 15 Ohio, 608; *Fox v. Mackreth*, 2 Cox, 320; 1 Story, Eq. Jur. § 203; Bigelow, Fraud, pp. 682, 683; *Van Bpps v. Harrison*, 5 Hill, 63.

Where the contract is executed courts will not receive evidence as to matters subsequent to the contract to determine whether the price paid was or was not adequate.

Gordon v. Butler, 105 U. S. 557, 26 L. ed. 1169; *Southern Development Co. v. Silva*, 125 U. S. 252, 81 L. ed. 681; *Tuck v. Downing*, 76 Ill. 71; *Livingston v. Peru Iron Co.* 2 Paige, 890, 2 N. Y. Ch. L. ed. 956.

Parties guilty of such negligence as complainant was cannot be heard to complain of their want of knowledge of their own property.

Willard, Eq. p. 151; *Chrysler v. Canady*, 90 N. Y. 272; *Mamlock v. Fairbanks*, 46 Wis. 415; *Carlton v. Rockford Ice Co.* 78 Me. 49.

The law imposed on appellants no duty to inform respondent or Pollard of the knowledge they had of an improvement in the mine.

Kintzing v. McElrath, 5 Pa. 469; *Harris v. Tyson*, 24 Pa. 859; 1 Sugden, Vendors, p. 8; *Tuck v. Downing*, 76 Ill. 71; *Southern Development Co. v. Silva*, 125 U. S. 249, 81 L. ed. 680; *Williams v. Spurr*, 24 Mich. 386; *Gordon v. Butler*, 105 U. S. 553, 26 L. ed. 1166; *Laidlow v. Organ*, 15 U. S. 2 Wheat. 178, 4 L. ed. 214; *Haywood v. Cope*, 25 Beav. 140; *Clapham v. Shillito*, 7 Beav. 146; *Banta v. Savage*, 12 Nev. 151; Bigelow, Frauds, p. 868; *Dambmann v. Schulting*, 75 N. Y. 58; 2 Pomeroy, Eq. p. 893, *note*; Kerr, Frauds, 889; *Vernon v. Keys*, 13 East, 682; 1 Story, Eq. 205, 214; *Reynolds v. Palmer*, 21 Fed. Rep. 485; *Fuller v. Buice*, 80 Ga. 595; *Fox v. Mackreth*, 2 Cox, 320; *Fox v. Mackreth*, 2 Bro. Ch. 400; *Dolman v. Nokes*, 23 Beav. 402; *Dicconson v. Talbot*, L. R. 6 Ch. App. Cas. 82; *Cleland v. Fish*, 43 Ill. 284; *Livingston v. Peru Iron Co.* 2 Paige, 890 2 N. Y. Ch. L. ed. 956.

A mere passive cognizance of fraud or the illegal actions of others is not sufficient to show conspiracy. An active participation is necessary.

Evans v. People, 90 Ill. 384; *Miles v. State*, 58 Ala. 390.

This action cannot be maintained as to Pollard's interest. It was merely assigned to respondent to enable her to bring this suit to set aside his deed for fraud.

Robbins v. Deveril, 20 Wis. 142; Pom. Rem. §§ 153, 158, 249, 250; 1 Daniel, Ch. Pr. 4th ed. p. 220, and note; *Crocker v. Bellange*, 6 Wis. 645, 70 Am. Dec. 490; *Graham v. LaCrosse & M. R. Co.* 103 U. S. 156, 26 L. ed. 109; *Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444, and note; *Norton v. Tuttle*, 60 Ill. 180; *Dickinson v. Seaver*, 44 Mich. 624; 2 Story, Eq. 11th ed. § 1040; *Barker v. Barker*, 14 Wis. 136; *Martin v. Vedder*, 20 Wis. 467; 3 White & T. Lead. Cas. Eq. p. 1602; *Adams*, Eq. pp. 149, 150; 8 Pomeroy, Eq. p. 236, § 1236; 1 Am. & Eng. Encyclop. Law, p. 893, and notes; *Dayton v. Fargo*, 45 Mich. 153; *Tufts v. Matthews*, 10 Fed. Rep. 611; *Prosser v. Edmonds*, 1 Younge & C. Exch. 481; *Smith v. Harris*, 48 Mo. 557; *Evans v. Cook*, 11 Nev. 75; *Ex parte Blanchard*, 9 Nev. 105; *Vannickie v. Haines*, 7 Nev. 249; *Clark v. Clark*, 17 Nev. 124; *Wuest v. Wuest*, 17 Nev. 217; 6 Bacon, Abr. title *Maintenance*, pp. 410, 411; *Chater v. San Francisco Sugar Ref. Co.* 19 Cal. 247; *Perkins v. Center*, 85 Cal. 721; *Quincy v. Baker*, 87 Cal. 470; *Matsen v. Shaeffer*, 65 Cal. 83; *Williams v. Santa Clara Min. Assn.* 66 Cal. 200; *Powell v. Knowler*, 2 Atk. 224; *De Hopton v. Money*, L. R. 2 Ch. App. 164-169; *Hill v. Boyle*, L. R. 4 Eq. 260; *Milwaukee & M. R. Co. v. M. & W. R. Co.* 20 Wis. 174; *Robbins v. Deveril*, 20 Wis. 142.

Plaintiff is merely a nominal trustee for Adam Bay. He was the real party in interest and the action could not be maintained without making him a party.

Barbour, Parties, pp. 439, 481; Pom. Rem. §§ 124-148; Story, Eq. Pl. § 207; *Nichols v. Williams*, 22 N. J. Eq. 64; *Livingston v. Peru Iron Co.* 2 Paige, 893, 2 N. Y. Ch. L. ed. 958; *Bailey v. Ingles*, 2 Paige, 279, 2 N. Y. Ch. L. ed. 906.

The court erred in refusing to allow the appellants to prove by J. A. Stephens that the deed from Adam Bay to respondent was made for and intended as a mortgage.

Michael v. Foil, 100 N. C. 178; *Goodwin G. S. & M. Co's App.* 117 Pa. 514; *Brazel v. Fair*, 26 S. C. 370; *Hanton v. Doherty*, 7 West. Rep. 384, 109 Ind. 37; *House v. House*, 61 Mich. 69; *Caldwell v. Davis*, 10 Colo. 481; *Re Austin*, 42 Hun, 516; *People v. Van Alstine*, 57 Mich. 69; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 460; *Whiting v. Barney*, 30 N. Y. 830, 86 Am. Dec. 885; *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742; *Gallagher v. Williamson*, 38 Am. Dec. 114; *Moffatt v. Hardin*, 22 S. C. 9; *State v. McChesney*, 16 Mo. App. 259; *Todd v. Munson*, 53 Conn. 579; *Hebbard v. Haughian*, 70 N. Y. 54; *Hager v. Shindler*, 29 Cal. 47; *Coit v. McConnell*, 116 Ind. 256; *Weeks v. Argent*, 16 Mees. & W. 817; *Dunn v. Amos*, 14 Wis. 106; *Mobbs & M. R. Co. v. Yeates*, 67 Ala. 164; *Gulick v. Gulick*, 39 N. J. Eq. 516; *Coveny v. Tannahill*, 1 Hill, 33; *Randall v. Yates*, 48 Miss. 684; *Gore v. Harris*, 8 Eng. L. & Eq. 147; 9 L. R. A.

McLean v. Clark, 47 Ga. 24; *Parish v. Gates*, 29 Ala. 254; *Pulford's App.* 48 Conn. 247; *Rock v. Wright*, 21 Hun, 844; *Britton v. Lorenz*, 45 N. Y. 57; *Hatton v. Robinson*, 14 Pick. 416; *Al-dem v. Goddard*, 78 Me. 845; *De Wolf v. Strader*, 26 Ill. 227.

Messrs. R. H. Lindsay and Robert M. Clarke for respondent.

Murphy, J., delivered the opinion of the court:

This was a bill in equity to set aside deeds made by Caroline Gruber and A. A. Pollard to Joseph Munchton, and from Munchton to W. H. Baker, and to have the same canceled, annulled and declared void, on the grounds that the same were obtained by fraud and inadequacy of consideration. The complainant avers that on the 3d day of December, 1887, Oest, Pollard and Caroline Gruber were the owners, as tenants in common, of a mining claim, situate in the Devil's Gate and Chinatown mining district, at Silver City, Lyon County, Nev., known and commonly called the "Oest Mine,"—Oest being the owner of one half, Pollard one quarter and Mrs. Gruber one fourth. They worked the mine as copartners, sharing the profits and bearing the losses in proportion to their respective interests. Oest and Pollard lived at Silver City, Mrs. Gruber at Dayton, four miles distant; but one Mat. Bay, a brother of Mrs. Gruber, lived at Silver City, and acted as agent for her in the working and management of the mine. W. H. Neighley was foreman at the mine, subject to Oest's orders. During the time of the ownership of Pollard and Gruber, developments of great importance were made, without the knowledge of either Pollard or Gruber, by cutting and excavating through the clay wall, generally called the "foot wall," a body of gold and silver bearing ore 5 feet in thickness, 80 feet in length and of unknown depth, which ore was of the net value of \$500 per ton, and of the aggregate value of \$250,000. That before the discovery of this body of ore the mine was not worth to exceed \$8,000, but after the development the property was worth \$250,000. That said development was made known to Oest. That Pollard and Mrs. Gruber had no knowledge of the discovery, nor could they, with reasonable diligence, know or discover the same. And plaintiff avers that it was the duty of Oest, as co-owner, copartner and manager, to have made the said development and discovery known to his co-owners, and to have extracted and sent the said ore so discovered to the mill for reduction; that the facts of the said discovery were concealed from Pollard and Mrs. Gruber by the said Oest, and were by him imparted to Joseph Munchton and W. H. Baker, for the purpose of cheating and defrauding the said Pollard and Mrs. Gruber; that Oest, Munchton and Baker then entered into an agreement, confederation and conspiracy to fraudulently acquire the interests of Pollard and Mrs. Gruber for a grossly inadequate price and consideration, and to cheat and defraud them out of their said interests in said mine. The complaint contains specific averments constituting the alleged fraud.

The answer of the defendants Munckton and Baker contains specific denials of each and every allegation of the complaint in so far as it alleges fraud, and also denies the ownership of the property by Mrs. Gruber, and alleges that she is not the real party in interest in this action.

The plaintiff had made Fred. Oest a party defendant, but during the trial the action was dismissed as to him, and proceeded against Munckton and Baker. The cause was tried before the court without a jury. Judgment was rendered in favor of the plaintiff for the surrendering and cancellation of the deeds mentioned, and for the sum of \$22,000 damages, and costs of suit. Defendants appeal from the judgment, and from the order of the court overruling their motion for a new trial.

Appellants claim that the court erred in overruling their motion wherein they asked to have Adam Bay made a party plaintiff. The ground for their motion was that, some time prior to the sale of the mine by Mrs. Gruber to Munckton, Adam Bay owned one-fourth interest in the mine. He borrowed \$3,500 from his sister, Mrs. Gruber, giving her his note and a mortgage on his interest in the mine to secure the payment thereof. Some time thereafter, Adam Bay gave to Mrs. Gruber a deed to his interest in the mine, and Mrs. Gruber entered satisfaction of the mortgage in the records of Lyon County, Nev. The appellants claim that, notwithstanding Mrs. Gruber has entered satisfaction of the mortgaged debt, and holds a deed to the property, that it was the intention of the parties, and that it was so understood between them, that the deed was given and received to operate as a mortgage only. The testimony given on the trial of this cause does not support the appellants' views. Mrs. Gruber says that there was no understanding between herself and Adam Bay that the deed given was merely to secure the payment of the money loaned; that it was given by Bay, and received by her, as an absolute deed, and conveying to her all the right, title and interest of Adam Bay in and to said property to her; and that she had dealt with the property as her own. Munckton testified: "I saw Adam Bay. He was on his wagon. I asked him if he would take less than \$4,000 for his interest. He said: 'Anything that Mat. does about this is satisfactory to me.' I then went to Mat., and told him I had concluded, if this affair was settled up, that I would give him \$4,000 for their interest, and he said 'All right,' and I gave him \$20 on the bargain to bind it, and then he said: 'You have got to take a deed from Mrs. Gruber.'"

Mat. Bay is the brother of Adam Bay and Mrs. Gruber, and was acting as the agent for Mrs. Gruber. Munckton, having received the deed from Mrs. Gruber, is now estopped from denying her right to make the deed, or her title to the property. If Adam Bay had any interest in the property at the time of the sale from Mrs. Gruber to Munckton, he having stood by, and did not disclose his title and object to the sale, he is now precluded by estoppel from claiming the property, or

any interest therein, from Munckton, who was induced to buy and take the deed from Mrs. Gruber by the declarations of Adam and Mat. Bay that she was the true owner. Where a deed intended as security is recorded, the defeasance not being recorded, a purchaser for value from the grantee, without notice of the defeasance, will hold an absolute title as against the grantor and his grantees. It is an absolute deed as regards third persons, and a bona fide purchaser will take the land discharged of the equity of redemption of the mortgagor. *Brophy Min. Co. v. Brophy & D. G. & S. Min. Co.* 15 Nev. 107.

And a party is also estopped from asserting title to property when his declarations have induced another, who was about to purchase it, to believe that it was owned by a third person. *May v. Council*, 76 Iowa, 741; *Shuford v. Shingler*, 90 S. C. 612; *Ratcliff v. Bellfonte Iron-Works Co.* 87 Ky. 559; *Wise v. Newatney* (Neb.) 42 N. W. Rep. 846; *Williams v. Fletcher*, 129 Ill. 856; *Birch v. Stepler*, 11 Colo. 408.

On the trial of this cause the defendants called J. A. Stephens, an attorney-at-law, who drew up the mortgage and deed from Adam Bay to Mrs. Gruber mentioned in the fore part of this opinion, and endeavored to prove by him the understanding had between Adam Bay and Mrs. Gruber, at the time of the drawing of the deed, as to whether the deed was not drawn and intended as a mortgage to secure the payment of money due by Adam Bay to Mrs. Gruber, and to enable Mrs. Gruber to escape the payment of state and county taxes upon the mortgage. Stephens declined to answer the question for the reasons: (1) he was acting as the attorney for Bay and Gruber, and what was said to him at that time was received by him in the performance of his professional calling, and what was said he claimed to be a privileged communication; (2) if he was compelled to answer the questions, it would injure former clients of his. The plaintiff also objected to the witness answering the questions. The rule that an attorney cannot disclose communications made to him by his clients is not, as now understood, confined to communications made in contemplation of, or in the progress of, an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subject of professional employment. An attorney employed by two or more parties to give advice in a matter in which they are mutually interested can, no doubt, on litigation subsequently arising between themselves, be examined as a witness, at the instance of either of the parties, as to communications made when he was acting as attorney for all. But he cannot disclose such communications in a controversy between such parties, or either of them, and third persons. The communication made to Stephens by Adam Bay and Mrs. Gruber when he drew the deed for them were privileged. *Gulick v. Gulick*, 89 N. J. Eq. 516; *Michael v. Foil*, 100 N. C. 189; *Britton v. Lorens*, 45 N. Y. 56; *Whiting v. Barney*, 80 N. Y. 880; *Yates v. Olmsted*, 56 N. Y. 632; *Williams v. Fitch*,

18 N. Y. 550; *Root v. Wright*, 84 N. Y. 76.

The complaint in this action was filed on the 14th day of December, 1888. On the same day, A. A. Pollard made, executed and delivered to Caroline Gruber a deed purporting to convey all his right, title and interest in and to said mine and mining claim. Said deed contains the following clauses: "Also, all equitable right of title, claim or demand, in said mine of the said first party; also, all right of action to set aside a certain deed made by the said first party to Joseph Munckton dated December 8, 1887; also, all claim for damages arising from said deed; also, all claim or demand or right of action for damages, or for an accounting, or for the value of ores taken from said mine." On the same day, and as part of the same transaction, Pollard and Gruber entered into the following agreement:

"The undersigned mutually acknowledge and agree as follows: 1st. The action this day commenced in the name of Caroline Gruber against Joseph Munckton and others is for the mutual benefit of the undersigned. Each of us are to share equally the advantages, and to bear equally the costs and expenses. The assignment this day made by A. A. Pollard to Caroline Gruber was made for the purpose of enabling her to maintain the aforesaid action in her own name. When judgment is recovered, and the litigation finally terminated, said Caroline Gruber will assign and convey to said A. A. Pollard his part of the judgment and interest in the mine recovered. Witness our hands this 14th day of December, A. D. 1888.

"Mrs. Caroline Gruber,

[L. s.]

"A. A. Pollard,

[L. s.]"

This agreement was duly acknowledged before a notary public, and was entitled to be recorded, if it was not, in the records of Lyon County, Nev. Appellants claim that this action cannot be maintained, as to the Pollard interest, in the name of the plaintiff, because she is not the real party in interest; that the assignment of Pollard to Gruber does not convey the legal title to the property, but merely the right to sue in her own name, and, immediately upon the termination of the suit, she binds herself to redeed to him his one-fourth interest in the mine and mining claim, and pay over to him one half of whatever sum of money she may recover from the defendants as damages for the alleged fraud; that such an agreement cannot be enforced under the laws of this State; it savors of maintenance.

Section 8026, Gen. Stat., reads: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this Act." The only interpretation that can be placed upon this section of the Statute is that, whenever a thing in action transferable by law is absolutely assigned, so that the ownership passes to the assignee, without conditions or reservations, and the legal title or equitable claim is fully vested in him, he is the real party in interest, and must sue in his own name. Is Mrs. Gruber either the legal owner, or has she such an equitable claim in the Pollard interest in

this mine, or in this cause of action, to permit her to maintain this action in her own name? We think not. From the reading of the deed, and agreement between the parties, it was not intended that Mrs. Gruber should have any claim upon or interest in the property deed to her by Pollard. She was merely permitted to commence an action in her own name for the cancellation of the deeds given by herself and Pollard to Munckton, and by Munckton to Baker, and the recovery of damages for the alleged fraud; and she was, upon the termination of the suit, to reconvey to him the same interest in the mine, and to account and pay over all moneys received by her in the nature of damages in proportion to his interest in the property. It would be doing violence to the Statute to say that Mrs. Gruber was the real party in interest, under the facts in this case. Nor can we admit the correctness of the views expressed by the learned attorney for the respondent, that Mrs. Gruber was a trustee of an express trust. Were we to so decide, she would be permitted to do things indirectly, which another section of the Statute directly prohibits. It never was intended by the framers of this law that a party, being of sound mind, capable of managing his own affairs, residing in the immediate vicinity, who did appear in court and testify as a witness on the part of the plaintiff, should be permitted to divest himself of the title, create a trust for the purpose of commencing and prosecuting an action at law or in equity, in the name of the assignee or trustee, for his benefit, and upon the termination of the suit reconvey to him all the proceeds of such suit. We cannot sanction any such construction of our Statute, and it made no difference that Mrs. Gruber had a deed to the mine. The defendants had a right to demand that they be confronted by Pollard, who was the real party in interest.

In the case of *Robbins v. Denver*, 20 Wis. 148, the court held that a partner could not maintain an action in his own name for the benefit of the firm, although the demand had been transferred to the plaintiff alone by words of absolute assignment. In the case of *Hoagland v. Van Eiten*, 23 Neb. 688, the court said: "The language of the Statute is plain and unambiguous: 'Every action must be prosecuted in the name of the real party in interest, except,' etc. This case is not within any of the exceptions named, and therefore must be considered with reference solely to section 29 [of the Code]. If a party, having no interest in the subject matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then section 29 has no meaning whatever. We do not care to enter into a discussion of the propriety or impropriety of requiring actions to be brought in the name of the real party in interest. The Statute contains a plain provision which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled, under section

29, to maintain an action as the real party in interest." And in Minnesota "it was held, in some cases, that the beneficial owner of a negotiable bill or note payable to bearer, or indorsed in blank, might institute suit on it in the name of anyone who would allow his name to be used for that purpose, and that, unless the maker had a defense to the note, good against the real owner, he could not be permitted to show that the plaintiff was not the real party in interest. . . . Although this rule might be correct at common law, it certainly is not good under the Statute of this State, which provides that 'every action shall be prosecuted in the name of the real party in interest.' . . . It is apparent from the language used that it was not the intention of the indorser to make the indorsee the owner of the note, or of the money after collection, but simply to give him authority on the note to collect it. The relation of the indorser and indorsee is that of principal and agent. The agent cannot be the 'real party in interest' in a suit brought on the note." *Rock County Nat. Bank v. Hollister*, 21 Minn. 885; *Third Nat. Bank of Syracuse v. Clark*, 28 Minn. 288.

In the case of *Sinker v. Floyd*, 104 Ind. 292, 2 West. Rep. 218, it is said: "We are satisfied that under our Code an action for a breach of covenant must be prosecuted in the name of the real party in interest, and that the real party in interest is the person entitled to the money recovered as damages." And in the case of *Bostwick v. Bryant*, 118 Ind. 448, 13 West. Rep. 804, the same court said: "The Statute provides that every action must be prosecuted in the name of the real party in interest. . . . The answer shows clearly that Anna S. Bloomer is the owner of the note, and the real party in interest. The plain provisions of the Statute cannot be avoided." *Bartholomew County Comrs. v. Jameson*, 86 Ind. 163.

In the case of *Phillips v. Bush*, 15 Iowa, 64, the court held that, when A sold certain lands to B, making false and fraudulent representations as to the locality of the land sold, and at the request of B conveyed the same to C as security for the payment of an indebtedness from B to him, in an action for damages for such fraudulent representations, A was liable, and B, being the real party in interest, was the proper party plaintiff, notwithstanding the legal title was in C."

The rule that actions must be prosecuted in the name of the real party in interest has always been the rule in equitable actions, as distinguished from actions at law, and the statutory enactment is nothing more than that which has always prevailed in equity. *Groce v. Judy*, 24 W. Va. 298; *Kellam v. Sayre*, 30 W. Va. 198; 1 Van Santv. Eq. Pl. 72.

Under the old practice, when law and equity were administered by different tribunals, the rule respecting parties in courts of law differed from those in courts of equity. The blending of the jurisdiction made it necessary to revise those rules to some extent. In doing so the Legislature had this purpose in view: to do away with the artificial distinctions existing in courts of law, and to

require the real party in interest to appear in court as such, knowing that the true rule had always prevailed in the courts of equity, that he who had the right was the person to pursue the remedy. We have adopted that by enacting section 8026, and it seems to us too plain for misconception. In construing statutes we must consider the sections together, and that interpretation should be placed upon the language which will give each and every section of the Act its proper effect, and which at least will make it compatible with common sense and the plain dictates of justice. *Maynard v. Newman*, 1 Nev. 271; *Ex parte Siebenhauer*, 14 Nev. 368.

ChamPERTY and maintenance were defined as offenses in very early stages of the English law. The English doctrine of maintenance arose from causes peculiar to the state of society in which it was established. It was a principle of the common law that a right of action could not be transferred by him who had the right. When we seek the reason of this rule, we find it was an apprehension that justice would fail, and oppression would follow, if the right of action might be assigned. In early times this rule concerning rights of action was rigorously enforced, but this rigor has, however, been relaxed. The apprehension that justice would be trodden down if property in action should be transferred is no longer entertained, and the common-law rule now serves only to give form to some legal principles. The Statute of Limitations, Statute of Frauds, and the giving of costs against the unsuccessful party, have all taken place since the Law of Maintenance was enacted; and all these have contributed to prevent groundless and vexatious litigation. In States where the common-law rule still prevails, the laws concerning maintenance are still in force, and they all hold that a right of action may be transferred to a purchaser for a valuable consideration with complete effect. But we fail to find, in any decided cases, where a party has been permitted to maintain an action in his own name where he had no interest whatever in the result of the suit. We have no statute concerning champerty and maintenance in this State. Section 8021, Gen. Stat. Nev., reads: "The common law of England, so far as it is not repugnant to, or in conflict with, the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State."

This court has held in a number of cases that the English statutes in force at the date of the Declaration of American Independence, in so far as they were applicable to our situation, are a part of the common law which we have adopted. Why are not champertous contracts void in this State? True, they are not so declared by statute, but they were so at common law, and the common law of England has been recognized as part of our system, its principles being the rule of our decisions, except as modified by statute. Of course, these principles must be applicable to the nature of our institutions, and to the genius of our form of government; to our

wants, habits and necessities. In a number of States they have no statutes against champerty or maintenance, yet the courts of last resort hold that the common law on these subjects prevails. The modern decisions of the courts of the United States and England make a distinction, which before prevailed in the rules of the common law, between maintenance which is innocent and that which is unlawful. To maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit, or unless he is connected with the assignor by ties of consanguinity or affinity. Landlord and tenant, executors, administrators, trustees of an express trust, the exercise of legal profession by an attorney and acts of charity to the poor, are all cases in which it is not unlawful to give aid in the conduct of a suit before a court of justice.

The reason of the rule, as applied to champerty and maintenance, with us, is to prevent litigation and the prosecution of doubtful claims by strangers to them. If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer his right to another party for the purpose of prosecution, thereby encouraging strife and litigation. It has therefore been deemed beneficial to the public interest to prohibit a transaction such as is attempted in this case, as being contrary to public policy, and void. The deed passed from Pollard to Gruber with the understanding that it was not to convey any interest in or title to the property whatever, but merely for the purpose of allowing Mrs. Gruber to maintain this action in her own name, for the benefit of Pollard, to set aside a deed made by Pollard to Munckton, and which Pollard claimed had been obtained by fraud. Therefore, Mrs. Gruber is not the real party in interest, within the meaning of the Statute, and places the parties within the rule of law that the assignment of a bare right to file a bill in equity for fraud committed upon the assignor will be held void as being against public policy; and such an assignment cannot be maintained in either a court of law or equity, nor can a trust be created in such an assignment.

In 1 Perry, Trusts, § 69, he says: "The mere right to file a bill in equity for a fraud committed upon the assignor, or to sue for a tort, cannot be assigned, and a trust created in such rights."

Bigelow, Fraud, 214, says: "A right of action for fraud cannot be conveyed at law or in equity. Equity will not enforce the demand of an assignee or a grantee of a right to sue for fraud when the action is confined to that wrong."

2 Story, Eq. Jur. § 1040h, says: "So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance." To the same effect are *Ryall v. Rowles*, 2 Lead. Cas. Eq. *820; 3 Pom. Eq. Jur. § 1276; *Adams, Eq. 7th Am. ed. *57*; 1 Pars. Cont. 226; 1 Am. & Eng. Cyclop. Law, 833, title *Assignments*; 9 L. R. A.

Dayton v. Fargo, 45 Mich. 153; *Dickinson v. Seaver*, 44 Mich. 624; *Brush v. Sweet*, 88 Mich. 574; *Morris v. Morris*, 5 Mich. 181; *Carroll v. Potter*, Walk. Ch. 855; *Marshall v. Means*, 12 Ga. 66; *Morrison v. Deaderick*, 10 Humph. 344; *Smith v. Harris*, 48 Mo. 557; *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.* 20 Wis. 188; *Crocker v. Bellangee*, 6 Wis. 645.

In *Pomeroy's Remedies and Remedial Rights*, § 158, he says: "The following are illustrations of personal interests or rights which cannot be assigned: . . . the right of a grantor to avoid his conveyance on the ground of fraud."

In the case of *Jones v. Babcock*, 15 Mo. App. 150, Thompson, J., in delivering the opinion of the court, said: "We shall affirm the judgment in this case upon the sole ground that the bare right to complain of a fraud is not a vendible commodity. 'It has always been held,' said Bliss, J., 'that the assignment of a bare right to file a bill in equity for fraud upon the assignor is void, as against public policy.' *Smith v. Harris*, 48 Mo. 557, 562.

"The case charged, in substance, is that Frances J. Jones and Richard S. Jones, her husband, had made certain conveyances in trust to the defendant, Leicester Babcock, to secure certain debts; that Babcock, in 1874, secretly purchased the notes thereby secured, advertised the property for sale, sold the same as trustee, and caused it to be bid in in the name of the *cestui que trust*, but really for himself; that this fraud was not discovered until March, 1880; and that in May, 1880, Frances J. Jones and Richard S. Jones conveyed by quitclaim deed their right, title and interest in the premises thus sold under these deeds of trust to this plaintiff. What did this quitclaim deed convey to this plaintiff beyond the bare right to prosecute a suit in equity to set aside a trustee's sale on the ground of fraud. That was all the grantors had to convey; and, while they could have asserted such a right themselves, they could not assign it to another. . . . Here no title has passed, but the trustee's sale in question was not void in the sense that no title passed to the purchaser. It was merely voidable at the election of the parties prejudiced thereby."

In the case of *Jones v. Hill*, 9 Bush, 695, the court said: "It is a general rule, to which we can see nothing in this case constituting an exception, that a contract or conveyance will not be set aside for actual or constructive fraud except at the option of the party defrauded." And to the same effect are the cases of *Ayers v. Hewett*, 19 Me. 286; *Tufts v. Matthews*, 10 Fed. Rep. 610; *Norton v. Tuttle*, 60 Ill. 184.

In *Livingston v. Peru Iron Co.*, 2 Paige, 393, 2 N. Y. Ch. L. ed. 958, it is said: "The complainant cannot recover upon the bill in its present shape. 'Although the conveyance of the land was obtained by a fraudulent misrepresentation it was not void. It was only voidable at the election of the vendor. And the defendants, or some of them, were in the actual possession of the premises, claiming title to the same under their deed, at the time of the conveyance to the complainant. The legal title to this property

could not pass to the complainant under that conveyance, while it was thus held adversely. If John Livingston was still living, he would be a necessary party to a bill to rescind the sale on the ground of fraud."

In *Prosser v. Edmonds*, 1 Younge & C. Exch. 496, Lord Chief Baron Abinger said: "The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this: whether or not parties who either became purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged that an equitable, as well as a legal, interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But, where an equitable interest is assigned, it appears to me that, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. . . . In the present case, it is impossible that the assignee can obtain any benefit from his security except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. . . . What is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. . . . There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles, and by analogy, to such acts, a court of equity will discourage the practice." This decision has never been reversed; but, upon the contrary, whenever the question has been raised on the right of the assignee to sue in his own name, to set aside a conveyance obtained by fraud, when he was not the real party in interest, his application has been denied. 2 Spence, Eq. Jur. 867; *De Hoghton v. Money*, L. R. 2 Ch. App. 164; *Hill v. Boyle*, L. R. 4 Eq. 268.

In deciding this case in the court below, the judge said: "I am still of the opinion, under the principles stated in the cases of *McMahon v. Allen*, 35 N. Y. 403; *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148 [26 L. ed. 106], and *Dickinson v. Burrell*, L. R. 1 Eq. 887,—that, where not only the right to bring the action is assigned, but also an interest in the property is conveyed, to the assignee, as was done here, the assignee can maintain the action." We cannot agree with the learned judge who presided at the trial of this cause, that "all interest in the property was conveyed to the assignee." All that was transferred was the mere right to commence and maintain this action in the name

of Mrs. Gruber; and, upon the termination of the suit, she was not only to reed to him a portion of the property recovered, but the entire portion as represented by the Pollard interest.

The case of *McMahon v. Allen* has no application to this case whatever. In that case Allen was the agent and attorney of Harrison. Allen knew that his client was in debt, and, so knowing, induced Harrison, by fraudulent representations, to convey to him his interest in his mother's estate. Harrison, being ignorant of the fraud practiced upon him, made a general assignment for the benefit of his creditors of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. It cannot control the present case, because the assignment and conveyance were made for the benefit of the creditors of Harrison, with full power to sue for their benefit, which made them the parties beneficially interested; and they were the real parties in interest when they were trying to secure their own just demands. It is an elementary principle of law that all the property which a debtor has shall be responsible for his debts. Therefore, when Harrison sold the property to Allen, the creditors had such an interest in the property as would entitle them to maintain an action in their own names, under the Statute of Frauds, to set aside the conveyance to Allen, without any assignment from Harrison whatever.

The case of *Graham v. La Crosse & M. R. Co.* supports the views we have expressed in this opinion, and approves the decision in the case of *Prosser v. Edmonds*, and draws the distinction between that case and the cases of *McMahon v. Allen* and *Dickinson v. Burrell*, and a number of other cases. The supreme court also approves of the opinions rendered in the cases of *Orocker v. Bellangee*, 6 Wis. 645, and in *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.*, 20 Wis. 183, by saying: "A deed obtained from the grantor through fraudulent representations made by the grantee is not void, but voidable only at the election of the grantor, and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title,—the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right, incapable of sale or transfer.

. . . In other words, is this mere right to litigate the question, and to set aside the deed or release on account of fraud practiced upon the assignor, a subject of assignment and transfer? And will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?"

The court held that the assignee could not maintain the action in his own name.

In the present case, at the time Pollard made the deed to Mrs. Gruber, he had no title to convey. Pollard having prior thereto conveyed all his right, title and interest in and to the mining claim to Muncckton, and placed him in possession of the same. His deed to Muncckton was not void, but merely voidable, and was a valid deed, as between the parties, until such time as Pollard should have instituted proper proceedings to have the same set aside on the ground of fraud perpetrated upon him by Muncckton. It cannot be disputed that, if an innocent party had purchased from Muncckton, before these proceedings had been commenced, not knowing of the fraud,—if a fraud had been perpetrated,—he would hold the legal title to the property, as against Pollard.

The case of *Dickinson v. Burrell* is not in conflict with that of *Prosser v. Edmonds*. In deciding that case, Lord Romilly said: "The demurrer is mainly supported on the case of *Prosser v. Edmonds*, which was decided, after long deliberation, by Lord Abinger; but I am of opinion that the case before me does not fall within the rule established by that decision." His lordship then said: "If James Dickinson had thought fit, after the sale to Edens, . . . to sell the same property to A. B., saying that the previous sale was a fraudulent one, and that, though he himself would not take any steps to set it aside, if A. B. thought fit to do so he might, and that he would sell all his interest in the property to A. B. for a sum of money then bona fide agreed on, in such a case, in my opinion, A. B. could have maintained this suit. . . . I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, . . . has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense. I am therefore of opinion that, if the present plaintiffs had given valuable consideration for the execution of the indenture, . . . they would have been entitled to maintain this suit. . . . It is contended that in a case of this description the fact that the conveyance is voluntary suggests the possibility of some secret understanding or subordinate agreement by which the property, when recovered, is to be reconveyed, or to be discharged from the trusts, and that in fact the voluntary conveyance is made only colorable, and for the purpose of instituting or maintaining such a suit as the present. This may possibly be shown hereafter, in the progress of the cause; but on this demurrer, where I am bound to take the allegations as true, I cannot entertain any such suspicion. I am bound by the allegations in the bill, which I must assume to be true; and, that being so, the right to sue is, in my opinion, incidental to the interest conveyed to the plaintiffs, and the demurrer must be overruled." The opinion does not only approve of the rule laid down in *Prosser v. Edmonds*, but also decides that, where the property is conveyed for the purpose, merely, of maintaining a suit in the

name of the assignee, it will not be permitted; for the judge says, if there is any secret understanding or subordinate agreement, by which the property, when recovered, is to be reconveyed or to be discharged from the trusts, and that in fact the voluntary conveyance is made only colorable, and for the purpose of instituting or maintaining such a suit as the present, this may possibly be shown hereafter, in the progress of the cause,—intimating that, if such a state of facts were shown upon the trial of the cause, the bill would be dismissed, but upon the demurrer he could not inquire into the facts of the case; and the demurrer was overruled.

In the present case, we have the written agreement of the parties, as well as the testimony of Pollard, as to the understanding between themselves, that the property was to be reconveyed to him upon the termination of the suit. See also *Traer v. Clews*, 115 U. S. 539 [29 L. ed. 470], where it is held that the mere right to file a bill in equity for a fraud committed upon the assignor will be void, as contrary to public policy. The mere fact that Mrs. Gruber and Pollard are tenants in common does not change the principle of this rule. They are strangers to one another in so far as their titles are concerned. One could sue without the other's consent, or sell her or his share to whom they pleased, and for whatever price they saw fit to fix upon it. In fact, they are independent of each other, and may deal with each other in the same manner as owners of separate property.

The assignment to Mrs. Gruber of the Pollard interest being for the sole purpose of having her maintain this action in her own name, she is not the real party in interest, and to allow her to prosecute this suit as to the Pollard interest would be contrary to public policy. The court, therefore, erred in holding that Mrs. Gruber could maintain this suit as to the Pollard interest. The bill must be dismissed as to his interest.

The next inquiry is as to the character of the evidence that is requisite to establish fraud. A party alleging fraud must clearly and distinctly prove the fraud as alleged. If the fraud is not proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings; for fraud will not be carried, by way of relief, one tittle beyond the manner in which it is proven. The rules of evidence are the same in equity as at law; and when certain facts, as proved, amount to a fraud, is a question for the court. But the court is not justified in finding such facts upon any less or different kind of proof than would be required to satisfy a jury, for the law in no case will presume fraud. The presumption is always in favor of innocence, and not of guilt. In no doubtful matters should the court lean to the conclusion that a fraud had been committed; nor should it be assumed on doubtful evidence. The facts sufficient to establish a fraud should be clear and convincing. Circumstances of mere suspicion will not warrant the court in coming to the conclusion that a fraud has been committed. We do not wish

to be understood as holding that, in order to establish fraud, it requires direct or positive proof; for in matters that regard the conduct of men the certainty of mathematical demonstration cannot be expected or required, and much of human knowledge on all subjects may be inferred from facts that are established. Care should be taken, however, not to draw conclusions hastily from premises that will not warrant it; but, if the facts established afford a sufficient and reasonable ground for drawing the inferences of fraud, the conclusion to which the proof tends must, in the absence of contradiction, be adopted. The motives with which an act is done may be, and often are, ascertained and determined by circumstances connected with the transaction. Various facts and circumstances evince sometimes, with unerring certainty, the hidden purposes of the mind. Therefore, fraud may be shown by circumstances. But when the evidence, whether it be direct or circumstantial, is so strong as to produce conviction in the mind of the judge of the truth of the charge, it will be sufficient. This we take to be the extent of the rule that fraud must be proved. But this does not authorize the finding of fraud on less than a preponderance of the evidence, taken as a whole; for it is difficult to see how any disputed question of fact can be found except by the greater weight of evidence. The difference in the weight may be slight, but, unless it preponderates on the side of the plaintiff, the matter in dispute cannot be said to be proved; and this rule is adhered to more strictly in actions of this character than in any other class of civil cases, for it is said that while the law abhors fraud, it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of parties. What amount or weight of evidence is sufficient proof of a fraud is not a matter of legal definition. The proof, however, must be satisfactory. It should be so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference of fraud may be drawn. As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed.

The evidence in this case shows the following state of facts: Neighley was the foreman of the mine, and had control of the same. Oest was at the mine every day or two. Pollard crushed the ore at his mill, kept the books and accounts, paid the men and was the superintendent, in so far as it was necessary to have one. The Bay Bros., who were acting as agents for Mrs. Gruber, had the contract for the hauling of the ore to the mill for reduction, and were at the mine every day or two to haul the ore away. A rich body of ore was discovered in the mine on or about the 28d day of November, 1887. The man employed in the mine, and who made this discovery, went to Oest's house, called

him out of bed, and informed him of the development in the mine. Neighley, on his return to the mine in the morning, found the prospect in the blacksmith shop which had been left there, and immediately proceeded to seek from whence it came, and found the place. Neighley then notified Oest and Munckton of the discovery. Baker was also notified of the strike, and was taken into the mine by Neighley, and permitted to examine the place from which the rich quartz came; and Neighley took samples of the ore, and prospected them for Baker's benefit. Immediately after the discovery in the mine and the examination as made by Baker, Munckton proceeded to negotiate for the purchase of Mrs. Gruber's interest in the mine. The place from whence the rich quartz came was concealed by directions of Neighley, so that, if an owner had gone into the mine, he could not have found the place from which the rich ore came, with ordinary diligence, without someone who was aware of the covering up had pointed it out to him. Munckton had been, and was being, informed every day or two as to the condition of the mine, from the time of the discovery until he had purchased the Gruber interest, by Neighley and others employed in the mine, and was also notified by Neighley that the place from whence the rich rock came was covered up so that it would not do the owners any good if they did go into the mine; and, although the agent of Mrs. Gruber was at the mine nearly every day, and did ask Neighley every day, during the negotiations, as to the condition of the mine, he was informed that there was no improvement in the ore body or the mine. And this fraud and deception were kept up from the date of the discovery until Munckton had received his deed for the property. Although the evidence is conflicting, yet the preponderance of the evidence is in favor of Mrs. Gruber's claim. Munckton, knowing that Neighley was perpetrating a fraud upon Mrs. Gruber, cannot be permitted to avail himself of the benefits thereof. He, knowing what Neighley was doing, became a party to the fraud; and in actions of this nature the true measure of damages are the profits derived from the property while in the possession of the purchaser. The facts in this case support the judgment as to the Gruber interest.

The judgment of the court will be that Munckton and Baker shall reconvey to Mrs. Caroline Gruber one-fourth interest in the Oest mine, and the said Munckton and Baker pay to Mrs. Gruber the sum of \$11,000; that the action for the Pollard interest be dismissed; and that the appellants have judgment for their costs on appeal.

Hawley, Ch. J., concurring:

The right of Mrs. Gruber to maintain this action in her own name for the one-quarter interest deeded to her by Pollard is the only question upon which there is any difference of opinion among the members of this court. The terms of the agreement executed contemporaneously with the deed clearly show that there was no absolute sale, no conveyance of the property, nor of any interest

therein. Mrs. Gruber acquired no right, title or interest in or to the one-quarter interest of Pollard in the Oest mine by the deed, or in the fruits of the litigation, so far as that interest is concerned. All that was conveyed to her, or that was intended to be conveyed, was the mere naked right to sue in her own name for the sole benefit of Pollard. There are some very respectable authorities which maintain the doctrine that the right to bring an action to cancel a deed for fraud cannot be conveyed or assigned even to a purchaser for value. Other—more numerous and better considered—cases declare that the party who has been defrauded may sell his equitable interest in the property to a third party, and that such third party may establish the fraud in equity, and thereby be protected in his purchase. These authorities recognize the distinction between an absolute conveyance of the property, and the assignment of a mere right to sue for the benefit of the grantor. Where the conveyance is made to another person, bona fide, for a valuable consideration, such person can maintain the action in his own name; for he is the real party in interest. If a conveyance is made to a trustee for the benefit of creditors, minor heirs or persons who may inherit an interest in the estate, or in any case where the assignee has an interest in the fruits of the litigation, the action can be maintained, for the same reason. But, if the transaction relating to the assignment or conveyance of the property amounts simply to a mere right in the assignee or grantee to sue in his name for the sole benefit of the assignor or grantor, then the action cannot be maintained. All the authorities agree that the assignment of a bare right to file a bill in equity for a fraud committed on the assignor cannot be maintained in the name of the assignee. The fraud upon Mrs. Gruber and Pollard arose out of the purchase of their separate interests in the Oest mine, at the same time, in the same manner and from the same cause; but Mrs. Gruber was not thereby defrauded or damaged by the sale of Pollard's interest, nor was Pollard injured by the fraud upon Mrs. Gruber. They were both equally interested in having the transaction declared fraudulent, and beyond that their interests and rights were entirely separate and distinct. Neither had any right, title or interest whatever, either in the damages, or in the property to be recovered by the other.

It is claimed that the assignment of the Pollard interest to Mrs. Gruber ought to be sustained because it tended to lessen the litigation, and to avoid the unnecessary expenses of separate suits; in other words, that appellants, instead of being prejudiced, have really been benefited, by the assignment. The contention is not well founded. If two persons were injured in a collision upon a railroad, at the same time and place, one of them might, by assigning his cause of action for damages to the other, for the purpose of settling all disputed questions in one suit, materially lessen the expenses of the litigation; and cases might be imagined where such a course would be beneficial, instead of prejudicial, to the railroad corporation, the de-

fendant in the action. But is it not equally clear that cases might frequently arise when it would be detrimental and injurious to the interest and legal rights of the defendant? If such a practice were permissible, the parties injured, by blending the causes of action into one suit, and thereby uniting the weaker with the stronger and clearer case, might stand a much better chance for a recovery on both than if each was made to rest exclusively upon its own merits. Would not the defendant in such an action, irrespective of the question of expense or injury, and without any proof that the assignment was champertous, have the right to object, and have his objections maintained, upon the ground that the law does not permit such actions to be assigned? It is within the power of the Legislature, whenever it is deemed advisable so to do, in the interest of public justice, to make causes of action for fraud assignable, so as to authorize any person to maintain such a suit for the benefit of another; and, in my opinion, it is a safer and better course for the courts to leave the question of practice, if any change is needed, to be decided by legislative action. It may be that no harm or injury has resulted in this particular case to appellants; but they had the legal right to prove, as they did, that Mrs. Gruber had no interest whatever in the interest in the mine deeded to her by Pollard, or in the damages to be recovered thereon, and to object to her maintaining the suit as to the Pollard interest on that ground, and to rely in support of the objection upon the numerous authorities which without exception declare that such assignments are void as against good policy, and savor of maintenance. This conclusion is based upon the theory that such assignments, if allowed, would have a tendency to encourage litigation, and lead to improper intermeddling and undue interference in the prosecution of such suits. I am of opinion that, as a general rule, it would lead to such injurious results, and that the reasons given in the decided cases are substantial, wise and just, and ought to be sustained. Entertaining these views, I concur in the judgment announced by *Mr. Justice Murphy*.

Belknap, J., dissenting:

Caroline Gruber, A. A. Pollard and Fred Oest owned the Oest mine as tenants in common, and worked it as copartners. They were engaged in the partnership business for some time prior to the ore discovery, and until the sale to Munckton. The business was unprofitable. The relations of the Bay Bros., who were Mrs. Gruber's brothers, and who represented her interest in the mine and partnership, were unfriendly with Mr. Oest, the principal owner, and Mrs. Gruber had offered her interest for sale. In this condition of affairs, and on the night of the 20th of November, 1887, the rich ore was struck. All information of the discovery was withheld from Mrs. Gruber and her brothers and from Pollard, by direction of Oest, for the purpose, as he declared, of getting rid of the Bays. Subsequent explorations made for the purpose of ascertaining the extent and value of the ore

body were conducted pursuant to this plan. The rich ore was not mined, but low grade and unprofitable ores were worked, for the purpose of discouraging the plaintiff, and inducing her to sell. Munckton received early information of the discovery from Oest, and, at his request, from Neighley, the foreman; and defendant Baker, a brother-in-law of Neighley, was allowed to examine the mine, and shown the discovery. Negotiations entered into at first for the purpose of purchasing only Mrs. Gruber's interest resulted in the purchase of her interest and Pollard's as well. A joint deed was made by them to Munckton,—Baker's interest being concealed; and afterwards Munckton conveyed to him one half of the interest acquired. Pollard was superintendent, but gave little personal attention to the workings of the mine. He and the other owners relied upon the reports of its condition made to them by Neighley, the foreman. During the period between the strike and the sale, and while the negotiations were pending, both Pollard and the plaintiff, by her agent, inquired of Neighley concerning the condition of the mine. He stated that no change had taken place and that there was nothing new to report. Relying upon these statements, and with no suggestion to the contrary, plaintiff sold her one-quarter interest for \$4,000, and Pollard a like interest for \$2,000. The ore discovered yielded in gross \$112,000, of which sum \$58,000 were profits, one half of which, or \$28,000, defendants received.

Leaving out of consideration the acts of Oest, Neighley was bound to truthfully report to the plaintiff, or her agent, and to Pollard. Instead of stating the truth, he concealed it. If Munckton had been ignorant of this concealment, and dealt at arm's-length with the sellers, it might well be argued that he was under no obligation to inform them of the value of their property. But it is manifest that he knew of the fact and purpose of the concealment. Upon this point the learned judge before whom the cause was tried says: "But all the evidence and the circumstances, taken together, convince me that Munckton and Baker knew the plaintiff and Pollard had not learned of the discovery of ore, and knew of the means by which the knowledge had been kept from them." And again: "Munckton knew of it; and, if he had thought that Pollard and the Bays also knew it (as he certainly would, if he did not know to the contrary), he would certainly have mentioned it in the course of the negotiations, defeating the whole scheme." The discovery greatly enhanced the value of the mine. It was the inducement to defendants to purchase; and, if the sellers had known of it, they naturally would have used the fact for what it was worth. But plaintiff asked no more for her interest than the price she had offered it at before the strike, and Munckton conducted his negotiations so as not to disclose the fact of the discovery. From these facts the district court must have concluded that Munckton's conduct was inconsistent with ignorance of the concealment. They are sufficient, in connection with the fact that knowledge of the strike was con-

cealed from plaintiff and Pollard, and communicated to Munckton, in order that he might purchase, to support the finding of the district court upon this point. The scheme to defraud did not originate with Munckton. Others set in on foot, and bore a more active part than he in the perpetration of the fraud, but he consummated it by purchasing with guilty knowledge of the general plan. He cannot, therefore, retain the avails of the scheme. The decree of the district court directs a cancellation of the deed of conveyance to the defendants, requires a reconveyance, and that they repay to the plaintiff the profits acquired from the mine.

Appellants claim that the measure of damages should have been the difference between the market value of plaintiff's interest and the value she received. In an action at law, when a plaintiff affirms a contract and seeks only damages caused by fraudulent representation, the difference between the actual value and the price paid may afford compensation. But this is not a case of that character. Plaintiff does not affirm, but repudiates, the contract, and seeks a rescission of it. Under the rule invoked, she would receive \$1,000 damages,—that sum being the difference between the price paid and the market value,—while the profits upon the ore—amounting, for the one-half interest, to the sum of \$28,000—would inure to the benefit of the defendants. The injustice of this view is clear, and it is equally clear that the court, in placing the plaintiff, so far as it could, as if no fraud had been practiced, adopted the only rule of damages that could afford adequate relief.

Objection was taken that Adam Bay was not made a party plaintiff. Appellants urge that he was the real owner of a one-quarter interest in the mine, standing in the name of the plaintiff at the time of the sale; that, although the legal title was in the plaintiff, she was in fact a mortgagee. We will not consider the testimony upon this point. Defendant Munckton had purchased his interest and that of Baker from her, and was in possession under her deed. They were therefore estopped to deny her title. This view renders it unnecessary to consider the objection to the ruling of the court excluding the testimony of Mr. James A. Stephens, the attorney who drew the deed from Adam Bay to Mrs. Gruber, and by whom defendants offered to show that it was intended as a mortgage.

Further objection is made to the character of proof by which plaintiff's case was established. Neighley, the foreman above mentioned, and who actively participated in the perpetration of the fraud, was plaintiff's principal witness, and as such detailed the means by which the fraud was accomplished. It is said that he stood before the court precisely as an accomplice in crime who confesses his own participation in it. Concede this, and yet upon all material points the testimony of the witness was corroborated.

Appellants also contend that the transfer by Pollard to Mrs. Gruber was simply the transfer of a lawsuit, and is void asavoring

of maintenance. "Maintenance" is defined by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." And "champerty" is defined as "a species of maintenance, . . . being a bargain with a plaintiff or defendant *comprom partire*, to divide the land or other matter sued for between them if they prevail at law." 4 Bl. Com. 184. "The doctrine of the common law as to champerty and maintenance," says Judge Story, "is to be understood with proper limitations and qualifications, and cannot be applied to a person having an interest, or believing that he has an interest, in the subject in dispute, and bona fide acting in the suit; for he may lawfully assist in the defense or maintenance of that suit." 2 Story, Eq. Jur. § 1048a.

Applying these principles to the facts, the agreement between Pollard and Mrs. Gruber does not come within the rules of maintenance, nor within the reason of laws upon that subject. Each had an equal interest in the mine, and had alienated it under a similar state of facts. If either had brought suit to annul his or her deed, the other had such interest in the subject of the litigation as would sustain an agreement for the prosecution of the suit. *Call v. Caley*, 18 Met. 362; *Pinden v. Parker*, 11 Mees. & W. 675.

And, in order that relief for both could be obtained by one suit, Pollard conveyed to Mrs. Gruber. This tended to reduce the expenses of the litigation, and could not have prejudiced appellants. There is an entire absence of officious intermeddling by maintaining or assisting another to prosecute the suit; the agreement expressly providing that they shall divide the expenses of the litigation,—in other words, each shall pay in proportion to his or her interest.

The case of *Prosser v. Edmonds*, 1 Younge & C. Exch. 481, is relied upon by appellants in support of their contention. In that case a debtor had been fraudulently induced to make certain deeds of conveyance. Subsequent creditors, to whom the debtor afterwards assigned his interest in the property, brought a suit in equity to annul the first conveyance. The debtor made no complaint, and refused to be made a party plaintiff to the suit. It was held that the second assignment could not be sustained. The distinction between that case and this is: There the debtor made no complaint. Here the transferrer is, in

effect, a suitor maintaining his share of the expenses of the suit. The class of cases to which *Prosser v. Edmonds* belongs holds that an assignment or transfer will not be upheld when it is, in effect, the transfer of a lawsuit to be prosecuted at the expense of the assignee or transferee. The decisions are placed upon two grounds: (1) that such transactions involve the offenses of maintenance or champerty, or lead to their mischievous consequences, and are therefore repugnant to the policy of the laws upon these subjects; and (2) they are contrary to the common law, which forbade the transfer of a disputed title to real property by a party out of possession, upon the principle that such transfers savored of maintenance. As to the first ground, the agreement set forth involves none of the ingredients of the offenses named, and, as to the second, expressly permits the transfer interdicted by the common law. Gen. Stat. § 8026.

The reasons, therefore, which have required courts to disregard the transfer of disputed rights, do not exist in the present case. I will not consider whether plaintiff is the real party in interest, within the meaning of section 4 of the Civil Practice Act, as this ground was not relied upon by appellants.

As opposed, however, to the view expressed in the opinion of Mr. Justice Murphy, Prof. Bliss, in discussing similar statutes requiring actions to be brought in the name of the real party in interest, says most of the courts have held that, in actions brought by the transferee, it does not concern the defendant for what purpose the transfer was made, and he cannot object unless he has some defense, or holds some claim, against the real owner. Bliss, Code Pl. § 51.

I think the judgment should be affirmed in all respects.

A petition for rehearing was subsequently filed, and on June 28, 1890, **Murphy, J.**, delivered the following response in behalf of the court:

In their petition for a rehearing, counsel for respondent present a number of cases in support of their views therein expressed. The cases so cited were examined by the court while the case was under consideration. We find nothing to change the views expressed in the opinion of the court.

Rehearing denied.

Hawley, Ch. J., concurs; **Belknap, J.**, dissents.

INDIANA SUPREME COURT.

William PENSO, by Philip Reeder, His
Next Friend, *Appt.*,

v.

Asbury McCORMICK et al.

(....Ind.....)

**Mill owners, who have permitted their
uninclosed and publicly situated mill-
yard to be used for a playground by
9 L. R. A.**

children who have been accustomed to play upon the pile of furnace ashes which have for months been cold and devoid of danger, cannot make an excavation therein and fill it with hot ashes, leaving no traces of the change, without either giving proper notice thereof or answering in damages if children of tender years, in attempting to go upon the ash-pile, as usual, get into the hot ashes and are injured.

(September 19, 1890.)

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A PPEAL by plaintiff from a judgment of the Circuit Court for Carroll County sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Judson Applegate and Charles R. Pollard, for appellants:

One who places a dangerous thing in a position where it is likely to cause injuries to others, is liable to a child who is injured, although he may be a trespasser.

Binford v. Johnston, 83 Ind. 430; *Durham v. Musselman*, 2 Blackf. 97; *Young v. Harcey*, 16 Ind. 815; *Graves v. Thomas*, 95 Ind. 864; *Mayhew v. Burns*, 1 West. Rep. 577, 108 Ind. 387; *Lane v. Atlantic Works*, 107 Mass. 106, 111 Mass. 141; *Plumley v. Birge*, 124 Mass. 58; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 44; *Hydraulic Works Co. v. Orr*, 83 Pa. 886; *Schilling v. Abernethy*, 8 Cent. Rep. 168, 112 Pa. 442; *Kerushaker v. Cleveland, O. & O. R. Co.* 8 Ohio St. 189; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 167; *Powers v. Harlow*, 53 Mich. 515; *Power v. Harlow*, 57 Mich. 110; *Davis v. Chicago & N. W. R. Co.* 58 Wla. 656; *Bird v. Holbrook*, 4 Bing. 628; *Daniels v. Potter*, 4 Car. & P. 262; *Illidge v. Goodwin*, 5 Car. & P. 190; *Lynch v. Nurdin*, 1 Q. B. 85; *Stone v. Jackson*, 82 Eng. L. & Eq. 359; *Townsend v. Wathen*, 9 East, 281; *Croughurst v. Amersham Burial Board*, 4 Exch. Div. 6; *Keefe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 395; *Schmidt v. Humphrey*, 48 Iowa, 652, 30 Am. Rep. 415; *Kansas Cent. R. Co. v. Pittsimmons*, 22 Kan. 686, 31 Am. Rep. 205; *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 196.

Although the injury resulting from the wrong complained of must be such as might have been reasonably foreseen and provided against, yet it is sufficient if it was of such a general nature as was likely to result from the act of the wrong-doer.

Dunlap v. Wagner, 85 Ind. 581; *Henry v. Dennis*, 98 Ind. 455; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 488; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 78; *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 576; *Clark v. Chambers*, L. R. 3 Q. B. Div. 337.

An owner of property cannot place temptations upon it, to allure anyone to a dangerous place upon its premises, and escape liability for injury, that even a trespasser may sustain, in yielding to the temptation to go there.

Schmidt v. Kansas City Distilling Co. 7 West. Rep. 124, 90 Mo. 284. See also *Heaven v. Pender*, 11 Q. B. Div. 608.

The habitual use of a foot-path warrants the finding of a license.

Driscoll v. Newark & R. Co. 87 N. Y. 687; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 292; *Byrnes v. New York Cent. & H. R. R. Co.* 6 Cent. Rep. 892, 104 N. Y. 886; *Taylor v. Delaware & H. O. Co.* 4 Cent. Rep. 628, 118 Pa. 175; *Orogan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 100.

The conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. The care and caution required of a child is according to his maturity

and capacity only, and this is to be determined in each case by the circumstances of that case.

Sioux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 680, 21 L. ed. 748; *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 408, 21 L. ed. 116; *Weick v. Lander*, 75 Ill. 99; *Chicago v. Major*, 18 Ill. 860; *Kerr v. Forgue*, 54 Ill. 484; *Chicago v. Keefe*, 1 West. Rep. 850, 114 Ill. 229; *Schmidt v. Milwaukee & St. P. R. Co.* 23 Wis. 189; *Meibus v. Dodge*, 88 Wis. 808; *Townley v. Chicago, M. & St. P. R. Co.* 58 Wis. 636; *Mulligan v. Curtis*, 100 Mass. 514; *Elkins v. Boston & A. R. Co.* 115 Mass. 200; *Lynch v. Smith*, 104 Mass. 57; *Plumley v. Birge*, 124 Mass. 58; *O'Connor v. Boston & L. R. Co.* 185 Mass. 862; *Collins v. South Boston H. R. Co.* 2 New Eng. Rep. 649, 142 Mass. 815; *Moyntihan v. Whidden*, 8 New Eng. Rep. 863, 143 Mass. 292; *Reynolds v. New York Cent. & H. R. R. Co.* 58 N. Y. 252; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 838; *Maher v. Central Park, N. & E. R. Co.* 67 N. Y. 54; *McGoern v. New York Cent. & H. R. R. Co.* 67 N. Y. 421; *Byrnes v. New York Cent. & H. R. R. Co.* 88 N. Y. 621; *Dowling v. New York Cent. & H. R. R. Co.* 90 N. Y. 871; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 394; *Kuns v. Troy*, 6 Cent. Rep. 498, 104 N. Y. 850; *Rauch v. Lloyd*, 81 Pa. 870; *Pennsylvania R. Co. v. Kelly*, Id. 878; *Philadelphia & R. R. Co. v. Spears*, 47 Pa. 804; *Oakland R. Co. v. Fielding*, 48 Pa. 826; *Smith v. O'Connor*, Id. 222; *Gray v. Scott*, 66 Pa. 247; *Orissey v. Heatonville, M. & F. P. R. Co.* 75 Pa. 86; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 88; *Philadelphia, B. & W. R. Co. v. Layer*, 8 Cent. Rep. 381, 112 Pa. 418; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 518; *Daniels v. Clegg*, 28 Mich. 41; *Hassenger v. Michigan Cent. R. Co.* 48 Mich. 209; *Hutsega v. Outler & S. L. Co.* 51 Mich. 276; *Whirley v. Whitman*, 1 Head, 622; *Brown v. European & N. A. R. Co.* 58 Me. 387; *Lynch v. Nurdin*, 1 Q. B. 88; *Evansich v. G. O. & S. F. R. Co.* 57 Tex. 126; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 196; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 406; *Indianapolis, P. & O. R. Co. v. Pitzer*, 7 West. Rep. 396, 109 Ind. 188.

Mr. Joseph A. Sims, for appellees:

Mischief which, by no reasonable probability, could have been foreseen, and which no reasonable person would have anticipated, cannot be made the basis upon which to predicate a wrong, or to maintain an action.

Durham v. Musselman, 2 Blackf. 96; *Wabash, St. L. & P. R. Co. v. Locke*, 11 West. Rep. 877, 112 Ind. 404.

The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers and licensees, or others who come upon them, not by invitation, express or implied, but for their own pleasure or to gratify their own curiosity, however innocent or laudable their purpose may be. An accident on private premises cannot be made the ground for damages unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there, as to a place of business, or of general resort, held out as open to customers or others whose lawful occasion leads them to visit there.

Hargreaves v. Deacon, 25 Mich. 1; *Kahn v.*

Lovett, 44 Ga. 251; *Zoebisch v. Tarbell*, 10 Allen, 885; *Victory v. Baker*, 87 N. Y. 366; *Murray v. McLean*, 57 Ill. 878.

Olds, J., delivered the opinion of the court:

This is an action brought by the appellant against the appellees for damages resulting to William Pensio, an infant of the age of eight, by falling into a pit of hot ashes and burning embers while crossing the mill-yard of the appellees. Appellees demurred to the complaint for want of facts. The court sustained the demurrer, to which ruling the appellant excepted and prosecutes this appeal and asks a reversal on the ground that the court erred in sustaining the demurrer.

The complaint alleges the appellant William Pensio to have been an orphan about eight years of age at the time of the happening of the grievances complained of, and that for seven years prior to that time he had resided with a family in the Town of Rockfield, in Carroll County, Indiana; that the appellees were conducting, and for many years had conducted, a saw-mill in said town; that the mill was situated in the most public part of the town or village, near to a public highway and railway station in said town; that the grounds surrounding said mill were not and never had been inclosed, and were used by the citizens of the town as a passageway from one street to another, and also used for a play-ground for the children of said town, including the appellant Pensio, with the knowledge, approbation and consent of the appellees; that for months immediately prior to the 21st day of May, 1887, the time of the injury to said appellant, there was a mound on said mill grounds, from four to five feet high, made and formed by the appellees, of ashes and cinders before that time accumulated at the mill and deposited on the mill grounds, from which mound of ashes all heat had escaped, and such mound constituted a favorite play-ground for the children of the town, including the appellant, where they were accustomed to gather and play upon until said 21st day of May, 1887; that upon said day, without giving any notice to the appellant or to the public generally, the appellees excavated and removed from one side of the base of said mound about twenty bushels of ashes and filled the cavity so made with embers and cinders, hot, glowing and burning from the fire box of the engine; that appellees erected no barriers about the smouldering mass of embers and cinders, nor did they give any warning that it was dangerous to step upon it; that in a very short time the outer surface ceased to give out light, heat and smoke, and presented the appearance of the remainder of the mound, and to all appearance all parts of the mound were the same in condition and structure, but in fact that portion so recently deposited was a smouldering, burning heap beneath the surface, and while in such condition, on said day, the appellant was sent by the persons with whom he lived for the cows; that the cows were then and before that time accustomed to pasture on the commons in said town and the uninclosed

land in and about said mill-yard; that appellant, while in search of the cows, passed in and attempted to cross said mill-yard, passing onto the top of the mound safely, and seeing nothing to admonish him of any danger or the condition of the recently deposited embers and cinders, in pursuing his course he attempted to pass down upon the other side of the mound, when, without any fault upon his part, he stepped into the mass of burning embers and cinders and received very severe injuries.

The allegations of the complaint show that the appellees, in removing the ashes, embers and cinders from their saw-mill and depositing them on their uninclosed mill-yard, in a public place in the town, and near to a public street, had built a mound, and that for several months prior to the time of appellant's injuries the embers had ceased burning and the mound had cooled and was in a safe condition to pass over, and the citizens of the town had been accustomed to pass over it for months, and during which time the children of the town, including appellant, had been accustomed to play upon the mound so built of ashes, embers and cinders; that without any notice or warning the appellees, on the day of the injury, had excavated a hole or pit in one side of the heap or mound, and refilled it with hot and burning coals, embers and cinders, the top of which immediately cooled and gave no signs of any change in the condition of the mound or any warning of danger to those who had been accustomed to pass over and play upon the mound; and the question is presented whether, under such circumstances, the owners of the mill were not required, in making such change and creating such a danger pit in such public place and near to a public street, to give proper notice of the changed condition of the mound and of the danger imminent from passing over it.

As a general rule the owner of land has the right to the sole use and occupation of it, but such use and enjoyment of it must be exercised with a due regard for the public good and with a reasonable and humane regard for the welfare and rights of others.

The case of *Young v. Harvey*, 16 Ind. 814, was brought to recover the value of a horse killed through the negligence of the defendant. The facts were, Harvey, the defendant, commenced digging a well upon a lot owned by him. He sunk it to a depth of six feet, being forty-two inches across, and then abandoned it. It was located in an uninclosed lot near the line of a street in a suburb of Indianapolis. It remained a long time in this condition, sometimes partly covered with loose boards. Stock was allowed to run at large and did run at large on the commons in the vicinity of this lot and of which the lot formed a part. On a certain day the plaintiff's horse fell in the hole and was killed. As to whether the action could be maintained or not the court says: "Whether it can be or not depends upon the degree of probability there was that such accident might happen from thus leaving exposed the partially dug well, considered, perhaps, in connection with the usefulness of the act or thing caus-

ing the damage. *Durham v. Musselman*, 2 Blackf. 96.

If the probability was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard that community from the danger to which the pit exposed its members in person and property, he is liable to an action for loss occurring through his neglect to perform that duty. We think any reasonable man, of ordinary understanding and extent of observation of the ways of life, would say that the probability of injury to others, under the circumstances, from leaving the well in question in the condition it was, was not only strong, but that it amounted almost to certainty."

The case of *Graves v. Thomas*, 95 Ind. 861, was brought to recover damages suffered by the plaintiff from falling into an excavation for a cellar recently made by the defendant upon a lot adjoining a street and sidewalk in the city of Terre Haute, the defendant having negligently failed to guard said excavation or to place any signals to warn passers-by of the danger, it appearing that there had been a path diverging from the sidewalk and passing over the defendant's lot, which had been used by persons passing along the street for a number of years. The court in that case says: "In the case at bar we think that the fact that for a long period the public using the sidewalk had been permitted to use the place where the plaintiff fell as a part of the sidewalk made it the duty of the defendant to guard the excavation made at that place, and that the jury were authorized to find from the evidence that the plaintiff did not by her own negligence contribute to the injury."

In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, it was held that where a person for a long time allowed a portion of his lot to be used as a part of the street, and made an excavation in his lot about ten feet from the street, by which a person was injured, he was liable.

In *Binford v. Johnston*, 83 Ind. 480, the court says: "There are many well reasoned cases which, carrying the doctrine still further, hold that one who places a dangerous thing in a position where it is likely to cause injuries to others is liable to a child who is injured, although he may be a trespasser."

In the case of *Harriman v. Pittsburgh, O. & St. L. R. Co.*, 45 Ohio St. 11, 9 West. Rep. 488, it is held that where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and it is bound to exercise care accordingly proportioned to the probable danger to persons using its road. The injury in that case was caused by the explosion of a signal torpedo left upon the track, and the court, after a careful review of the authorities, says: "The defendant, knowing of the probable use of its roadway by children, from the previous habitual use thereof by the public, 9 L. R. A.

long acquiesced in by the defendant, ought reasonably to have anticipated such use by the plaintiff and other children; and its servants, in placing and leaving the unexploded torpedo, an innocent looking, but highly dangerous and destructive, article, where they might reasonably anticipate plaintiff and other children would be likely to go and handle it and be injured, thus placing a new and hidden danger in their way without notice or warning, failed to use such care as a person of ordinary prudence would and ought under the circumstances."

In the case of *Indianapolis v. Emmelman*, 108 Ind. 580, 6 West. Rep. 566, the court says: "The excavation into which the appellee's son fell was made in Spruce Street, at a point where it crosses Pleasant Run. It was made in the bed of a shallow stream, and left alone unguarded on a July day, with knowledge that children were accustomed to play in the vicinity. The city must be held to know that children are attracted to such a place in July weather. They were not intruders. It was gross carelessness on the part of the city, with such knowledge, to leave an unguarded pit filled with water in the street, into which an unsuspecting child might fall."

The court in the same case further says: "Conceding all that has been contended for in respect to the condition of the pit, the levee and the street and run at the time and place of the sad occurrence, the fact remains that the city made an excavation in a street at a place where it knew children living in the vicinity were accustomed to play, and where they had a right to be at all proper times, without being intruders upon the premises or invaders of the rights of anyone. In the absence of the workmen, that the children went into the shallow stream to play was precisely what the appellant might have expected. It owed them the duty to guard the pit in the street so that they might not fall into it and perish. Neither the father nor mother knew of, nor had they reason to suspect, any danger at the place in question. It was therefore not negligence to permit the child to be with another, as the mother supposed it was, at such a place so near its home."

It is a well-recognized doctrine that persons are required to use greater care in dealing with children of tender years than with older persons who have reached the age of discretion, and that greater care is required to avoid injury to them, even when they are trespassers. *Indianapolis, P. & O. R. Co. v. Pitzer*, 109 Ind. 179, 7 West. Rep. 896.

The facts as pleaded in this case show that the appellee, after having created the mound of ashes upon this uninclosed lot in a public place in the town, near a public street, had for months known of and permitted its use by the public to pass over from one street to another, and as a play-ground for the appellant, a child only eight years of age, and other children of the town, which use they had known and acquiesced in to such an extent as we think amounted to a license to such children to use the same for such purpose, and under such circumstances, instead

of using care to avoid injury to such children, they made an excavation and filled it with hot and burning embers, the top of which, being exposed, immediately cooled and presented its former condition upon the surface, but underneath was a hidden mass of burning embers and fire, which, under the circumstances, it was but reasonable to suppose and to anticipate that children of tender years who were accustomed to use the same as a play-ground and as a passageway, would enter upon and into and be severely injured. Under the facts alleged in the complaint it was but reasonable to expect that would occur which did in fact occur, viz., that a child accustomed to pass over and play upon the heap with the knowledge and acquiescence of the appellees, would enter upon and sink into the hidden pitfall constructed by the appellees, and be severely and dangerously burned and injured. We do not hold or intend to hold that the appellees would be liable for the ordinary use of their lot in piling hot ashes taken from their mill upon it in the usual way, or that persons are liable ordinarily for mere negligence in the use of their own property as against trespassers. But the allegations of the complaint show a wanton disregard of the rights and safety of others. It shows that the appellees had, by their knowledge and acquiescence, given license to children of tender years to use their uninclosed lot as a play-ground, and, without any warning to them or others, they constructed a pitfall in the ground where such children were accustomed to play, which they filled with burning embers, and which gave forth no signs of its condition or the danger in stepping upon its covering, and while in this condition the plaintiff, a child of tender years, entered upon it, as he was accustomed to do, without any knowledge of its changed condition, and was severely burned and injured, and the appellees are liable under such circumstances to respond in damages.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed at costs of appellees, and for further proceedings in accordance with this opinion.

PHOENIX INSURANCE CO., of Brooklyn,
N. Y., *Appt.*,

Albert A. TOMLINSON.

(....Ind.....)

Acceptance by the insurer, with full knowledge of the facts, of the amount due on a premi-

NOTE—Fire insurance: forfeiture for nonpayment of premium note; waiver of.

A condition that the company shall not be liable for any loss or damage, if default shall have been made in the payment of any installment due by the terms of any installment note, is valid, although by the terms of the contract the premium notes of the insured remain binding upon him. *Blackerby v. Continental Ins. Co.* 88 Ky. 374.

A clause in a policy of fire insurance, providing

um note which was overdue and unpaid at the time of the destruction of a part of the insured property, will render him liable, under a policy providing for a suspension of liability during default in payment of premium notes, for the amount of the loss already accrued, and will estop him from claiming either a forfeiture or that his liability revived from time of payment and attached only to property not there destroyed, at least where the entire premium was thereby paid and there was no provision that default in payment should entitle the insurer to treat the premium as earned.

(September 18, 1890.)

A PPEAL by defendant from a judgment of the Superior Court for Marion County, overruling a demurrer to the complaint in an action brought to recover the amount alleged to be due under a policy of fire insurance. *Affirmed.*

The case is fully stated in the opinion.

Messrs. Alexander Gilchrist, C. A. De-Bruler and Ayres, Brown & Harvey, for appellant:

A waiver by an insurance company, by any act of the company, cannot be implied where the policy itself provides expressly what the effect of the act shall be. When the policy provides what the effect of paying the premium note shall be, that provision is alone to be looked to.

Willcuts v. Northwestern Mut. L. Ins. Co. 81 Ind. 800.

Nonpayment of the premium note made the policy void during the default. The Company, in taking judgment upon the note, waived nothing. The effect of payment was to make the policy good from the time only of the payment. As it appears by the complaint that the loss occurred during the default, there can be no recovery.

Willcuts v. Northwestern Mut. L. Ins. Co. *supra*; *Klein v. New York L. Ins. Co.* 104 U. S. 88, 28 L. ed. 663; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696, 28 L. ed. 866; *Beadle v. Okenango County Mut. Ins. Co.* 8 Hill, 161; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543; *Holly v. Metropolitan L. Ins. Co.* 7 Cent. Rep. 263, 105 N. Y. 487; *Wall v. Home Ins. Co.* 86 N. Y. 167. See also *Williams v. Albany City Ins. Co.* 19 Mich. 451.

The question in *Lyon v. Travelers Ins. Co.*, 55 Mich. 141, has been decided in directly the opposite way in *Bane v. Travelers Ins. Co.*, 85 Ky. 677.

Where the right of the insurer to his premium is fixed, the acceptance of it after a breach of some condition of the policy, not relating to the payment of the premium, is no waiver of the breach.

Shimp v. Cedar Rapids Ins. Co. 18 West.

that "the company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof shall be actually paid," may be waived by the company. *Nebraska & L. Ins. Co. v. Christensen* (Neb.) May 18, 1890.

A condition that a company shall not be liable until the premium is paid into its treasury may be waived by its adoption of a course of business allowing agents to receive checks. *Universal F. Ins. Co. v. Rloek*, 1 Cent. Rep. 554, 100 Pa. 585; *Lebanon*

Rep. 857, 26 Ill. App. 254; *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329.

Messrs. Duncan, Smith & Wilson for appellee.

Elliott, J., delivered the opinion of the court:

The complaint of the appellee alleges that the appellant issued to him a policy of insurance covering a period of five years; that in payment of the premium the appellee gave the appellant \$9.73 in money and executed a promissory note for \$16.39; that the property insured was destroyed by fire on the 1st day of August, 1887; that immediately thereafter he gave the appellant due notice of the loss, and that the appellee performed all of the conditions of the contract on his part. The averment of performance is, however, qualified by specific allegations which read thus: "And the plaintiff admits it to be true that when said premium note became due he did not pay the same. But he would further show that after the maturity of the note, and prior to the loss, to wit: on the 25th day of June, 1887, said Phoenix Insurance Company recovered judgment against the plaintiff on said premium note, for the full amount thereof, before one Ezra Martin, a justice of the peace in and for Wayne Township, Marion County, Indiana; that the plaintiff procured execution to be stayed by one _____ offering himself as replevin bail, who was accepted as such by said justice of the peace; that said replevin bail had thus been tendered and accepted before the

happening of said loss; that thereafter, on the expiration of the stay of execution, to wit, on October 10, 1887, the said judgment was by this plaintiff fully paid and satisfied to said justice of the peace." The policy contains the following provision:

"In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity, and no legal action on the part of this Company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy and makes it good for the balance of its term."

The contention of the appellant is that the complaint is bad for the reason that it is not shown that there was a performance of the conditions precedent on the part of the plaintiff. The theory of the appellant's counsel is that the appellant did not, by resorting to legal proceedings, nor by accepting the amount of the judgment rendered on the note, waive its right to insist that the appellee lost his claim to the benefit of the policy during the time the premium remained unpaid. The counsel for the appellee thus outlined their theory: "Our contention is not at all that the taking of the judgment on the premium note and the entering of replevin bail were equivalent to the payment of the note; hence we do not discuss any citations to that point. Our theory of the case is this: We say that when the note went past due, the Insurance Company had a right to de-

Mut. F. Ins. Co. v. Humes, 5 Cent. Rep. 211, 113 Pa. 591.

Where an agent agreed to give notice to the insured before any installment became due, which he failed to do, but afterwards gave notice, when the premium was paid, no claim being made that the policy was forfeited; and the agent then agreed to give notice before all subsequent installments, but gave no such notice, and no further installments were paid,—it was held a waiver of the forfeiture, notwithstanding that the installments were several years past due. *Alexander v. New York Continental Ins. Co.* 67 Wis. 423.

An insurance company waives a forfeiture of a policy, where its adjuster, with full knowledge of the facts, continues to recognize the validity of the policy, and enters into negotiations for a settlement, whereby the insured incurs expense or trouble. *Oshkosh Gas Light Co. v. Germania F. Ins. Co.* 71 Wis. 454.

If, in any negotiations or transactions after forfeiture, under circumstances indicating to the company or its authorized agent that the insured makes a claim under the policy, no reply is made indicating the intention of the company to take advantage of the forfeiture, and the insured afterwards makes proofs of loss, the forfeiture is thereby waived. *Smith v. St. Paul F. & M. Ins. Co.* 8 Dak. 80.

The acceptance of the cash premium by the general agent, after default and notice of the loss, operates as a waiver of the forfeiture, and renders the company continuously liable on the policy, as though the note given for cash premiums had been paid at maturity. *Ibid.*

Where it was the fault of the insurance company that money paid as premium did not reach the company before the loss occurred, in an action on the policy the company is estopped to deny the validity of the claim. *Universal F. Ins. Co. v. Block*, 1 Cent. Rep. 557, 109 Pa. 535.

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Where the premium is promptly paid over to the insurance broker, the fact that the broker retains the money, by arrangement with the agent, will not suspend the company's liability. *Riley v. Com. Mut. F. Ins. Co.* 1 Cent. Rep. 119, 110 Pa. 144.

The forfeiture of an insurance policy for failure to pay the premium is not waived by accepting a part of the amount, where it provides that it shall remain null and void during such default, but that this shall not prevent the company collecting the amount due by suit or otherwise. *Curtin v. Phoenix Ins. Co.* 79 Cal. 619.

An insurance company may recover on an installment note for premium earned prior to any default of the policy-holder in paying the installments, although the policy provides that the company shall not be liable for loss during a default in the payment of an installment, and the policy shall lapse until the payment is made. *Limerick v. Gorham*, 37 Kan. 789.

When the premium of an insurance policy is earned and forfeiture occurs before the loss, taking and retaining the premium is not a waiver of the forfeiture, or evidence tending to show it. *Smith v. Continental Ins. Co. of N. Y. (Dak.)* Oct. 10, 1889.

Before a company can suspend a policy on account of the nonpayment of a premium note, it must, under Laws 1880, chap. 210, not only give thirty days' notice of its intention, but must also notify the assured of the amount required to pay the customary short rates, including the expense of taking the risk, up to the time of the proposed suspension; and the insured does not waive the failure to give such notice by applying for an extension of time on the note. *Boyd v. Cedar Rapids Ins. Co.* 70 Iowa, 325.

Waiver of conditions; what constitutes. See note to *German Ins. Co. v. Gray* (Kan.) 8 L. R. A. 70.

clare such policy forfeited for such nonpayment, and it likewise had the power to waive such forfeiture and consider the policy in force; that this waiver may be by conduct as well as by words; that there are certain lines of action or conduct which, in law, clearly work a waiver of any such forfeiture."

It is established law that the right to declare a forfeiture of a policy for the nonpayment of premiums may be waived, and that the waiver may be manifested by conduct as well as by words. *Sweetser v. Odd Fellows Mut. Assn.* 117 Ind. 97; *Willcuts v. Northwestern Mut. L. Ins. Co.* 81 Ind. 800; *Behler v. German Mut. F. Ins. Co.* 68 Ind. 347; *United L. F. & M. Ins. Co. v. North America Ins. Co.* 42 Ind. 588; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 573 [24 L. ed. 841]; *Appleton v. Phœnix Mut. L. Ins. Co.* 59 N. H. 541; *Stylow v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 69 Wis. 224; *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107.

This general rule is too firmly settled to be shaken; so that the only question which is here open to controversy is whether the Company did waive the right to forfeit the policy by an acceptance of the premium after the loss had occurred.

It is proper to say at the outset that this case is to be discriminated from such cases as *American Ins. Co. v. Henley*, 60 Ind. 515, and *American Ins. Co. v. Leonard*, 80 Ind. 272, for the reason that in those cases the premium notes were shown to be unpaid at the time of the loss, and it did not appear that the insurance company had subsequently accepted payment, while here there was an acceptance of the premium after the loss occurred.

We cannot perceive any valid ground upon which it can be held that an insurance company may accept payment of the entire premium after a loss has occurred, and yet escape payment of the loss. By accepting payment it affirmed the validity of the policy and tacitly asserted that the policy was in force from the time it was executed. In such a case there is no interregnum in which there was a lifeless policy, for the policy is continuous in its nature and effect, and the premium covers the risk as an entirety. It would do violence to the intention of the parties and the language of their contract to declare, as the appellants seek to have us do, that the payment simply revived the policy. It cannot be justly affirmed that the parties meant to revive a policy in a case where, as here, the act which revived it was performed after the loss occurred. The reasonable effect to be attributed to such an act is that the parties meant that the affirmance of the contract should relate back to the execution of the policy.

In our judgment, acceptance of the premium after the loss has occurred is a waiver of the right to declare a forfeiture of the policy, and not a mere act of revivor. It is not reasonable to assume that the parties meant to do no more than revive the policy and give it force from the time of the acceptance of payment, since, as the loss had already occurred, the insured could acquire no benefit from the revived policy. The only rule which would yield him benefit and give him a consideration for his money is that which we adopt.

It is a principle of wide sweep that forfeitures

are not favored, and within the spirit of this principle such cases as this clearly fall. To treat the acceptance of the premium as merely reviving the contract is in effect to adjudge a forfeiture, for in the event that we should adopt the views of the appellant the result would be the same as to adjudge the policy forfeited. This is clear when it is brought to mind that if the policy is held to be lifeless from the time of default in payment until after the loss, it must also be held that the insured cannot recover anything upon his contract. A construction of the conduct of the parties which will practically produce the same result as a declaration of forfeiture is one which it is the duty of the courts to avoid if it can reasonably be done. It is clear that this construction may be reasonably avoided; it is, indeed, quite clear that such a construction as that for which the appellant contends would be against reason and justice.

It is a familiar general rule that a party who accepts and retains benefit from a contract confirms the contract as it was executed. Under the operation of this general rule there is not a revival of the contract, but a confirmation, and we can see no reason why such a case as this should be excepted from the rule. The doctrine we approve produces equitable results. It certainly does so in this case, for it is but just that the Company, having accepted the entire premium after the occurrence of the loss, should yield the consideration for which the premium was paid. It is not just that the Company should retain the premium and give no value in return.

The fact that all of the property insured was not destroyed does not affect the question, for the policy is indivisible and continuous. If, to put an illustrative case, the premium should be \$500 and the amount of the loss only \$50, and the Insurance Company should enforce payment of the entire premium after the loss occurs, it seems quite clear that it could not escape payment of the loss, and the principle in the real case must be the same as that in the supposed, for the amount cannot change a fundamental principle of law.

It was not in the power of the assured to pay part only of the premium; he was bound to pay it all or lose the benefit of his contract. The rights of the parties are reciprocal. The Company was not bound to accept part of the premium, nor had it a right to treat the premium as paid upon part only of the property insured. It was the right of the Company to refuse to accept part of the premium, but it had no right to accept the whole premium, and treat it as payment for an insurance upon part only of the property covered by the policy. Having accepted the entire premium, with full notice of the loss, it confirmed the contract as to the whole of the property insured. It had the right to elect to accept or reject the premium, but it cannot accept the entire premium and yet assert that it is liable only from the time of the acceptance, although the loss occurred prior to that time.

The provision of the policy we have quoted does not provide that the default in payment shall entitle the Company to treat the premium as earned; if it did we should have a more difficult question. In this instance the premium

was not earned, for the period covered by the policy was five years, and the loss occurred within seventeen months after the policy was written. There was, in fact, at the time of the loss and at the time of the acceptance of the amount of the judgment, no earned premium beyond that paid in cash. Nor is there any recital that default shall entitle the Company to treat the premium as earned. There is therefore no tenable ground upon which the Company can justify its act in taking the insurer's money and yet repudiate liability for the loss. The moment the risk attached, the premium paid was beyond recovery by the insured. *Standley v. Northwestern Mut. L. Ins. Co.* 95 Ind. 254; *Continental L. Ins. Co. v. Houser*, 111 Ind. 266, 9 West. Rep. 676.

His right is correspondent with his burden. He cannot get his money back, but he can enforce his contract, and his contract is continuous for the period named, and indivisible as to the property described. When the Company accepted payment of the entire premium, it waived all right to forfeit the policy, for, as the insured can get back no part of the premium paid, neither can the Company escape the performance of its part of the contract. It cannot have the benefit and escape the burden. The only natural and reasonable construction which can be placed upon the conduct of the Company is that it elected to waive its right to take advantage of the default in payment. And this is the only legal and equitable construction that can be given to its acts, for it cannot repudiate the policy in part and confirm it in part. It can no more accept and retain the entire premium without confirming the contract than can the insured recover back the premium paid after the risk is attached. It was in the power of the Company to accept or refuse payment. It made its election, and it must abide the legal consequences of that act. It was a voluntary performance, with full knowledge of all the material facts, and the election was complete.

We have studied with care the cases referred to by the appellant's counsel, and we cannot regard them as sustaining the position counsel assume, for we do not believe that in any of them is the doctrine asserted that under such a policy as that before us the Insurance Company may, with knowledge of the loss and notice that the assured is affirming the validity of the policy, accept and retain the entire premium, and yet refuse to pay the loss.

In *Klein v. New York L. Ins. Co.*, 104 U. S. 88 [26 L. ed. 662], there was no offer to pay the premium until after the death of the assured, and then the offer was refused, the company declining to accept the money and offering to pay the surrender value of the policy.

The policy in the case of *Wall v. Home Ins. Co.*, 86 N. Y. 157, contained a provision that in case of default in the payment of the note given by the insured "the premium shall be considered as earned," and the evidence showed that after the loss the insured offered to pay the premium and that it was declined. The evidence also showed that before knowledge of the loss the agent of the insurance company agreed that he would not press for payment of the note; that it might lie over for a short time."

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The court held that there could be no recovery. The court was, as we believe, in error in holding that there was no waiver of payment sufficient to excuse the insured, for there are well-reasoned cases which assert a different doctrine, and among them our own and one or more in New York. *Sweetser v. Odd Fellows Mut. Assn.* 117 Ind. 97; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 10 West. Rep. 842.

But, granting that the decision is sound, it cannot aid the appellant, for the reason that in this instance there was an acceptance of the entire premium with full knowledge of all the facts.

In *Williams v. Albany City Ins. Co.*, 19 Mich. 451, it was held that where the policy provided that in case default was made in the payment of a premium note, "the premium shall be considered as earned," acceptance of the premium after knowledge of the loss did not preclude the company from taking advantage of the provisions of the policy declaring that it should be inoperative during the time the premium remained unpaid. The decision rests, for authority, entirely upon *Wall v. Home Ins. Co.*, *supra*, and we are not inclined to regard it as of controlling influence, for the reason that there is an essential difference between the provisions contained in the policy in that case and those found in the policy before us. We are, indeed, not convinced of the soundness of the decision, but it is not necessary to do more than to decline to regard it as in point, and in this we are fully supported by the later case of *Yost v. American Ins. Co.*, 89 Mich. 581, where the court expressed an opinion as to the force and meaning of the provision in the policy to which we have referred.

The only case directly in point, referred to by counsel, or discovered by us, is that of *Jolliffe v. Madison Mut. Ins. Co.*, 89 Wis. 111. That case received careful consideration, and the decision sustains the position of the appellee. The court discriminates the case before it from those in which the policy provides that in case of default the payment shall be deemed to be earned, and builds its decision principally upon the ancient doctrine that where there is no risk there is no right to a premium. It is declared that Mr. May's statement of the law is correct, and the court quotes what is said by him in speaking of a contract of insurance, and that is this: "It is, moreover, a conditional contract, for when no risk attaches no premium is to be paid, or, if paid, must, in the absence of fraud, be returned to the assured. In point of fact the contract is to pay the premium on condition that the risk is run, and the refunding of a premium is of frequent occurrence in maritime insurance; and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as when the ship is never dispatched by the owner on the projected voyage." The language of *Lord Mansfield in Tyrie v. Fletcher*, Cowp. 668, is explicit: "When the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned." And this principle is alike applicable to all policies of insurance." May, Ins. § 4.

The court applied this doctrine to the case

before it, and said: "But the defendant received the whole cash premium for which the note was given. By so doing it received compensation for the risk covering the time when the loss occurred, and we think it cannot now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of the loss is entirely inconsistent with the claim that the risk was suspended when the loss occurred."

The decision in *Lyon v. Travelers Ins. Co.*, 55 Mich. 141, while not directly in point, does assert a doctrine which bears strongly upon the case under investigation. In the case referred to, orders for the premium were drawn upon a railroad company, but were not paid, and the court held the insurance company liable, saying, among other things: "A forfeiture is not favored at law or in equity, and a provision for it in a contract will be strictly construed, and courts will find a waiver upon slight evidence, when the equity of the claim made, as in this case, is, under the contract, in favor of the insured."

It is, however, insisted by the counsel for the appellant that the case of *Bans v. Travelers Ins. Co.*, 85 Ky. 677, is opposed to the case last mentioned; but we think counsel are in error, for the Kentucky court puts its decision upon the ground that the assured had not earned the wages which he assumed to assign, and declares that in this respect the case differs from *Lyon v. Travelers Ins. Co.*, *supra*.

In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, the court said: "But it may be asserted broadly that if, in any negotiations or transactions with the assured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is waived as a matter of law, and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." Other cases assert a similar doctrine. *Osterloh v. New Denmark Mut. H. P. Ins. Co.* 60 Wis. 126; *Cannon v. Home Ins. Co.* 58 Wis. 585; *Farmers Mut. F. Ins. Co. v. Bowen*, 40 Mich. 147; *Phania Ins. Co. v. Lansing*, 15 Neb. 494.

In the case last cited the court, in speaking of the duty of the insurance company, said: "But it cannot treat the policy as valid to collect the premium and void for the payment of losses. The note having been paid after the loss, the acceptance of the money waived the condition of forfeiture in the policy, and it was valid and subsisting at the time of the loss."

The case before us falls within the principle declared in the cases cited. The acceptance of the money was after the loss and after the Company knew that the assured was affirming the validity of the policy and his right to recover the loss. It knew that he did not regard the policy as suspended, and by accepting the money it confirmed the contract as of the date of its execution.

We adjudge that the complaint makes a case sufficiently strong to drive the appellant to answer.

Judgment affirmed.

9 L. R. A

Henry DUGAN, *Appt.*,

v.

STATE OF INDIANA.

(....Ind.....)

1. A State has jurisdiction to try and punish offenses against its Sunday Laws, committed by persons engaged in carrying passengers over navigable waters of the United States lying along its borders, between different points within its territory.
2. A steamboat pilot who is employed upon a boat engaged in carrying passengers to and from pleasure parties on Sunday is within the provisions of a statute providing for the punishment of persons who are found on that day at common labor or engaged in their usual avocations, works of necessity and charity alone excepted.

(September 20, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Clark County entered upon a verdict found against him for an alleged violation of the Sunday Laws. *Affirmed.*

The case is fully stated in the opinion.

Messrs. A. Dowling and J. K. Marsh for appellant.

Messrs. Louis T. Michener, Atty. Gen., G. H. Voigt, Pros. Atty., and J. H. Gillett for the State.

Elliott, J., delivered the opinion of the court:

The appellant was adjudged guilty of a violation of the Sunday Law by pursuing his usual vocation as a steamboat pilot, and from the judgment against him he prosecutes this appeal.

It is admitted that the appellant's usual vocation was that of a steamboat pilot; that one who pursues such a vocation is engaged in common labor; that the appellant was employed as such pilot on a steamboat plying between Jeffersonville and Fern Grove on the Ohio River; that both of those places are in Clark County, Indiana; that the steamboat of which he was the pilot plied between the points named on the Sunday designated in the indictment; that he was then more than fourteen years of age; that the steamboat on which the appellant was engaged was chartered by persons, not the owners nor common carriers, at a stipulated price, to transport persons desiring to attend picnics at Artie Springs and Fern Grove from Louisville, Kentucky, and Jeffersonville, Indiana; that the appellant, as well as all the other persons employed on the boat, were

NOTE.—Sunday Law.

The fact that a person was traveling on Sunday, in violation of an Act concerning vice and immorality, does not preclude him from maintaining an action for damages for personal injuries resulting from negligence of the carrier. *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435, 53 N. J. L. 168. See note to *Louisville, N. A. & C. R. Co. v. Buok* (Ind.) 9 L. R. A. 520.

Under the laws of Minnesota, issuing, publishing and circulating a newspaper on Sunday is unlawful. It is not a work of necessity. *Handy v. St. Paul Globe Pub. Co.* 4 L. R. A. 466, 41 Minn. 188.

As to works of necessity, see *Western U. Teleg. Co. v. Yopst*, 8 L. R. A. 224, note, 118 Ind. 248.

hired and paid by the Louisville & Jeffersonville Ferry Company, the owner of the boat. It is further admitted that the ferry company was a corporation organized under the laws of Kentucky; that its principal office was in that State; that on the Sunday designated in the indictment the steamboat piloted by the appellant started from the City of Louisville, Kentucky, landed at the City of Jeffersonville, in this State, thence proceeded up the Ohio River to Artic Springs and Fern Grove, in Indiana, and returned to Louisville, Kentucky, where the voyage ended. It is still further admitted that the boat was not plying as a ferry-boat between Louisville and Jeffersonville on the Sunday named in the indictment.

The case is before us upon these admitted facts, and we are required to declare the law upon those facts.

Virginia gave Indiana jurisdiction over the Ohio River, and what Virginia gave Indiana accepted. *Carlisle v. State*, 32 Ind. 55; *Sherlock v. Ailing*, 44 Ind. 184.

So far as it was in the power of the State having original dominion to cede jurisdiction, it did confer it upon Indiana, and the authority conferred by Virginia has been exercised by Indiana. Other States have exercised for many years similar jurisdiction under grants from Virginia. *McFall v. Com.* 2 Met. (Ky.) 394.

The older authorities are all to the effect that one State may punish crimes committed upon a navigable stream and near the line of the State. *Carlisle v. State*, *supra*; *People v. Tibbets*, 19 N. Y. 524; *Parker v. Cutler M. Co.* 20 Me. 356; *Stoughton v. State*, 5 Wis. 295; *Withers v. Buckley*, 61 U. S. 20 How. 87 [15 L. ed. 817].

In comparatively recent decisions of the Supreme Court of the United States it is held that the States have jurisdiction of no narrow extent over navigable streams along their respective borders. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 7 [81 L. ed. 631]. See authorities in *note*, 1 Elliott, Roads and Streets, 27.

Whether the recent decisions upon the subject of federal authority in matters of interstate commerce change the rule declared by the earlier decisions is a question it is not necessary to discuss, for no question of interstate commerce arises in this case. A steamboat engaged in carrying persons to pleasure parties from point to point within the State is not engaged in commerce between the States. As the points at which the steamboat of which the appellant was the pilot received passengers, and at which it discharged them, are on the Indiana shore, there was no interstate commerce, and the case falls within the decisions of the Supreme Court of the United States which declare that over its local commerce a State has complete and exclusive jurisdiction. *Sands v. Manistee River Imp. Co.* 123 U. S. 288 [31 L. ed. 149].

We hold that there was jurisdiction to try and punish offenses of the class to which that charged against the appellant belongs.

The steamboat on which the appellant was employed as a pilot was engaged in carrying passengers to and from pleasure parties. This is an admitted fact, for the word "picnic" implies in its usual and broad signification, a

mere pleasure party. It is quite clear that such is its signification in this instance. We are not, therefore, in the remotest degree concerned with any question relative to the lawfulness of carrying persons to religious exercises, on charitable missions, or on excursions to secure pure air and rest, conducted by persons out of health or overworked, or by persons engaged in any work of necessity; nor are we, indeed, concerned with any question relative to the carrying of persons to attend business requiring prompt attention. We do not seek any general rule, for the case before us requires of us a decision upon the single question whether it is lawful to carry persons to and from pleasure parties on Sunday. It is not, indeed, within the power of the courts to lay down any general rule for the government of all cases, since, to a very great extent, each case of this kind must depend upon its own particular facts. A case takes its color and texture from the facts of the particular instance, and not from generalities. *Edgerton v. State*, 67 Ind. 588.

Our Statute declares that any person over fourteen years of age, "found at common labor or engaged in his usual avocation (works of necessity and charity alone excepted) on Sunday, shall be fined in any sum not more than \$10 nor less than \$1." Rev. Stat. § 2000.

We are far within the doctrine asserted by the decided cases when we affirm that carrying persons for pleasure solely is not a work of necessity or charity. It has been held by some of the courts that the exception contained in the Statute cannot be enlarged to include mere matters of business. *Davis v. Somerville*, 123 Mass. 594, 85 Am. Rep. 899; *Smith v. Boston & M. R. Co.* 120 Mass. 490.

Other cases somewhat modify this doctrine, and assert that ordinary business, where there is no urgency, is not within the exception, but that the business in a particular instance may be of such a peculiar character, or of such an urgent nature, as to be within the exception. *Ungericht v. State*, 119 Ind. 379; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 8 L. R. A. 224; *Western U. Teleg. Co. v. Wilson*, 108 Ind. 308, 6 West. Rep. 547; *Yonoski v. State*, 79 Ind. 898; *Rogers v. Western U. Teleg. Co.* 73 Ind. 169; *Turner v. State*, 67 Ind. 595; *Wilkinson v. State*, 59 Ind. 416; *Crocket v. State*, 83 Ind. 416; *Morris v. State*, 81 Ind. 189; *McGatrick v. Watson*, 4 Ohio St. 566; *Hennerdorf v. State*, 25 Tex. App. 599; *Dixon v. State*, 76 Ala. 89; *Murray v. Com.* 24 Pa. 270; *Trowert v. Decker*, 51 Wis. 46; *State v. Goff*, 20 Ark. 239.

But the appellant can get no assistance from the cases which thus relax and liberalize the rule by enlarging the exception, for, carrying persons for their own pleasure is not business at all, much less is it business of an urgent nature, demanding prompt action. The most liberal courts do not extend the rule to all matters of business, but restrict it to business of a nature reasonably requiring prompt action, and the line of reasoning adopted by those courts very clearly shows that such cases as this cannot be brought within the statutory exception. It is held in well-reasoned cases that the exception cannot be so extended as to include mere matters of convenience. *Mueller v. State*, 76 Ind. 810; *Bucher v. Fitchburg R. Co.* 181 Mass.

156; *Johnston v. Com.* 22 Pa. 102; *Allen v. Duf* *fe*, 43 Mich. 1, 88 Am. Rep. 159.

It is very clear to us that, under the law as declared by the authorities to which we have referred, the exception cannot be so enlarged as to include persons who, in pursuing their usual vocation, carry pleasure seekers to and from picnics. Nor do we doubt that this conclusion is the only one defensible on principle. *Judgment affirmed.*

James O'BRIEN, *Appt.*,
v.
STATE OF INDIANA.

(....Ind.....)

1. The jurisdiction of a trial court, which is a court of general jurisdiction, will be presumed upon appeal if the record does not show its absence.
2. The transcript of the record in a case carried for trial to a county different from that in which the indictment was found need not show affirmatively that the grand jury which returned the indictment was duly impaneled in order to give jurisdiction; that the jury was legally impaneled will be presumed from a statement in the record, and a recital in the copy of the indictment contained therein, that the indictment was returned by a grand jury of the county from which the record was transmitted.
3. Where the original indictment is required by statute to be filed with the clerk of the court in which the trial is to be had upon change of venue in a criminal case, if the required transcript is made out and filed it will be presumed on appeal to have been accompanied by the indictment in the absence of evidence to the contrary; and the fact that the record is silent as to the filing of the indictment is immaterial if the statute does not require it to make mention of that fact.
4. The admission of testimony as to

marks and scars found upon the person of a defendant, in a criminal prosecution, during a forcible examination of him with a view to ascertaining his identity for the purpose of arresting him, is not prohibited by a constitutional provision that no person in any criminal prosecution shall be compelled to testify against himself.

(September 16, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Wells County, entered upon a verdict convicting him of the crime of involuntary manslaughter. *Affirmed.*

The case is fully stated in the opinion.

Messrs. A. N. Martin, J. B. Kenner, Levi Mock and Abram Simmons, for appellant:

The record must somewhere show that the grand jury which returned the indictment was duly and legally impaneled, charged and sworn.

Bailey v. State, 89 Ind. 438.

The court erred in permitting William K. Dillon to testify to the jury as to the marks and scars on the person of the defendant, which marks and scars were ascertained by said Dillon against the consent of the defendant, while he was handcuffed and imprisoned in jail at Ashland, Wisconsin.

The Constitution of the United States, art. 5, § 29, among other things provides that no man shall be compelled in a criminal case to be a witness against himself; also Ind. Const., § 59.

See *Myers v. State*, 115 Ind. 554.

It has been held error to compel the defendant to exhibit his person or any part thereof to the jury as evidence against himself, and it has also been held error to admit evidence derived from a compulsory exhibition of the defendant's person prior to the trial, because such methods are deemed to compel him to be a witness against himself.

People v. McCoy, 45 How. Pr. 216; *Abbott*, Trial Brief, § 591; *Wilkins v. Malone*, 14 Ind. 153; *People v. Kelly*, 24 N. Y. 75; *Wharton*,

NOTE—*Arrest for crime; searching prisoner for evidence of guilt.*

An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence. *Roscoe*, Cr. Ev. 211; *Reg. v. O'Donnell*, 7 Car. & P. 128; *Reg. v. Kinsey*, Id. 447; *Reg. v. Burgess*, Id. 428; *Reg. v. Rooney*, Id. 514; *Best*, Ev. § 128.

Party cannot be compelled to furnish evidence against himself.

Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. *Day v. State*, 68 Ga. 609.

If a person under duress confesses to having stolen goods and deposited them in a certain place, his confession of the theft will be rejected; yet evidence that he stated where the goods were will be received, provided the goods were found at the place described. *Duffy v. People*, 26 N. Y. 589; *White v. State*, 8 Heisk. 338; *Selridge v. State*, 30 Tex. 60; *Reg. v. Gould*, 9 Car. & P. 364.

The court has no right to compel a female prisoner to submit to a personal physical examination by physicians, for the purpose of enabling them to testify that she has had a child. Evidence thus ob-

tained would be inadmissible against her. *People v. McCoy*, 45 How. Pr. 216.

It is the capability of abuse, and not the probability of it, which is to be regarded in judging of the reasons which lie at the foundation, and guide in the interpretation, of constitutional restrictions. *Emery's Case*, 107 Mass. 183.

Late cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by declaration inadmissible *per se*, as having been obtained by improper influence. *State v. Johnson*, 67 N. C. 55; *Archb.* Cr. Pl. 181.

It has been held in Georgia that it is within the discretion of the trial court to require the plaintiff, suing for a physical injury alleged to be permanent, to submit to a physical examination. See *Richmond & D. R. Co. v. Childress*, 5 L. R. A. 808, and note, 32 Ga. 719.

Change of place of trial.

The rule of the statute, that only one change of venue from the judge, and one change of venue from the county, shall be granted, is not violated where a change of judge was ordered, but not perfected until a new judge came upon the bench, when another application for change of judge may be allowed. *Duggins v. State*, 66 Ind. 350.

Law of Evidence, §§ 533, 536, 731; *Stokes v. State*, 5 Baxt. 619, 80 Am. Rep. 72; *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717; Rogers, Expert Testimony, p. 105, § 74.

Messrs. Louis T. Michener, Atty-Gen., W. A. Branyan, Pros. Atty., and J. H. Gillett for the State.

Berkshire, C. J., delivered the opinion of the court:

This prosecution originated in the Huntington Circuit Court, and upon the appellant's motion the venue was changed and the prosecution carried to the Wells Circuit Court. In the latter court the appellant was placed upon trial and convicted of the crime of involuntary manslaughter, and from the judgment of the court he appeals.

Several errors are assigned, but in the briefs filed for the appellant but three questions are discussed, and these are all that we are called upon to consider. The questions are: (1) Had the Wells Circuit Court jurisdiction of the subject matter of the prosecution? (2) Was there sufficient evidence to support the judgment of the court? and (3) Did the court err in the admission of certain testimony offered on the trial in behalf of the State?

The Wells Circuit Court is a court of general jurisdiction, and as it does not appear from the record that it was without jurisdiction this court will presume in favor of its jurisdiction. *Passmore v. Passmore*, 118 Ind. 237, 13 West. Rep. 83.

The foregoing would seem to be a sufficient answer to the first objection raised, but we may further state that it appears from the record that on the 15th day of April, 1889, a certain transcript was filed in the clerk's office of the Wells Circuit Court, which is copied into the record at length. This transcript purports to contain the proceedings had in the Huntington Circuit Court in a certain criminal action in the name of the *State of Indiana v. James O'Brien*, and discloses that at the March Term, 1889, of said court its grand jury returned into open court an indictment, which is copied in full into the record. The indictment as copied recites that it is a presentation by the grand jurors in and for the County of Huntington, State of Indiana, against George Dillon, James O'Brien and Henry Stinebrenner for the crime of murder, and purports to be signed by the prosecuting attorney for the Huntington Circuit Court, and has upon it the proper indorsements. The transcript is duly certified by the clerk of the Huntington Circuit Court.

It is contended that the transcript does not state, nor the copy of the indictment therein found recte, that the grand jury who returned the indictment were duly impaneled, and, as it does not, that the presumption is that they were not, and hence the court was without jurisdiction. There is nothing in this objection. Reasonable certainty is all that is required under our Code of Criminal Procedure. Rev. Stat. 1881, §§ 1775, 1776; *McCool v. State*, 23 Ind. 127.

It appearing affirmatively in the record, and also by recital in the copy of the indictment which it contains, that the indictment was returned by a grand jury of Huntington County, the presumption must be that it was a legally

impaneled grand jury. In this connection we may say further that after the return of the indictment and before asking that the venue be changed, the appellant entered his plea of not guilty, thereby waiving any irregularity in the organization of the grand jury. *Powers v. State*, 87 Ind. 144; *Ford v. State*, 112 Ind. 873, 11 West. Rep. 858.

But it is further contended that the statute requires, when the venue is changed in a criminal prosecution, that the original paper on file in the court granting the change shall be filed in the clerk's office of the court to which the venue is changed; that the record does not show that this was done, and therefore it must be assumed that the original papers were never filed in the clerk's office of Wells County, and the conclusion must follow that the Wells Circuit Court was without jurisdiction.

Let it be conceded that if the original indictment had not been filed in the clerk's office of the Wells Circuit Court, that it had no jurisdiction, the state of the record is not such as to lead us to the conclusion that the indictment had not been properly filed. The Statute does not require that a record shall be made of the fact of the filing of the indictment, and hence the State cannot be prejudiced because there is no such record. The Statute made it the duty of the clerk of the Huntington Circuit Court to make a transcript such as we find in the record, of the proceedings had in the court, and to seal it up, together with the original papers, and deliver the same to the sheriff of his county, whose duty it was to deposit the package in the clerk's office of Wells County. When this was done the Wells Circuit Court had jurisdiction. Rev. Stat. 1881, §§ 1771, 1772.

The transcript seems to have found its way to the Wells Circuit Court, and we must presume that it did so in the manner prescribed by law, and, the contrary not appearing, we must presume that the original papers accompanied the transcript. We are bound to presume that public officers do their duty until the contrary is made to appear. Authorities, *supra*; *Leslie v. State*, 88 Ind. 180; *Duncan v. State*, 84 Ind. 204; *App v. State*, 90 Ind. 73; *Bright v. State*, Id. 843.

If the original papers had not been filed in the Wells Circuit Court it was incumbent on the appellant to make that fact affirmatively appear. The fact was susceptible of proof, which was necessarily at hand, and could have been introduced without hardship or even inconvenience to the appellant.

From a careful consideration of the evidence we are of the opinion that it fully supports the verdict of the jury.

That a felonious homicide was committed there can be no question. The controverted question is as to whether the appellant participated in the commission of the crime. He introduced evidence tending to prove an alibi. We are not favorably impressed with the testimony which he introduced to support this theory of his defense.

We come now to the consideration of the last question presented for our consideration. William Dillon was called and examined as a witness on behalf of the State. The appellant was in jail in the Town of Ashland, State of Wisconsin. The witness and one Rosebrough

were sent there to ascertain if he was the James O'Brien named in the indictment, and if so, to take steps for his removal to Huntington County to answer to said indictment. When the witness and Rosebrough arrived at the jail where the appellant was confined, in the presence of the jailer they requested of the appellant permission to make an examination of his body for certain marks or scars thereon to be found, if he was the person accused in said indictment as James O'Brien, and, the appellant refusing to grant the request, he was handcuffed and the proposed examination made forcibly and against his will. It was as to the marks and scars which the witness claimed to have discovered from said examination that the State proposed to have him testify.

To the offered testimony the appellant objected, stating several grounds of objection, but as none of them were sufficiently specific to present any question for our consideration save one, we shall confine ourselves to the question presented.

It is contended that the proposed testimony was within the inhibition found in the last clause of section 14 of article 1 of our State Constitution, and which reads as follows: "No person in any criminal prosecution shall be compelled to testify against himself."

We are not called upon to decide whether or not the court could, at the trial or anterior thereto, have compelled the appellant to submit to an examination, that the information thus obtained might be used as evidence against him on the trial, and express no opinion upon that question. But for a learned discussion of the question pro and con., see *State v. Ah Chuey*, 14 Neb. 79, 38 Am. Rep. 590, and note; *Blackwell v. State*, 67 Ga. 78, 44 Am. Rep. 717; *Stokes v. State*, 5 Baxt. 619, 30 Am. Rep. 72.

Nor was the testimony offered as to information obtained to be used upon the trial, but, as we have already seen, with a view to his arrest.

The question of duress and its effect upon information thereby obtained is not involved, for the facts to which the witness was called to testify did not depend upon a confession made by the appellant, nor upon any act of his; the marks and scars upon the body had no relation to the force used to enable the witness to find them.

The case is much like the examination of a person under arrest for concealed weapons with which he could have committed the crime of murder of which he is accused, or for stolen property where he is accused of larceny, and the right to examine the accused for such purpose has never been questioned.

The conclusion can only be reached that the offered testimony was within the constitutional prohibition upon the theory that the witness was the mere mouth-piece, and that the appellant was the real witness, which would be a strained construction of the constitutional provision as applied to the offered testimony. In construing the Constitution the courts should follow the ordinary import of the language employed, unless there are controlling reasons indicating that a different construction was intended.

Worcester says that the word "testify" has three definitions: "(1) to make a statement or declaration in confirmation of some fact; to

bear witness; (2) to give evidence or testimony in regard to a case defending in a court or tribunal; (3) (law).—to make a solemn declaration under oath or affirmation before a tribunal, court, judge or magistrate for the purpose of proving some fact."

The last of these is from Burrill's Law Dictionary. Webster's definition is substantially the same.

To hold that the testimony of the witness was incompetent would compel us, in every case involving the identity of a person accused of crime, to hold that testimony as to marks and scars hidden under the clothing which he wears is inadmissible, if the information of the witness was obtained without the consent of the accused, no difference under what circumstances or in what manner obtained. The textbooks throw but little light upon this question under consideration, and yet we are not entirely without authority.

State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1, was an indictment for murder. The prisoner was charged with the murder of Almira Garrett. The prisoner, while under arrest and very much agitated, before the coroner, and after the jury had rendered their verdict against her, in their presence, was ordered by the coroner to unwrap her hand, which she alleged had been burned, and show it to Dr. Walker, so that it might be seen if it had been burnt or not. This she did and there was no indication of any burn upon it. This evidence was objected to on the trial by counsel for the prisoner, because it was, in substance, compelling the prisoner to furnish evidence against herself. The court says: "The prisoner objected to the admissibility of the evidence as to the condition of her hand, and relied upon the case of *State v. Jacobs*, 5 Jones, L. 259. The distinction between that and our case is that in the *Jacobs Case* the prisoner himself on trial was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color. Thus he was forced to become a witness against himself. In our case not the prisoner but the witnesses were called to prove what they saw upon inspecting the prisoner's hand, although the inspection was obtained by intimidation."

The court then holds that there was no error. See *State v. Graham*, 74 N. C. 646, 31 Am. Rep. 493.

The syllabus of that case is as follows: "An officer who had arrested a prisoner charged with larceny compelled him to put his foot in a track found near where the larceny was committed, and testified as to the result of the comparison. Held, that the evidence was not procured by duress and was admissible."

In *Walker v. State*, 7 Tex. App. 245, 33 Am. Rep. 595, "the first error assigned is (says counsel for the appellant) that the court should not have allowed George Grimes to testify as to the result of a comparison between tracks found near Munroe's house and a track which the defendant was compelled to make while under arrest. If the defendant shall not be compelled to give evidence against himself (Bill of Rights, § 10) how can he be compelled to put the State in possession of any fact which the State says goes to establish his guilt?" The court in that case says: "There is but a single

bill of exceptions exhibited in the record, and this was saved to the admission in evidence of proof with regard to foot-tracks made by the defendant in Judge Janier's office whilst he was under arrest.

Just after the discovery of May Munroe's murder some parties present commenced examining for any signs or evidence left by the perpetrator, at the house and around the premises. Foot-prints were found in the house at a window and in a peach orchard, which were measured by the witnesses, one of whom was George Grimes. The portion of the testimony which was objected to on the trial was as follows: 'I saw the same measure applied to a track in Judge Janier's office at Breman. Janier made the defendant make his track in the ashes and sand in his office where a stove had been. The impression made was plain and it was about the same as tracks made in Munroe's house. The measure was applied to the footprints in Janier's office, and it was the same in every particular,—fitted exactly.'

"It is contended that the evidence was incompetent and inadmissible, because it was evidence which defendant was compelled to make and give against himself, in contradiction of the tenth section of the Bill of Rights (article 1 of the Constitution), which declares that the accused of crime shall not be compelled to give evidence against himself."

The court then copies at length from the opinion in the case of *State v. Graham, supra*, and upon the reasoning and conclusion in that case affirms the judgment.

We find no error in the record.
Judgment affirmed, with costs.

Joshua I. MORRIS *et al.*, *Appts.*,

vs.
Simon T. POWELL.

(....Ind.....)

1. Where a State Constitution has fixed and defined the qualifications necessary to constitute one a voter, the Legislature has no power to require additional qualifications; hence where a property qualification is not among those fixed by the Constitution, a statute requiring a certain class of persons, in order to entitle themselves to vote, to produce certificates which can only be obtained in case they own property, is void.
2. A law which requires one person to be registered in order to be entitled to vote, while it permits another person to vote without being registered, is void under a Constitution which prescribes registration according to law as one of the qualifications of voters.
3. Where the Constitution requires residence in a voting precinct for only thirty days before an election to entitle a person to vote, the Legislature cannot require him to register ninety days before an election if the act of registering includes the fixing and designation of the precinct in which he shall be entitled to vote.
4. A requirement that an intending vot-

NOTE.—Registration of voters; Statute construed. See note to *Fresleben v. Shallcross* (Del.) 8 L. R. A. 357.

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er shall at the time of registering sign a statement as to his lodging place, and that he is a bona fide resident of the precinct in which he lodges, the production of a certificate of which at election time is necessary to show his right to vote, is an attempt to compel him to designate, at the time of registration, the precinct in which he shall be entitled to vote.

5. Where the Constitution requires the Legislature to provide for the registration of all persons entitled to vote a law providing for the registration of a class or part only of the voters is void.
6. A law imposing extra burdens and hardship in the matter of registration upon persons entitled to vote under the Constitution, but who are absent from the State for a period of six months or more, or who are compelled to change their places of residence from one county to another within six months next preceding an election in order to be permitted to cast their votes, is invalid; hence, a law which requires such persons to register ninety days before an election, while other persons are not required to register at all, is void.
7. A person cannot, before being permitted to vote, be compelled to give proof of qualifications which under the Constitution he does not have to possess.

(October 8, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Henry County in favor of plaintiff in an action brought to enjoin the payment of an account for books furnished the county for the registering of voters. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Charles S. Hernly for appellants.

Messrs. Mark E. Forkner and Addison C. Harris, for appellee:

The Legislature cannot add to the qualifications of a voter prescribed by the Constitution, unless the Constitution confers that authority expressly.

Quinn v. State, 35 Ind. 489; *Rison v. Farr*, 24 Ark. 161; *Barker v. People*, 3 Cow. 686; *People v. Canaday*, 73 N. C. 198; *State v. Constantine*, 42 Ohio St. 487; *Daggett v. Hudson*, 1 West. Rep. 789, 43 Ohio St. 548; *White v. Multnomah County Commrs.* 18 Or. 817; *Kinneen v. Wells*, 4 New Eng. Rep. 457, 144 Mass. 497; *State v. Corner*, 23 Neb. 265; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 39 Mo. 485; *State v. Williams*, 5 Wis. 308; Mech. Pub. Off. § 148.

The Legislature cannot select a class of voters, viz., those going out of the State temporarily for six months or more, and disfranchise them, and not those going for the same purpose a shorter time. This is special and partial.

Atty. Gen. v. Detroit (Mich.) 7 L. R. A. 99; *Kinneen v. Wells*, 4 New Eng. Rep. 457, 144 Mass. 497.

Olds, J., delivered the opinion of the court: This action was brought by Simon T. Powell against Joshua I. Morris, auditor of Henry County, and William H. Elliott, to enjoin the payment of an account for books furnished the county for registering voters under section 13 of the Election Law of 1889 (Acts 1889, p. 162), Elliott's Supplement, § 1835, and it involves the validity of said section. A demur-

rer was filed by the appellant to the complaint, and overruled, and, he refusing to plead further, judgment was rendered on demurrer in favor of appellee. The section of the law reads as follows:

Section 18. Each elector shall vote by ballot in the precinct wherein he resides. Any person who, having been a resident of Indiana, shall have absented himself from the State for a period of six months or more, or who shall have gone into any other State or sovereignty with the intention of voting therein, or during any absence in any other State or sovereignty shall have voted therein; and also any person who shall not have been a bona fide resident of this State and of the county in which he resides at least six months before any election, —shall, before being entitled to vote at any election in this State, register a notice of his intention to become a qualified elector therein, in the office of the clerk of the circuit court of the county in which he resides. Whoever shall be absent from the State for a period of six months or more on business of the State or of the United States shall, at the time he offers to vote, produce a certificate from the county auditor that his name has continuously, since his departure from the State on such business, been upon the tax duplicate of said county for the purpose of taxation during his absence from the State, and that he is still a taxpayer in said county; and, failing to produce such certificate, such person shall not be permitted to vote. Such registration shall be made at least three months prior to any such election, and the notice shall state such person's name, age and place of residence (by which shall be understood his lodging place), and the notice shall be in the form following, and sworn to before such clerk:

State of Indiana, } ss.
----- County. }

I, ———, the subscriber hereto, hereby declare my intention to become a qualified elector under the laws of Indiana; that I was ——— years of age on my last birthday; that my lodging place is now ——— (here insert exact location), and I am a bona fide resident of the precinct in which I lodge.

Provided; that the provisions of this section respecting such registration and notice shall not apply to any voter who, six months or more previous to any election, shall have registered with said clerk a notice declaring his intention to hold his residence in this State during a contemplated absence, and that during such absence he will not exercise the right of suffrage elsewhere; and which notice shall be as follows and shall be sworn to before said clerk:

State of Indiana, } ss.
----- County. }

I, ———, the subscriber hereto, a qualified voter of ——— (here insert the name of his precinct, ward, township, town and city), in said county, intending to absent myself, do hereby declare my purpose to hold my residence as a voter in said State, and that I will not exercise the right of suffrage elsewhere during my absence.

On the filing of any notice as provided for in this section it shall be the duty of such clerk to enter the name and residence of said elector

and date of the filing of said notice in a book furnished for said purpose, to be open at all times to the inspection of the public, and safely preserve said original notice and deliver a certified copy of the same to the elector so registering; and on demand of any challenger or member of the election board, such elector shall be requested to produce the same before being allowed to vote. No person shall register for any other person, or in the name of any other person, or present the copy of the register for any other person at a polling place, or induce, hire or advise any other person not to register who may be required to register as above. Any person violating the provisions of this section, or who shall vote or attempt to vote without having been registered when required to do so as above, shall be guilty of a felony, and, upon conviction, shall be imprisoned in the state prison for not less than one nor more than five years, and be disfranchised for any determinate period. No elector shall be at any cost or charge for such registration or certificate thereof; and the clerk shall be allowed twenty-five cents and no more for each registration and certificate thereof, to be in full for all services connected therewith, which allowance shall be made out of the county treasury by the board of county commissioners, on itemized statements sworn to by said clerk.

Article 2, section 1, of the Constitution of this State declares that "all elections shall be free and equal;" and section 2 of the same article defines in unambiguous language who shall be entitled to vote.

Section 2. "In all elections not otherwise provided for by this Constitution, every male citizen of the United States of the age of twenty-one years and upward, who shall have resided in the State during six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election; and every male of foreign birth of the age of twenty-one years and upward, who shall have resided in the United States one year, and shall have resided in this State during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election, and shall have declared his intention to become a citizen of the United States conformable to the laws of the United States on the subject of naturalization,—shall be entitled to vote in the township or precinct where he may reside, if he shall have been duly registered according to law."

Section 4 of the same article provides that "no person shall be deemed to have lost his residence in the State by reason of his absence, either on business of this State or of the United States."

Under the Constitution a person must have certain qualifications to entitle him to vote, viz.: he must be a male citizen of the United States (or if of foreign birth must have declared his intention to become a citizen of the United States conformable to the laws of the United States on the subject of naturalization, and have resided in the United States one year); he must be twenty-one years of age and have resided in this State six months and in the township sixty days and in the precinct thirty days,

and he must be duly registered according to law providing for the registration of voters. If a person possess all of these qualifications he is entitled to vote; but if there be any one of these qualifications which he does not possess then he is not entitled to vote, except if there be no legally enacted statute providing for the registration of voters, then he is exempted from the duty of registering; or rather, the voters of the State cannot be disfranchised by reason of the failure of the Legislature to comply with a constitutional mandate.

In 1881 the electors of the State, by a majority vote of over eighty-seven thousand, amended section 14 of article 2 of the Constitution so as to provide that the "General Assembly shall provide for the registration of all voters entitled to vote," and it is by reason of an omission or a refusal on the part of the General Assembly to obey and comply with this constitutional mandate that the voters of the State have exercised the right of suffrage without registration since the adoption of this Amendment.

That the General Assembly has the power to enact a law providing for a uniform system of registration of all voters we think cannot be controverted, and that it is made the duty of the General Assembly, by the Constitution, to enact a law providing a reasonable, uniform and impartial system for the registration of all voters must be conceded; but section 18 of the present law imposes certain duties upon a certain class of voters and requires certain qualifications of other classes, while a much larger portion is not included within its provisions or affected thereby. The question is presented as to whether or not the Legislature can impose the obligations which it seeks to do by this section on the class of voters therein specified, and to another class add a qualification not required by the Constitution to entitle them to vote.

This section attempts to impose an obligation upon all persons who, being residents of the State of Indiana, but shall absent themselves from the State for a period of six months or more, or who shall have gone into any other State or sovereignty with the intention of voting therein, or who, during an absence in another State or sovereignty, have voted therein, and upon all persons who shall not have been bona fide residents of this State, and of the county in which they reside, at least six months before any election,—the duty of registering a notice of their intention to become qualified electors in their respective precincts in the office of the clerk of the circuit court of the county in which they reside at least three months prior to any such election, and makes it a felony, punishable by imprisonment in the state prison, to vote or attempt to vote without having been so registered.

It is also attempted by this section to make the right to vote of certain electors of this State who shall be absent from this State for a period of six months or more on business of the State or of the United States, to depend upon their producing at the time they offer to vote a certificate of the county auditor that their names have continuously since their departure from the State been upon the tax duplicate of said county for the purpose of taxation during their absence from the State, and that they are still taxpayers in said county.

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This latter clause seeks to add, in addition to the qualifications required by the Constitution, a property qualification to a certain class of voters, for it provides that persons being absent from the State on the business of the State or United States shall be taxpayers in the county in which they reside, and that they shall keep their names on the tax duplicate during their absence, and shall furnish a certificate of the auditor to that effect before they shall have a right to vote. None of the names of voters except able-bodied men between the ages of twenty-one and fifty years, and persons owning taxable property in the county, properly appear upon the tax duplicate and are not taxpayers in the county; so that a voter over fifty years of age, being absent on business of the State or United States, and owning no taxable property in the county, is not a taxpayer in the county, and he could not procure such a certificate from the county auditor; and on voting or attempting to vote he would, by this section, be guilty of a felony.

The only reasonable construction to be placed upon this part of the section is that, in addition to the qualifications to vote as required by the Constitution, it adds another—a property qualification—that he shall own taxable property within the county where he resides, and shall keep his name upon the tax duplicate. The Legislature has no such power. That, when the people by the adoption of the Constitution, have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the Legislature cannot add an additional qualification is too plain and well recognized for argument or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualification of voters, that qualification cannot be added to or changed by legislative enactment. That our Constitution does define the qualification of voters, and that the part of section 18, *supra*, providing that certain persons shall make proof of the fact that they are taxpayers of the county is an attempt to add an additional qualification, will admit of no doubt; and it is therefore unconstitutional and void. This is in accordance with the holding of this court.

In *Quinn v. State*, 85 Ind. 485, the court in this case says: "In *Rison v. Farr*, 24 Ark. 161, the court held that where the Constitution, as in that State, fixes the qualifications of and determines who shall be deemed qualified voters, those qualifications cannot be added to by the Legislature."

In the case of *Quinn v. State* it is held that a law providing for a residence of twenty days in the township was in conflict with the Constitution of this State then in force, which did not require a residence for any definite length of time in the township. *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 89 Mo. 435; *People v. Canaday*, 78 N. C. 198; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 273; *State v. Williams*, 5 Wis. 308; *Kinneen v. Wells*, 144 Mass. 497, 4 New Eng. Rep. 457, 59 Am. Rep. 105.

That portion of the section providing for certain persons to register before being entitled to vote was evidently intended, and we think it must be regarded, as an attempt to create a system of registration whereby persons coming within its provisions shall be required to

register before being entitled to vote. It is true, it can hardly be said that it creates a court or board with authority to determine who are legal voters and have the right to vote and enter their names upon a register as legal voters. Yet it does provide for a mode of registering and keeping a record of certain classes of voters, and requires such voters to produce a certificate of such registration before being entitled to vote, and it may be properly regarded as attempting to create a system for the registration of certain classes of voters. It is designated in the section as a registration.

Courts differ as to the effect of a law requiring the registration of voters in States wherein the Constitution defines the qualifications of voters and is silent upon the question of registration, some courts holding registration to be a mere regulation as to the mode of exercising the right of suffrage, while other courts, and we think the better reasoned opinions, hold it to be adding a qualification. But whatever may be the true rule where the Constitution is silent, we think there can be no doubt that under the Constitution of this State registration under a proper law constitutes a qualification. When the Legislature of this State enacts a law providing for a reasonable, uniform and impartial registration of all voters in this State, then registration will constitute a qualification which the voter must possess to entitle him to vote, the same as any of the other qualifications defined by the Constitution. When such a Registration Law is enacted, the voter, then, must then possess the qualification of being a male citizen of the United States, twenty-one years of age or over, and must have resided in the State six months, in the township sixty days, in the ward or precinct thirty days, and must be duly registered according to law. If he possess all these qualifications he can vote; if he lacks either he cannot vote. The Constitution in defining the qualification of voters makes one of the qualifications to be "if he shall have been duly registered according to law." When a valid law for the registration of all voters shall have been enacted as required by the Constitution, then registration will be as much a qualification as age or residence. The qualifications of voters must be uniform. One voter must possess the same as another, and he need possess no more. Where, as under our Constitution, registration is a qualification, one voter cannot be required by law to register while another has the right to vote without registering. Indeed, such a discrepancy would invalidate a law even if the Constitution was silent as to registration.

Under the Constitution of this State a male citizen of the United States over the age of twenty-one years, who has been a resident of this State for six months prior to any election, may, up to sixty days prior to such election, exercise the right to move and change his residence from county to county and from township to township within the State as often as he may desire, but from that time forward he must have a fixed residence in the county and township where he intends to vote; but he may still continue to change his residence from precinct to precinct up to thirty days prior to the election, after which time he must have a fixed residence in the precinct to be entitled to vote.

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The Constitution grants to every voter the right of changing his intention and residence from county to county and township to township up to sixty days before an election, and of still continuing to change, if he so desire, from precinct to precinct up to thirty days before an election. Nothing is required of the voter up to sixty days prior to the election except that he reside in the State. The Constitution does not require of the voter that he fix or designate his residence in any particular township up to sixty days prior to an election. From that time forward he cannot change his residence from one township to another if he desires to vote. The same is true in regard to the precinct up to thirty days before an election. The voter is left free to change his intention and residence up to these dates. These privileges belong to and are exercisable by every qualified voter of the State whether he be temporarily absent from the State for a day, a month, a year or even longer, or not absent at all. A mere temporary absence does not in any way affect his residence or his right to vote under the Constitution; but section 18, *supra*, provides that persons who absent themselves from the State for a period of six months, and persons who have not resided in one county for six months before any election, shall register, as provided by such section, ninety days before the election, to entitle them to vote; and they are required to produce the certificate of registration before voting. While this section is indefinite in some of its provisions, and its meaning and purpose somewhat obscure, yet it seems to us that the reasonable construction to be given to it is that such voters shall declare their intention to become qualified voters and fix and designate the respective precincts of which they are residents and entitled to vote ninety days before an election; and that upon presentation of their certificates of registration they shall have the right to vote in the precinct so designated; and that it requires of such voters that they designate their voting precinct ninety days prior to an election, and is, in fact, requiring a fixed residence in the precinct ninety days previous to an election, and in this particular at least it is an abridgement of the rights of such voters, and is in direct conflict with the Constitution. It seems to us that the construction we have placed upon this part of the section is the only reasonable construction it will bear. It certainly was not the intention of the Legislature to require such voters to designate their particular place of residence, even to their exact lodging place, as required by the notice, in some voting precinct other than that in which they would have a right to vote, or, in other words, to require them to designate their particular lodging place in one precinct ninety days before an election, and yet recognize the right of such voters to change their residence sixty days after registering and vote in another precinct, and make the evidence of the registration proof of their right to vote in a ward or precinct other than that designated in the notice of registration. This section also provides that the registration books shall be kept open at all times to the inspection of the public. Certainly the object of such registration and the keeping of the books open to the inspection of the public is for the purpose of

requiring such voters to fix and designate their residence and voting places sixty days before the election, and affording information to the public as to the residence and lawful voting places of such persons. But if we are in error in this construction, the provision is obnoxious to the Constitution and void for other reasons.

It is a well-settled rule of law that, "when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition or to extend the penalty to other cases." This language of *Judge Cooley* is quoted with approval by the court in the case of *Quinn v. State*, *supra*. See also *Mech. Pub. Off.* § 148; *State v. Williams*, *supra*; *State v. Tuttle*, 58 Wis. 45.

In other words, when the Constitution commands how a right may be exercised it prohibits the exercise of that right in some other way; if exercised at all it must be exercised as commanded by the Constitution. The Constitution of this State, section 4, article 2, provides that the "General Assembly . . . shall provide for the registration of all persons entitled to vote." This provision defines how the Legislature shall exercise the right of requiring the registration of voters, that is, by providing that all voters shall register. This constitutional mandate is an implied prohibition against providing for the registration of any class or for only a part of the voters, and this is consistent with the great weight of authorities upon the question of the validity of Registration Laws, which hold that such laws must be impartial, reasonable and uniform.

Judge Cooley states the law to be that "all regulations of the elective franchise, however, must be reasonable, uniform and impartial. They must not have for their purpose directly or indirectly to deny or abridge the constitutional right of the citizen to vote or unnecessarily to impede its exercise. If they do they must be declared void." *Cooley*, *Const. Lim.* 5th ed. p. 758. See also authorities hereinbefore cited.

In a well-reasoned opinion in the case of *Attorney-General v. Detroit*, the authorities on the question are fully reviewed and considered, and it is held by the Supreme Court of Michigan in that case that a Registration Law is unreasonable and void if it provides for but five registration days during the year, at one of which the elector must make personal application for registration; that it thereby disfranchises persons who are ill or absent on registration days, but who would be able to vote on election days. It also holds the same Act void because it is not impartial, in that it requires a naturalized voter to produce his certificate of naturalization, or show by evidence other than his own oath that such certificate was issued, while it permits a native-born citizen to prove his right to vote by his own oath. *Atty-Gen. v. Detroit* (Mich.) 7 L. R. A. 99.

The court in that case, after citing and reviewing numerous authorities, says: "These authorities all tend in one direction. They hold that the Legislature has the right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to

establish and ascertain by proper proof the right to vote of any person offering his ballot; but has no power to restrain or abridge the right or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to return home to register, as well as to vote, making two trips when only one ought to be required." See *Daggett v. Hudson*, 43 Ohio St. 548, 1 West. Rep. 799, 54 Am. Rep. 882.

Indeed, section 18, *supra*, seems to be aimed at a certain class of voters who may be absent from the State for a period of six months, either for pleasure or on business of a public or private character, and those at all times within the State who may be compelled, in order to obtain employment or for other lawful purposes, to change their residence from one county to another within the six months next preceding an election; and it imposes a burden upon them which is not imposed upon other voters, and changes their constitutional privileges and rights. It requires them to designate their particular residence and voting precinct, and prohibits them from again changing it, at a time when, under the Constitution, they are not required to do so. It imposes extra burdens and hardships on these classes of voters. In this respect it is both unreasonable and not impartial. Under the Constitution the rights of voters who are required to move from one county to another within six months and prior to sixty days before an election, in order to obtain employment or for other lawful purposes, and those who are compelled to be temporarily absent from the State for six months or longer, to earn a living for themselves and families, or to recuperate their health, or for other proper motives, are as sacred under the Constitution as those whose circumstances are such as not to require them to change their residence to seek employment, or to be absent from the State for that or any other lawful purpose. The Constitution guarantees the same rights to all voters who are bona fide residents of the State.

If once admitted that the Legislature has the power to enact a law requiring persons who are absent from the State six months to register ninety days before an election, why may not a law be valid requiring persons who are absent from the State three months or one month or one day also to register; and if a law requiring a registration ninety days before an election is valid, why not a law requiring a registration six months, one year or even a longer time before an election? If a law requiring all persons who are absent from the State six months to register, and none others, is valid, why would not a law requiring all foreign-born citizens or all persons engaged in farming or manufacturing, and none others, to register be valid? If this law is valid which requires all persons to register who are residents of the State six months, but not residents of the county six months, prior to an election, why may not the Legislature enact a valid law requiring persons moving from one ward to another at any time within six months, and none others, to register? Indeed, it seems to us to be beyond controversy that if the present Act can be

upheld, aimed, as it is, at a class of traveling men and men whose business of a public or private character, or ill health, may take them from the State six months, and persons who may be required to move from one county to another to obtain employment within six months preceding an election, and imposing, as it does, a burden upon these classes of citizens which are imposed upon none other, then the Legislature may enact a valid law relating to any class, designating them by nationality, place of birth, religious belief, professional or business pursuits, and require them and none others to register. If this law which requires a registration of this class of citizens ninety days before an election is valid, then any class of voters may be singled out and burdened and duties imposed upon them which are not imposed upon others, and obstructing their right of suffrage as given to them by the Constitution of the State. It matters not whether this provision of the law be termed a registration of voters or a provision requiring certain proof of the class of voters named to entitle them to vote. In either event the effect is the same, for it requires proof of qualifications to vote which the voter under the Constitution does not have to possess, and the effect of the law is the same, and it changes and abridges the rights of the classes of voters designated.

We believe this section of the law to be in contravention of the Constitution, in opposition to all authority, and illegal and void.

As we have said, the Legislature has the right to pass a law requiring a registration of all voters, and the Constitution expressly requires the passage of such a law. But under the provisions of the Constitution it must apply alike to all voters. One class of voters cannot be required to possess qualifications which are not required of all others.

Under the Constitution, voters may change their residence from precinct to precinct up to thirty days prior to an election. This right cannot be impaired or taken from them by legislative enactment, and until that time has occurred they cannot be required to designate their intended residence and voting precinct at a future election. Up to that date they have the right to change their intention and place of residence as often as their circumstances may require or as they may choose. The right to so change their intention and residence is given to every voter by the Constitution, and cannot be abrogated or interfered with.

The authorities universally hold that Registration Laws must be impartial, uniform and reasonable, giving to all who have a right to vote a fair and reasonable opportunity to exercise such right. The Constitution not only confers upon the General Assembly the power to make illegal voting an impossibility by a proper system of registration, but makes it the imperative duty of that body to exercise that power. The imposition of unauthorized burdens and qualifications not authorized by the Constitution upon a part of the citizens of the State is not an exercise of that power; and while we would regret to declare void any law having for its object the purity of the elections, we cannot so far forget our duty as to uphold a law so plainly in conflict with the funda-

mental law of the State as the section of the law under consideration.

The provisions of the section we have particularly considered and discussed render the whole section void, and we deem it unnecessary to further discuss the other portions of the section. *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *Baldwin v. Franks*, 120 U. S. 678 [30 L. ed. 766]; *Norton v. Shelby County*, 118 U. S. 425 [30 L. ed. 178].

The conclusion we have reached being in harmony with the holding of the circuit court, it follows that the judgment must be affirmed.

Judgment affirmed, with costs.

Elliot, J.:

The questions for decision, although they arise on a single section of a statute, are of the gravest importance, inasmuch as they concern the highest right of citizenship, and it is therefore not improper that separate opinions should be expressed. No other questions face us except such as arise upon section 18 of the Election Law of 1889, and the decision of those questions does not affect other provisions of the Act, nor can it do so, for the section is an independent one, and its downfall carries no other part of the Act. Nor do I deem it necessary for us to decide whether there are not some provisions of the section which, if separated and put in proper form, might not be valid, for the entire section, with its provisions interlocked beyond the power of severance, is before us for judgment, and we can only give judgment upon the section as it is written. *Griffin v. State*, 119 Ind. 520; *Baldwin v. Franks*, 120 U. S. 678 [30 L. ed. 766].

It is proper to say, by way of introduction, that the question is, what a Legislature may do acting under a written Constitution which gives it all the power respecting the right of suffrage that it possesses, and not what may be done by Congress or by a Territorial Legislature acting under a law of Congress, nor what may be done by the people in framing or amending a Constitution.

The thirteenth section of the Act of 1889, construed as I think it must be, requires one who has not resided for six months in the county where he claims the right to vote, to register his intention to become a voter ninety days before the election, thus requiring of the citizen two things, namely: that in order to be entitled to register he shall have resided in the county six months, and that he shall register his intention to become a voter ninety days before the election. He is required by these provisions to reside in the county in order to acquire the character of a voter a much longer time than the Constitution requires, for it requires a residence of only sixty days. It is entirely safe to affirm that no one will question the proposition that the Legislature has no power to require a longer residence than that fixed by the Constitution. The affirmation of this proposition leads, beyond the possibility of cavil, to the conclusion that the provisions referred to are entirely destitute of force.

There are, however, other objections to the validity of section 18 which seem to me to be insurmountable, and these objections go to the entire section, as its provisions are so inter-

woven as to be incapable of severance, and are, to my mind, so palpable that it is impossible to avoid perceiving them or to escape their force.

It may not be improper to preface the direct statement and discussion of these objections by affirming that it is not because the Legislature does not possess power to enact a general registry law that section thirteen is invalid, for no one who studies the language of the Constitution or reads the history of the Amendments of 1881, can doubt that it was the purpose of the people to invest the Legislature with power to enact a general registry law. But, while this is true, it is also true that no other conclusion will square with the judgment of candid men than this: The Legislature can enact only such a law concerning the right of suffrage as the Constitution authorizes. This, therefore, is the central question: Is the thirteenth section of the Election Law of 1889 such an enactment respecting the right of suffrage as the Constitution authorizes?

The question is one of power. If the Constitution authorizes such enactments as those contained in section thirteen, the power exists and the section must stand; if the Constitution does not authorize such a law, the power does not exist and the section must fall. With questions of policy or expediency courts have nothing to do, but it is their duty to determine whether there is or is not power to enact a law. The power which the General Assembly assumed to exercise is not an ordinary legislative power, for, in assuming to legislate upon the subject of the qualifications of voters, that body entered into the domain of those in whom original power resides, and from whom all legislative powers are derived. The people control the subject of the right of suffrage, and legislative assemblies have only such power over that subject as the people have granted them by the Organic Law.

That the Legislature cannot add to the qualifications of voters is a proposition upon which there is no diversity of opinion. *Cooley, Const. Lim.* 68.

It would be strange indeed if the Legislature could add qualifications to those prescribed by the Constitution, for the right of suffrage is a political right, and it is the right of a sovereign. The people are above the Legislature, and they are there because the Legislature has no power to abridge or qualify the sovereign right of suffrage.

Section thirteen violates the Constitution by assuming to classify the voters of the State and by adding qualifications to those prescribed by the Constitution. It assumes to divide the voters into taxpayers and non-taxpayers, and to add to the requirements of the Constitution the requirement that the citizen shall be recorded as a taxpayer. It violates the Constitution by assuming to classify voters into those who remain continuously in the State and those who temporarily absent themselves from it. Where the Constitution makes a classification, a different one cannot be made by the Legislature. Our Constitution does make a classification, for it specifically provides who shall be eligible to vote. Where the Legislature exercises the power conferred upon it and enacts a registry law, then registration is essential to qualification; but where there is no such law,

registration cannot be made essential, for in the absence of a registry law the sole qualifications of a voter are citizenship, age and residence.

The General Assembly has no power to enact a law operating through a classification exclusively its own. This is, indeed, a corollary of the proposition that it has no power to classify voters except by following the Constitution. Under the Constitution the Legislature has power to make two classes, registered and unregistered, but it cannot create a third class. *Atty-Gen. v. Detroit (Mich.)* 7 L. R. A. 99.

If the power to classify exists in one case it exists in all. No one will deny that if the Legislature has power over a subject it is master of its own discretion and may enact any law it chooses. Grant the power and the discretion is unlimited. If the Legislature has power to make the classification attempted in section 13, then it may provide that only naturalized citizens may register, or that farmers shall register and no others, or that commercial travelers temporarily absent in the line of their business shall make affidavits and record their names, although such things may be required of no other citizen. In short, if the power exists, the Legislature may make any classification it pleases. To my mind it is perfectly clear that it can do no such thing. It cannot in any form classify the fundamental political right of suffrage except as the Constitution expressly authorizes it to do. Such a right is infinitely higher than legislative authority can climb. No matter what form legislation may assume, it is utterly void if it touches upon the right of suffrage in a mode not authorized by the Constitution. The name given the legislation adds nothing, for a name can no more change its substance than a name can change the odor of a rose.

The provision of section thirteen assuming to impose upon a citizen who has resided in the State for the period prescribed by the Constitution the duty of making an affidavit declaratory of his intention to become a voter is in violation of the Constitution; and so, too, is the provision which assumes to require a citizen who has been temporarily absent to swear that he has not voted elsewhere. A citizen who does what the Constitution requires cannot be required to do more. If he fixes his character as a voter by a residence for the time designated by the Constitution, the incidents inseparably connected with that character are beyond legislative touch. The principle here asserted has been declared by our own and by other courts. We must adhere to it or overrule our own decisions and disregard those of other States. *Quinn v. State*, 35 Ind. 485; *Webbman v. State*, 98 Ind. 516; *Rison v. Farr*, 24 Ark. 161; *Davis v. McKeeby*, 5 Nev. 369.

It is no answer to many of the propositions I have affirmed to assert that the classification attempted is valid because all who belong to a designated class are put upon an equality, so that if it were conceded that the assertion responds to some of the propositions affirmed and is valid, the Act nevertheless still remains undefended, for any one of the propositions affirmed is fatal to its validity. But it cannot be justly conceded that the classification is valid. When

the question is examined it will be found that the proposition that the equality of the classification rescues it from condemnation has not the poor merit of plausibility; it is, indeed, so thinly appareled even in plausibility that when brought to the touchstone of principle all semblance of strength vanishes.

The General Assembly has no power to classify voters except as the Constitution expressly provides, no matter what system it may adopt. This is so for the invincible reason that the prerogative of conferring and defining the right of suffrage is that of constitution makers, and not that of the creatures of constitutions. The electors who frame constitutions and give being and power to legislatures are above the created things, and legislators cannot reach above themselves to the source of their power and the authors of their existence for the purpose of enlarging or restricting the sovereign right of suffrage. If it were otherwise legislators would be the masters, and masters they are not. If the Legislature can limit or even define the right of suffrage, then it is greater than its constituency; but it can do nothing of the kind, for the right of suffrage is not subject to legislative power.

The right of suffrage is a political right of the highest dignity. It is a right of which, as the courts have declared, no department of government, nor all of them combined, can debase the citizen otherwise than in the mode and to the extent expressly authorized by the Constitution. *State v. Adams*, 2 Stew. (Ala.) 239.

It is because the right of suffrage is a political right abiding in the fountain of power that the Legislature cannot lay as much as a finger upon it except when expressly authorized by the Organic Law, and for this reason it is that the Legislature cannot make a classification of its own, no matter whether there is or is not equality. It is because the right of suffrage is a political right, as has been decided by the Supreme Court of the United States and by other courts, that the provisions of the Constitution respecting the bestowal of special privileges and immunities have no application to legislation upon that subject. These decisions demonstrate the proposition that those provisions apply only to rights in the nature of property interests, and not at all to political rights. *Minor v. Happersett*, 89 U. S. 91 Wall. 178 [22 L. ed. 631]; *Bradwell v. State*, 88 U. S. 16 Wall. 188 [21 L. ed. 445]; *Amy v. Smith*, 1 Litt. (Ky.) 843; *Anderson v. Baker*, 28 Md. 521; *Re Taylor*, 48 Md. 28; *Brown v. Hummel*, 6 Pa. 86.

To me it seems very clear that neither the decisions made under those constitutional provisions nor the provisions themselves can have the remotest relevancy to cases involving only high political rights of which constitutions are the framers and rulers. The right of suffrage is one for the consideration of the people in their capacity as creators of constitutions, and is never one for the consideration of the Legislature, except in so far as the Constitution authorizes a regulation of its mode of exercise. The people create, define and limit their own right to vote; no legislature can do that for them, although the Legislature may be authorized to regulate the mode of exercising this

right. Power to regulate the exercise of the right is not power to legislate upon the substantive right itself. The right is a transcendent one, and is far beyond legislative dominion. It would therefore be illogical in the extreme to assert that the framers of the Constitution meant to prohibit class legislation upon a subject where, without an express grant of power, there is no authority to legislate at all.

The provisions of section 18 assume to do much more than prescribe a mode of procedure. They assume to legislate upon the substantive right itself and to prescribe conditions precedent to the right to vote. They do more than declare what evidence a citizen whose right is challenged shall produce; they assume to declare what he shall do before he can acquire the character of a voter. If its provisions are of any force at all they require that the citizen shall be a taxpayer, and as such recorded; that he shall not only reside in the State and county six months, but that he shall also swear that he intends to become a qualified elector; and they also require that a citizen, although he is otherwise as fully qualified as the Constitution requires, who has been temporarily absent, shall swear that he has not voted elsewhere. Elliott's Supp. § 1885.

These requirements, every one of them, concern the substantive right and add qualifications to those prescribed by the paramount law to which all legislation must yield. The Supreme Court of Oregon in a strongly reasoned opinion denies that registry can be considered a matter of procedure, and says: "The true view of this question seems to be that stated in *State v. Baker*, 88 Wis. 86, that where registry is required as a prerequisite to the right to vote, such registry is a condition precedent to the right itself." *White v. Multnomah Co. Comrs.* 18 Or. 317.

In the course of the opinion it is said: "But under this Act he who goes to the polls on election day possessing every constitutional qualification may find that the Legislature has stepped in between him and the Constitution. He finds his vote denied because he has not done something which the Legislature has required him to do. He discovers that he is not a qualified elector, and yet he is told that his omission to do the act which had the effect to disqualify him is not a disqualification." The court adopts as the law the statement of Mr. Drake that "every definition of the qualification is but a statement of the terms upon which men may vote, and in every instance such definitions refer to what a party has done as well as what he may do. They say to the voter: If you have done certain things you may vote."

The thirteenth section of the Act before us does say to the citizen what he must do in order to be entitled to vote, and in doing this assumes to prescribe the terms upon which he may vote, thus stepping in between him and the Constitution, and adding qualifications to those which that instrument requires.

That the legislation embodied in section 18 does assume to control the substantive right itself, and that this assumption of power is in direct and irreconcilable hostility to the Constitution, is a conclusion which seems to me to be beyond debate.

Mitchell, J.:

Those provisions of the Constitution which define the right of suffrage and prescribe the qualifications of persons entitled to its exercise, and those statutes which look to the guarding of the purity of elections and the integrity of the ballot-box, demand the gravest and most deliberate consideration whenever they are drawn into judicial discussion. The right of the citizen, who possesses the requisite qualifications to vote, is to be jealously protected, and any statute, the effect of which is to abridge, alter or add to the constitutional qualification of the voter, or which imposes qualifications other than those prescribed by the Constitution, must necessarily fall under condemnation when subjected to a judicial test. *McCafferty v. Guyer*, 59 Pa. 109.

On the other hand, the fact must be kept constantly in view that the duty of prescribing rules and regulations for the orderly and honest exercise of the right of suffrage, and of providing reasonable safeguards for preserving the purity of elections, and for the prevention of frauds upon the ballot-box, has been committed to the Legislature, and when the judiciary ventures to strike down a statute enacted by the immediate representatives of the people in response to a demand for purer elections, being without power to provide another in the place of the one destroyed, it should be able to rest its decision upon ground that is absolutely sure and impregnable. The purity of elections is subverted quite as effectually by the rigid exclusion of those who are not entitled to vote, as by protecting the privilege of those who are.

It has been said, and repeated a thousand times, that courts have no concern with the policy, convenience or expediency of a public law. These are questions solely for the Legislature. Any decision, therefore, which obliterates from the public law of the State a statute designed to prevent fraudulent voting, and to give effect to the ballots of honest voters, should rest broadly upon the safe ground that the statute blotted out by the court is in clear violation of some express provision of the Constitution.

The test by which to determine the validity of every legislative enactment upon the subject of suffrage and elections is this: Does it add any substantive qualification or condition to those prescribed by the Constitution to the right of the voter to vote, or does it merely afford methods of proof by which to determine the presence or absence of the qualifications prescribed? If it falls within the class first described, it is unconstitutional and void; if within that last described, no matter what courts may think of its expediency, it is a valid exercise of legislative power, and is not subject to judicial interference. If the law is unwise or inexpedient, the Legislature is responsible, and it is for the people to apply the corrective, and not for the court to substitute its judgment for that of the Legislature, or run a race of opinions upon points of reason and expediency with the law-making power. The courts all agree that the Legislature cannot prescribe conditions to the right to vote, which shall add any substantive qualifications to those prescribed by the Constitution, but it may prescribe modes

of proof, such as test oaths, evidence of freeholders, or any other evidence which may be deemed efficient to disclose the presence or absence of the constitutional qualifications. The Legislature cannot impair or abridge the right of suffrage in those who possess the constitutional qualifications, but it is clearly within the just and constitutional limits of legislative power to adopt any reasonable and uniform regulation affecting the mode of exercising the right, in such a manner as to facilitate pure, orderly and honest elections, and, to that end, to require the voter to furnish evidence of his qualification by any provision of law not inconsistent with the right itself. *Copen v. Foster*, 12 Pick. 488.

Accordingly it has been held that an elector may be required to furnish preliminary proof of his qualification to vote, and that this proof may be required either by a board of registration at a specified time before the election, or by an election board before receiving the vote of the elector. *Re McDonough*, 105 Pa. 488.

"The necessity," said the Supreme Court of Wisconsin, "of preserving the purity of the ballot-box is too obvious for comment, and the danger of its invasion too familiar to need suggestion. While, therefore, it is incompetent for the Legislature to add new qualifications for an elector, it is clearly within its province to require every person offering to vote to furnish such proof as it deems requisite that he is a qualified elector." *State v. Lean*, 9 Wis. 279, 25 Am. Law Reg. 641.

For example, an Act of Congress defining the qualifications of voters in Territories subject to the jurisdiction of the United States disfranchised bigamists, polygamists and others living in prohibited marital relations. The Territorial Legislature of the Territory of Utah prescribed certain forms of proof which the voter was required to furnish in respect to his marital relations. This was recognized as a legitimate exercise of legislative power. *Murphy v. Ramsey*, 114 U. S. 15 [29 L. ed. 47].

In like manner, where it was a constitutional condition to the right of suffrage that the voter had not been engaged in acts of open rebellion against the authority of the United States, it was held that a provision requiring the voter to take an oath as evidence or in proof of his loyalty was a proper exercise of power. *Blair v. Ridgely*, 41 Mo. 68, 97 Am. Dec. 248.

The Constitution prescribes certain qualifications as conditions of the right to vote, but it is wholly silent as to the manner in which election boards or registration officers, if such shall be provided for, shall ascertain the presence or absence of the prescribed qualifications. The facts of sex, citizenship, age, domicile within the State, township or voting precinct are inquiries involved in the right of every person who claims the privilege of voting, and there can be no doubt but that the Legislature must either have the power to prescribe modes of proof upon these subjects, or the barriers against fraud and the prostitution of the elective franchise must be thrown down, so that elections, instead of reflecting the choice of honest voters, become a scramble between corrupt partisans to determine who shall excel in the pollution of the ballot-box. The Legislature must have the power to provide by law the

means of distinguishing the qualified from the unqualified voters, and this can only be done by providing a tribunal to decide, and by prescribing the means of obtaining evidence, upon which a decision can be made. The tribunal which shall decide, and the evidence upon which the decision shall be made, are matters exclusively within legislative control.

Does the Statute in question, when subjected to the tests proposed, add new and additional qualification to the right to vote, or does it merely require the voter to furnish the evidence that he possesses the constitutional qualifications? Does it alter or abridge the right to vote, or does it do anything more than afford evidence by which to distinguish the true from the false voter?

The constitutional qualifications relate to and affect the subjects of sex, citizenship, age and domicile, and certain general limitations in respect to the subjects mentioned are imposed upon the right of suffrage. Other limitations than those mentioned cannot be imposed by legislative enactment, but, as has been seen, the Legislature has unlimited and plenary power over the subject of the methods of proving that the voter possessed the Constitutional qualifications. It is pertinent to inquire, To what extent, if at all, does the Statute in question add new qualifications to the right to vote, or impose additional limitations than those above upon the exercise of the constitutional right?

The first substantive proposition contained in the Statute is to the effect that any person who, having been a resident of the State, shall have absented himself therefrom for a period of six months or more, shall, at least three months before any election at which he intends to vote, register a notice, the form of which is prescribed, of his intention to become a qualified voter, in the office of the clerk of the circuit court of the county in which he resides. There is a proviso which renders the notice inapplicable to any person who, six months or more before any election, shall have registered notice of his intention to hold his residence in this State during a contemplated absence. The Statute provides that upon the demand of any challenger or member of the election board, any person thus absent may be required to produce a certified copy of the notice so required to be registered before he shall be entitled to vote, which copy the clerk is required to furnish at the expense of the county. Having produced his certificate of registration, he shall then be entitled to vote unless the challenger, or some other qualified voter of the precinct, shall make a written affidavit that he knows or is informed and believes, giving the name of his informant, that the person offering to vote is not a legal voter; in which case the person so offering shall, in addition to his certificate of notice and his own affidavit, produce the affidavit of a qualified person as to his right to vote. Like provision is made in regard to all persons who shall have gone into any other State or sovereignty with the intention of becoming a voter there, or who have, during any absence from the State, voted in any other State or sovereignty; and also in regard to any person who shall not have been a bona fide resident of this State and of the county in

which he resides at least six months prior to any election at which he offers to vote. It is as plain as any proposition can be that the provisions of the law relate exclusively to methods of proof by which to ascertain the constitutional qualification of voters, to distinguish between the true and the spurious. With the exceptions to be hereafter noted, they add no new conditions to the right of any person constitutionally qualified to vote, nor do they in the slightest degree impair, alter or abridge the right of any legal voter to cast his ballot. It is true, a legal voter when properly challenged may be required to furnish certain proof of his qualification; but until it can be said that the Legislature can neither add to the constitutional qualifications of the voter nor require any proof of those prescribed except such as may suit the notions of the judiciary, it is difficult to find any ground upon which to set aside and annul the Statute. If the court can obliterate a statute which requires one method of proof, then any and all other methods which the Legislature may devise are subject to judicial surveillance. If, as has been truly and forcibly said, the legislative department, being the nation or State itself speaking by its representatives, has a choice of methods and is the master of its own discretion, then upon what principle can the court interfere and declare the particular method adopted of no effect? *State v. Haworth*, 121 Ind. 462, 7 L. R. A. 240.

If the court can say that a person who has absented himself from the State for six months or more, or one whose residence for six months or more prior to the election at which he intends to vote has been unfixed and of an ambiguous character, cannot be required, upon being challenged at the polls, to furnish evidence showing that his intention was fixed, at least three months before election, to claim his residence in the precinct in which he offers to vote, then it can for the same reason adjudge that he shall not be required to prove, by the oath of a freeholder of the precinct, that he is a legal voter therein. If the requirement that he shall produce a certificate showing his intention a specified time previous to the election is adding a new qualification, then the requirement that he shall procure the oath of a freeholder is doing the same thing. The reasons which serve to annul one statute which prescribes a particular method of proof are equally potent to strike down any statute which prescribes methods of proof. The result will be that the Legislature must either tie the hands of election boards and leave the ballot box open for the reception of honest and fraudulent votes alike, or it must feel its way blindly until it strikes a method of proof which shall pass judicial scrutiny.

Requiring a person who offers to vote to produce a certificate when he is challenged, on the ground of nonresidence, showing that he had declared his purpose to claim the right of suffrage before the heat, pressure and excitement of election day, free from the solicitation of partisan friends, is not in any sense imposing an additional qualification or abridging the right to vote, any more than requiring a voter to go to a specific place to vote or to cast his ballot between specified hours on a given day, or to fold his ticket in a prescribed manner, or

to prove by his own oath or the oaths of other parties his right to vote when challenged. *State v. Butts*, 81 Kan. 537.

As is pertinently said by Brewer, J., in the case last cited: "If the Legislature has the right to require proof of a man's qualification, it has a right to say when such proof shall be furnished, and before what tribunal, and unless this power is abused the courts cannot interfere." It is no argument which a court can consider at all to suggest that isolated instances may occur where a person absent from the State may be prevented, from sickness or other unavoidable cause, from registering the required certificate within the time prescribed; and it is equally impertinent to suggest that the nature of the employment of others may render it inconvenient, or even expensive, to return to the State at or prior to a designated time in order to record a declaration of their intention to vote. All laws designed for the prevention of great wrongs impose hardships occasionally on good men, while holding back the horde of evil-doers, for whose restraint they were enacted. They are not, however, for that reason to be declared unconstitutional. It might with equal reason be urged that the law requiring electors to cast their ballots on a particular day, at a specified place, was unconstitutional because it omitted to make provision for those too sick to attend the polling place, or for those who are unavoidably absent from the State on election day."

Nearly every law that has ever been passed requiring registration of some kind to be completed a specified time before election day has been assailed with these arguments; but in no case that has been followed as authority have these arguments proved availing. *State v. Butts*, *supra*, and authorities cited; *Patterson v. Barlow*, 60 Pa. 54; *People v. Hoffman*, 116 Ill. 587, 8 West. Rep. 523, 56 Am. Rep. 793.

Notwithstanding an isolated decision or two to the contrary, the authorities overwhelmingly sustain those provisions in election laws which require voters to afford the means for determining their qualifications prior to the haste and confusion of election day; and while exceptional cases of inconvenience or hardship may arise, this is nothing more than may often result from the fact that the right to vote is fixed at a certain place on a certain day and between fixed hours. Hardship or inconvenience is no test of the constitutionality of a law. Besides, what objection can an honest voter make to a law that enables him by his own act to relieve himself of the unfounded aspersions which unfriendly partisans are always ready to cast upon him when, after a temporary absence from the State, he presents himself at the polls to vote? What better or more satisfactory evidence can there be of a residence complete and maintained than the personal appearance of the elector on the day of election, claiming his vote, with a certified copy of a declaration made before the dust and smoke of the campaign had arisen, showing that the question of residence was not an afterthought engendered by the heat and excitement of the campaign. Is not such a law as this promotive of honest voting? and does it not afford to an honest voter a safe and dignified method of establishing his residence without being com-

pelled to deliver himself over to the ward politicians to be "put through" according to the devious methods which are sometimes practiced?

Without question, a law like this will sometimes work a hardship to an honest man, but that is not the fault of the law. The fault lies in the conditions which require the enactment of such a law. Is it necessary, because an honest man may occasionally suffer wrong or inconvenience, to nullify the Statute, with the sure consequence to follow that illegal voters and rogues shall have full swing to debauch the ballot box without let or hindrance? As was in effect said in *Patterson v. Barlow*, *supra*: What injustice is done to the real electors by requiring all those without fixed residences, or who have maintained an ambiguous residence, to appear in person before some officer and declare their residence at a specified time before election day? What clause of the Constitution forbids that a voter should be required to furnish evidence of his residence beforehand, rather than engage in a scramble for dubious evidence in the hurry and confusion of election day?

The Act is assailed because it is said the Constitution imposed upon the Legislature the duty of providing by a general law for the registration of all voters, and that inasmuch as this Statute only requires certain persons whose residence is of an ambiguous character to register, it is therefore void. Whether a law is general or not does not depend upon the number of persons who fall within its scope or operation. Laws are general, not because they operate upon every person in the State, but because every person who is brought within the relations and circumstances as provided for is affected by the laws. *Hancock v. Yaden*, 121 Ind. 386-374.

The Statute under consideration affects no particular class of persons. It affects all alike who come within the relations and circumstances upon which it operates. The only fair assumption is that the law is aimed at persons who seek to vote illegally. Any other assumption is a reflection upon the Legislature that ought not to be made.

It is in some respects a misnomer to call the Statute in question a Registry Law. While it is quite true the words "register" and "registration" are employed in the Statute, its provisions bear little or no resemblance to a Registry Law. The Act simply provides for certain modes of proof, in the cases of persons who offer to vote, upon the subject of their residence. This proof is not required to be made to a board of registration or before a registering officer, but to the election board. The evidence required is to consist of a written declaration or statement made by the elector and filed with a public officer, such a length of time before the election as to rebut any presumption that the pretense of residence is merely to secure the right to vote. The sole purpose of the Statute is to provide a method of proving residence, and not to secure a registry of voters of a particular class. The Statute is to be judged, not by what it is called, but by its language, scope and purpose. But conceding it to be a law requiring a partial registration, by which is meant a registration which applies

to all citizens under certain conditions or circumstances, while it has no application to others in a different situation, can the Statute be maintained? The question is not a new one. It has been decided in the affirmative again and again by courts of the highest authority in the land. A constitution would indeed be "deformed and sterile" if a law designed to protect the ballot-box in great centers of population from falsehood and fraud should fall under condemnation because it did not also include the rural districts, where the necessity for such a law did not exist. Equally sterile and deformed would be a constitution under whose provisions a law could be justly condemned which required proof of a specified kind as to the qualification of all voters under a given state of circumstances, because it omitted to require the same kind of proof from all other persons, whether they came within or under the designated circumstances or not.

Let it be conceded that the Constitution requires the Legislature to provide for the registration of all voters in the State, how does it logically follow that it prohibits the enactment of a law which requires all voters under certain conditions, viz., those having for the time being no fixed residence, to register a notice of their intention to claim the right to vote in a particular voting precinct? Premise: It was the duty of the Legislature to enact a General Registry Law. This duty it has failed to perform. Conclusion: Having failed to perform this duty, the courts will declare any law that it may enact requiring voters when challenged on election day to furnish certain proof of their qualification to vote, unconstitutional. This is the argument in substance.

To say that because the Legislature omitted to perform a given duty, it is thereby prohibited from taking any step in the direction of the duty prescribed, is to violate all legal precedents, as well as to go against all logical reasoning. The rule is that a body invested with a certain power may exercise the power with which it is invested to any degree not in excess of the whole. So when the chief executive, being invested with the whole pardoning power, paroled a prisoner on condition of good behavior, it was contended that he must exercise the whole power or none. It was held, however, that being invested with the whole power it was lawful for him to exercise it in any degree. Accordingly, too, it has been held in numerous cases where the enactment of laws providing for a uniform system of registration was required, that statutes requiring voters in certain designated cities, or in cities of a certain class, to register within a specified time prior to any election, were valid. *Patterson v. Barlow*, *State v. Butts* and *People v. Hoffman*, *supra*.

These decisions recognize the principle that the purity of the ballot-box must be protected from the local and particular frauds and evil practices which are known to exist, and which disfigure and destroy the freedom and fairness of elections. Any other interpretation of the Constitution must operate as an incentive to fraud which the Legislature is without power to arrest. Laws designed to protect the ballot-

box must strike at the pernicious practices which are known to be employed in order to nullify the votes of the honest voter. A law blind to the vicious methods of the dishonest politician, applied alike to every voter, might prove a delusion and a snare. A Registry Law which made no different provision for the registration and proof of domicile of those having no fixed abode from that required of permanent residents, would be an absurdity. To say that a law is to be so general that it must open the door for the very evils it was intended to guard against is to effectually tie the hands of the Legislature from enacting any law to preserve the purity of the ballot-box. *Com. v. McClelland*, 88 Ky. 686.

In so far as the law seems to require a voter who moves from one county to another to register a notice of his intention to vote in the county to which he removes, three months before the election, it is in my opinion invalid. *Page v. Allen*, 58 Pa. 838; *Com. v. McClelland*, 88 Ky. 686; *Atty-Gen. v. Detroit* (Mich.) 7 L. R. A. 99.

A voter who moves from one county to another sixty days before an election is entitled to vote in the township in which he establishes his residence. This Statute seems to require such a voter to register or give notice three months before the election of his intention to vote. This cannot be required. To the extent that the Statute requires an elector who moves from one county to another to register more than sixty days before the election, it adds a new qualification. Nor can the Statute be upheld wherein it undertakes to require of any voter, as a condition to his right to vote, that he should procure a certificate from the auditor of the county showing that his name had been continuously on the tax duplicate of the county for a given period. This last is a condition that might well imply a property qualification, and is in addition to those prescribed in the Constitution. As has been in effect said, a Registry Law which would require a longer residence prior to the time of voting than that required by the Constitution, or which should require the payment of taxes not required to be paid by constitutional provision, would be void. *McCrary, Elections*, § 8; *Kinneen v. Wells*, 144 Mass. 497, 4 New Eng. Rep. 457.

To the extent that the Statute requires persons who have absented themselves from the State for a period of six months or more, or those who have gone into any other State or sovereignty with the intention of voting therein, or who have voted in any other State or sovereignty during any absence from this State, and also to the extent that it requires persons who have not been bona fide residents of the State at least six months before any election at which they offer to vote, to present the required certificate of their intention,—it should be held constitutional and valid. To the extent that it requires persons who have lived in the State for six months, but who moved from one county to another, to present the proof prescribed, and to the extent that it requires proof that the voter has been borne on the tax duplicate, it is invalid.

VERMONT SUPREME COURT.

Horace TYLER

v.

TOWN OF WILLISTON *et al.*

(....Vt....)

1. All of the towns whose duty it is to keep a bridge in repair are liable for an injury occurring at a space between a point designated by the order of the court as the end of the bridge and the end as built, although such space was filled in and the filling maintained by one of the towns at its own expense.

2. Notice to the towns in which a bridge is situated of an injury resulting from a defect therein is constructive notice to all towns which are responsible for its maintenance in good repair, and will warrant a recovery against all under Acts 1882, No. 18, § 4, which provides for notice to the town or towns in which the bridge is situated only.

(August 11, 1890.)

EXCEPTIONS by defendants to a judgment of the Chittenden County Court in favor of plaintiff in an action brought to recover damages for an injury to a horse resulting from a defect in a certain bridge. *Overruled.*

The bridge was maintained at the joint expense of the Towns of Williston, Essex, Jericho and Underhill and all these towns were made defendants to the action. It spanned the Winooski River between the Towns of Williston and Essex, upon which alone the notice of the injury required by the statute was served. The action was brought under Acts 1882, No. 18, § 4, which renders the Towns responsible for the maintenance of a bridge liable for injuries which result from defects therein.

Further facts appear in the opinion.

Messrs. M. A. Bingham, V. A. Bullard and M. H. Alexander, for defendants:

The injury complained of did not occur on this bridge, or by reason of any defect in said bridge or its abutments, but upon a portion of the highway which the Town of Williston alone was bound to keep and maintain.

Powers v. Woodstock, 38 Vt. 45; *Bardwell v. Jamaica*, 15 Vt. 438.

To charge any town with liability, the plaintiff must notify one or more of the selectmen of such towns, sought to be charged, of his injury or loss and claim of damage. A liability cannot exist nor judgment be rendered in this case against the Towns, or either of them, who have received notice, as the action and liability are joint against all the Towns who are liable to keep in repair said bridge, and the plaintiff in his declaration has declared jointly against all the Towns.

Brown v. Fairhaven, 47 Vt. 386; *Whitcomb v. Rood*, 20 Vt. 49.

The action and liability being joint, the bridge, for the purpose of notice, at least, should be deemed to be situated in all the Towns liable to maintain the same.

Murdell v. Hammond, 40 Vt. 644; *Haskins v. Bennett*, 41 Vt. 702; *Webster v. Orne*, 45 Vt. 40.

Messrs. Roberts & Roberts for plaintiff.

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Royce, Ch. J., delivered the opinion of the court:

The bridge through the alleged insufficiency of which the plaintiff received the injuries complained of was built under an order of the Chittenden County Court at the September Term thereof, 1859. By such order the expense of erecting and repairing the bridge was apportioned among the defendant Towns as stated in the exceptions. The bridge was ordered to be built in accordance with the report of the commissioners appointed in the cause, and by that report the south end of the bridge was established at a point "nearly opposite the door on the back and northerly side of Roswell B. Fay's dwelling-house, there to connect with the present highway that comes to the river by the west end of said house." The Fay house was situated about six rods beyond and south of the river bank. The bridge was built, under contract, by one Edgerton, and, as built by him, and ever since maintained, the Williston, or southerly, end of the bridge extended over the abutment from five to eight feet, leaving a space about six feet high between the abutment and the end of the bridge as so built. This space had been filled in by the Town of Williston by a contrivance of its own devising, and this contrivance for filling in has been ever since maintained by the Town of Williston at its own expense. Williston has also graded the highway up to the bridge at its own end, and maintained it. The injury complained of occurred "at the end of the bridge between the bridge as contracted for and built by Edgerton as aforesaid, and this arrangement, so put in as aforesaid by said Town of Williston," and by reason of the insufficiency or want of repair of the "arrangement." It occurred within the limits of the bridge, as established by the commissioners, and the order of the court above referred to; and so we must hold that it occurred through the insufficiency of the bridge, and is a case contemplated by section 4 of No. 18, Acts of 1882. The contract made with Edgerton did not, as to the public, fix the limits of the bridge, nor relieve the Towns affected by the order from liability for accidents occurring within the limits specified by the order, though beyond the extremities of the bridge as actually built. It was not within the jurisdiction of the commissioners to prescribe the manner in which the bridge should be constructed or the expense of construction. *State v. Williston*, 81 Vt. 158.

But it was part of their duties to determine the place where it should be erected, and, inasmuch as they did this, and their report was adopted, and the order of the court made in accordance therewith, that order is just as conclusive and definite on this point as on the apportionment of the expense, or the question of the necessity or convenience of the bridge.

The ruling in *Powers v. Woodstock*, 38 Vt. 45, is not in conflict with the views here expressed. There a committee established a

bridge to be built and maintained at the expense of the four towns to be benefited, also a highway over the bridge, and required wing-walls to be built from the abutments to the river banks, and the space inclosed to be filled in by the four towns as part of the expense of building the bridge. Plaintiff's injury occurred on this space so inclosed and filled in, and the question was whether this was part of the bridge or of the highway. If the former, then the four towns would be jointly liable, and should have been sued. If the latter, then Woodstock alone, being the town in which the accident happened, was liable, and the action was properly brought. The court held, for satisfactory reasons, that the *locus in quo* was a part of the highway. But here the sole duty of the commissioners related to the establishment of the bridge and fixing its limits and apportioning the expense. And for any injury to the public occurring within the lim-

its so established, by reason of the insufficiency of the structure, of whatever nature, there erected, the towns whose duty it is to keep the bridge in repair must be held liable as for an insufficiency of the bridge.

The notice was sufficient. The law requires notice to the town or towns in which the bridge is situated (Acts 1882, No. 13, § 4), and such notice was given. This is constructively notice to all. No such question was raised in *Brown v. Fairhaven*, 47 Vt. 386. There the bridge was situated in both defendant towns, and both were liable for its repair and maintenance. Notice had been given to one only, and the court held that such notice was insufficient, and that the liability being a joint one, judgment could not be given against the town that had been notified for a share of the damage sustained proportional to its share of liability for the repairs.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHASE'S PATENT ELEVATOR CO., Appt., v. BOSTON TOW BOAT CO.

(....Mass....)

The facts that the capital stock of a corporation had not all been paid in and a certificate of the payments filed as required by Pub. Stat., chap. 106, § 46, which forbids corporations to commence the transaction of the business for which they were organized until those things are done, at the time it entered into and performed a contract, will not preclude it from recovering the amount due it thereon.

(October 25, 1890.)

APPEAL by plaintiff from a judgment of the Superior Court for Bristol County sustaining a demurrer to the replication in an action brought to recover the contract price of an elevator furnished by plaintiff to defendant. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Jackson & Slade, for appellant:

There was a corporate existence with right to sue and be sued, although the certificate required before the transaction of business had never been filed.

Merrick v. Reynolds Engine & G. Co. 101 Mass. 381; *Haves v. Anglo-Saxon Petroleum Co.* Id. 885.

The Statute recognized, and provided the only consequences for, a failure to pay in the capital stock before commencing business. No fine or punishment was provided, and this is significant.

Rock River Bank v. Sherwood, 10 Wis. 280; *Union Nat. Bank of St. Louis v. Matthews*, 96 U. S. 625, 25 L. ed. 189.

The sale of elevators was legal business, the only trouble being that the Company commenced the sale and made the contract before it had a legal right to do so. That action

constituted at most a breach of contract between it and the State, which the State alone could take advantage of. The penalty would be forfeiture of chartered rights.

Larned v. Andrews, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655.

Unless it appears affirmatively that the Legislature intended to render a forbidden act or contract absolutely void in legal contemplation, it will not be so held.

Morawetz, Priv. Corp. § 45.

If this contract is affected in any way as such by non-compliance with the law, it is a contract unlawful because in excess of the powers of the corporation. In such cases, where the contract is an executed one on the part of the plaintiff, the courts will not allow the debtor to successfully set up the defense of *ultra vires*.

Slater Woolen Co. v. Lamb, 8 New Eng. Rep. 443, 143 Mass. 420; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Davis v. Old Colony R. Co.* 131 Mass. 258; *Chaffee v. Middlesex R. Co.* 6 New Eng. Rep. 59, 146 Mass. 221; *Silver Lake Bank v. North*, 4 Johns. Ch. 270, 1 N. Y. Ch. L. ed. 871.

Mr. William S. Rogers, for appellee:

It appears on the face of the pleadings themselves that the contract sought to be enforced by the plaintiff in this suit is an illegal contract, one which the plaintiff was forbidden by law to make, and therefore incapable of enforcement by this plaintiff.

Felker v. Standard Yarn Co. 148 Mass. 236; *Taylor, Priv. Corp.* ed. 2 of 1888, § 297.

If the contract on which a suit is brought was made in violation of a law of the State, it cannot be enforced in any court sitting in the State charged with the interpretation and enforcement of its laws.

Wheeler v. Russell, 17 Mass. 258; *Allen v. Hawks*, 13 Pick. 79, 82; *Roche v. Ladd*, 1 Allen, 436, 441; *Bank of U. S. v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Groves v. Slaughter*,

40 U. S. 15 Pet. 449, 10 L. ed. 800; *Harris v. Runnels*, 53 U. S. 12 How. 79, 18 L. ed. 901; *Brown v. Tarkington*, 70 U. S. 3 Wall. 877, 18 L. ed. 255; *Davidson v. Lanter*, 71 U. S. 4 Wall. 447, 18 L. ed. 877; *Hanauer v. Doane*, 79 U. S. 12 Wall. 342, 20 L. ed. 439; *Law v. Hodson*, 11 East, 800; *Little v. Poole*, 9 Barn. & C. 192; *Thorne v. Travelers Ins. Co.* 80 Pa. 15; *Pattie v. Greely*, 18 Met. 284; *Miller v. Post*, 1 Allen, 434; *Williams v. Cheney*, 8 Gray, 215; *Jones v. Smith*, 8 Gray, 500; *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray, 876; *General Mut. Ins. Co. v. Phillips*, 18 Gray, 90.

The law of this State requires the provisions of the Statute in regard to making out, swearing to and filing the certificate of the payment of the capital stock to be strictly carried out and complied with.

Washington County Mut. Ins. Co. v. Hastings, 2 Allen, 898.

The certificate must be filed before the cause of action accrues.

Washington County Mut. Ins. Co. v. Chamberlain, 16 Gray, 165; *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray, 78; *National Mut. F. Ins. Co. v. Pursell*, 10 Allen, 231; *Provincial Ins. Co. v. Lapsley*, 15 Gray, 362; *Davis v. Old Colony R. Co.* 131 Mass. 258; *Bonditch v. New England Mut. L. Ins. Co.* 2 New Eng. Rep. 288, 141 Mass. 292; *Stater Woolen Co. v. Lamb*, 8 New Eng. Rep. 443, 143 Mass. 420.

The prohibition which has been violated here is one for the benefit of the public, and hence this defendant is not estopped to make this defense.

First Nat. Bank of Barre v. Hingham Mfg. Co. 127 Mass. 563, 570; *Bishop v. Palmer*, 6 New Eng. Rep. 129, 146 Mass. 469.

To entitle the plaintiffs to recover, they are bound to show a legal and valid contract.

Libby v. Downey, 5 Allen, 299.

This contract was not *ultra vires*, it being the very business the corporation was in terms organized to transact, but compliance with the requisitions of the Statute was a condition precedent to the plaintiff's right to make this contract.

Montgomery v. Forbes, 148 Mass. 249; *Braintree Water Supply Co. v. Braintree*, 6 New Eng. Rep. 117, 146 Mass. 482, 483; *Larned v. Andrews*, 106 Mass. 435.

Holmes, J., delivered the opinion of the court:

This is an action for the price of an elevator furnished to the defendant by the plaintiff under a written agreement. The answer charges that at the time of its making and performing the agreement the plaintiff's capital stock had not been paid in, and a certificate of the payments, etc., had not been filed, as required by Pub. Stat., chap. 106, § 46, which forbids a corporation to "commence the transaction of the business for which it was organized" until those things are done. The replication alleges that before the contract and sale a certificate of organization had been issued and a large part of the stock paid in; that shortly afterwards the stock was paid in full, and that a certificate was filed before the date of the writ. There is a demurrer to the replication, on which the superior court ordered judgment for the defendant.

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A majority of the court are of opinion that the demurrer must be overruled on the ground that the facts alleged in the answer are no defense. In other words, we are of opinion that Pub. Stat., chap. 106, § 46, when construed with the rest of the chapter, and in the light of former decisions, cannot be taken to make the contract void.

By section 61 of the same chapter the "stockholders in any corporation which is subject to this chapter shall be jointly and severally liable for its debts and contracts in the following cases: . . . first, for such as may be contracted before the original capital is fully paid in," etc. By section 62 their liability is made conditional upon the recovery of a judgment against the corporation.

It is expressly contemplated, therefore, that a corporation may make contracts before complying with section 46, upon which a judgment may be recovered. It cannot be maintained that the contracts for which the corporation, and, secondarily, the stockholders, are thus liable, are confined to contracts outside of its business, and so not within the scope of section 46. Such a limitation would be in the face of the obvious purpose to protect the public which is shown by the first clause of section 61. Some of the contracts mentioned, for instance those in the fourth clause (debts to operatives), are plainly contracts made in the course of business, yet they fall under the words "debts or contracts" at the beginning of the section, so that those words would have to be read as meaning two different things at once, as applied to the different clauses, in order to make the supposed limitation possible. The words are substantially the same that were used when corporations could begin business before the whole amount of their stock had been paid in. Gen. Stat. chap. 60, § 17. At that time, of course, they extended to contracts in pursuance of the business for which the corporation was organized, as was assumed by the cases, *Merrick v. Reynolds Engine & G. Co.* 101 Mass. 381; *Haves v. Anglo-Saxon Petroleum Co. Id.* 885, 111 Mass. 200; *Augur Steel Aile & G. Co. v. Whittier*, 117 Mass. 451.

There is no reason for construing them differently now, and it has not been suggested that they have not the same extent as before in the cases which have arisen since Stat. 1870, chap. 224, now embodied in Pub. Stat., chap. 106. *First Nat. Bank of Barre v. Hingham Mfg. Co.* 127 Mass. 563. See *Kelley v. Newburyport & A. H. R. Co.* 141 Mass. 496, 2 New Eng. Rep. 838.

It follows that if the parties to this action were reversed, and the defendant was the one who relied on the contract, section 45 would not prevent a recovery.

If, then, the contract sued upon bound the plaintiff, it would be entirely anomalous to hold that the defendant was free. The general rule is that when a contract is made void by a prohibition it is void against both sides. *Oranson v. Goss*, 107 Mass. 439, 440.

The defense of *ultra vires*, in the sense that the contract was illegal or prohibited, has been set up by corporations so much oftener than against them that it is hard to find cases of the latter sort, whereas if either party were to be precluded from it it would be the corporation.

It may be worth noticing, however, that the decision assumes that if it is a defense to the corporation it is a defense to the other party. *South Wales R. Co. v. Redmond*, 10 C. B. N. S. 675; *Oullaway Min. & Mfg. Co. v. Clark*, 82 Mo. 805, 808; *Ruiland & B. R. Co. v. Proctor*, 29 Vt. 93, 96; *Rock River Bank v. Sherwood*, 10 Wis. 230.

The same principle was recognized in the cases concerning prohibited insurance relied on by the defendant. *Williams v. Cheney*, 8 Gray, 215, 222; *Jones v. Smith*, Id. 500, 501; *Provincial Ins. Co. v. Lapsley*, 15 Gray, 262, 263; *Washington County Mut. Ins. Co. v. Hastings*, 2 Allen, 393, 400; *National Mut. F. Ins. Co. v. Pursell*, 10 Allen, 281, 282.

If a corporation makes such a contract as this before its capital stock is fully paid in, the result of §§ 48, 61, is not that it is void as against both contractors, nor that it binds the corporation and is void as against the other party, but simply that the personal liability of the members of the corporation takes the place of what had not been paid in upon the stock, as security to the other party.

By Gen. Stat., chap. 61, § 8, the officers of the corporations then mentioned were required to publish a certificate similar to that now required, but of less scope, "before such corporation commences business." This plainly means that such corporations shall not commence business until the certificate is published. But it was decided that that section did not prevent the corporation from recovering upon a contract made before the certificate was published. The discussion was directed mainly to showing that the corporation existed before the filing of the certificate, but one ruling asked was a general one, that the plaintiff could not recover; and it is said that "in the opinion of the court this omission of the officers cannot be set up to defeat the plaintiff's right to recover." *Merrick v. Reynolds Engine & G. Co.* 101 Mass. 381, 384.

A similar decision was made with regard to a similar statute of Connecticut. *Augur Steel Axle & G. Co. v. Whittier*, 117 Mass. 451.

The Act of 1870 was passed just after the decision in *Merrick v. Reynolds Engine & G. Co.* It was very plain from the language of that case, which we have quoted, that this court did not regard Gen. Stat., chap. 61, § 8, as invalidating contracts made before the certificate was published. If the Legislature had

intended to change the law in that respect it would have been likely to mark its intention by some greater change than that from, "Before such corporation commences business, the president, etc., shall," to "No corporation, etc., shall commence the transaction of its business, etc., until." Stat. 1870, chap. 224, § 32; Pub. Stat. chap. 106, § 46.

It is suggested that although the public are protected by the liability of the stockholders until the stock is paid in, they are not protected afterwards in case of a failure to file the certificate. But if the stock is paid in in fact, the public have all the security to which they are entitled. The certificate does not protect them; it protects the stockholders, if anyone. Chap. 106, § 59; *First Nat. Bank of Barre v. Hingham Mfg. Co.* 127 Mass. 563, 569, 570; *Stedman v. Eneleth*, 6 Met. 114.

Perhaps it was partly in recognition of this fact that the former liability of members until the certificate was filed, even if the stock had been paid in (Gen. Stat. chap. 60, § 17, chap. 61, § 5), was dropped in Stat. 1870, chap. 224, § 32; Pub. Stat. chap. 106, § 61.

The prohibition against commencing business is somewhat more vague than the specific prohibition of certain contracts of insurance by foreign companies in Pub. Stat., chap. 119, § 197; and it is noticeable that even in the latter case, where the prohibition was carried to its logical conclusion and was held to make the prohibited contracts void, the Legislature corrected it. Stat. 1851, chap. 331, § 6; 1852, chap. 331, § 8; 1854, chap. 343, § 46; 1856, chap. 252, § 49; Gen. Stat. chap. 58, § 73; Pub. Stat. chap. 119, § 200. See also *Lobby v. Downey*, 5 Allen, 269; Stat. 1863, chap. 171.

Taking all that we have said into account, we do not think that the Legislature intended, or that the words of the Statute mean, that if a corporation makes a contract in contemplation of beginning business as soon as it has filed a certificate, the contract shall be void, even if making the contract is itself in a sense beginning business. See *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727 [28 L. ed. 1137].

The fact that the contract is performed before the Statute is satisfied does not alter the case. The validity of the contract is determined at the time when it is made. See, further, *Bowditch v. New England Mut. L. Ins. Co.* 141 Mass. 292, 2 New Eng. Rep. 238.

Demurrer overruled.

COLORADO SUPREME COURT.

Louis HAX et al.

v.

William H. SEAMAN, Impleaded, etc., App't.

(....Colo....)

A mortgagee is not estopped to enforce his mortgage by previously selling the mortgagor's interest in the property on execution sale to satisfy another debt.

(May 15, 1890.)

APPEALS by defendant, Seaman, from an order of the District Court for Arapahoe
9 L. R. A.

County sustaining a demurrer to his defense and from a judgment in favor of plaintiffs in an action brought to set aside an execution sale of certain real estate for the purpose of removing the cloud thereby cast upon the title. *Affirmed.*

Statement by Helm, *Ch. J.*:

In the year 1883 Catherine Caspar, being indebted to appellees in the sum of \$2,000, executed four promissory notes for \$500 each, payable in three, six, nine and twelve months, respectively. To secure these notes, she also

gave a mortgage upon eight lots in the City of Denver, which mortgage was at the time duly filed for record with the clerk and recorder of Arapahoe County. At the time of the foregoing transaction, four of the said lots were already incumbered by a trust deed. The four lots thus incumbered were afterwards sold to satisfy the indebtedness secured by the said trust deed. In 1884 appellees obtained a judgment against said Caspar for a separate and distinct indebtedness. In July of said year, under said judgment, execution was duly levied upon the four lots covered by the mortgage. They were sold at sheriff's sale; and Gartner, one of the appellees, became the purchaser thereof. In August, 1884, the mortgage notes being due and unpaid, appellees began suit to obtain judgment thereon, and to foreclose their mortgage against the property. In 1885, while said foreclosure suit was still pending, Bentley, who was impleaded in the present suit, obtained a judgment against Caspar for the sum of \$85.53. After the expiration of six months from the date of the execution sale above mentioned, at which Gartner became the purchaser, Bentley, as an execution creditor, re-deemed, under the statute, from that sale. His execution was then levied upon the property. It was sold by the sheriff. He became the purchaser, and ultimately received his sheriff's deed. In September, 1886, a judgment of foreclosure was rendered in the mortgage proceedings, and the real estate ordered sold, in pursuance thereto, to satisfy the debt, then amounting to \$2,898.75. On the 12th of October, 1886, Bentley sold and conveyed by deed to appellant Seaman the interest acquired by him under his sheriff's deed. On the 25th of October, 1886, the present action was instituted, Caspar, Seaman and Bentley being made parties thereto. The object was to obtain a decree which should in effect remove the cloud cast upon the title by reason of the Bentley execution sale and the Seaman purchase, so that upon sale under the decree of foreclosure the purchaser's title might be perfect. Defendants Bentley and Caspar disclaimed. Defendant Seaman answered. A demurrer to his second defense was sustained, and from the order thus entered the first of these appeals was taken, under the Act of 1883, no longer in force. Afterwards, Seaman having in the mean time amended his answer, upon motion the court found in favor of appellees on the pleadings, and rendered a decree accordingly. To review the latter proceedings and decree the second appeal was taken. Colo. Gen. Stat., § 1889, provides that every interest in land, legal and equitable, shall be subject to levy and sale under execution.

Mr. J. A. Bentley, for appellant:

To permit the mortgagees to come now, and enforce their mortgage against the appellant's title, which he has obtained under and resting upon redemption proceedings by a judgment creditor from this sale, procured by them, and the benefit of which they now enjoy in the redemption money paid by appellant's grantor, would be the violation of all the principles of equity which uphold the doctrine of equitable estoppels.

2 Pom. Eq. Jur. §§ 803, 805, 807, 810.

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The doctrine estopping one to repudiate or invalidate the title of property, the benefits of the sale of which he is enjoying, is too elementary to permit of any discussion.

Bigelow, *Estoppel*, title *Estoppel by Conduct*, or *Equitable Estoppel*, p. 431 *et seq.*; 5 U. S. Dig. First Series, title *Equitable Estoppel*; *France v. Haynes*, 87 Iowa, 139; *Field v. Doyon*, 64 Wis. 560; *Fielding v. Du Boss*, 68 Tex. 681; *Dodge v. Pope*, 98 Ind. 480; *Evans v. Forstall*, 58 Miss. 80; *Rice v. Bunce*, 49 Mo. 281; *Vanneter v. Crossman*, 42 Mich. 465; *Reid v. Heasley*, 2 B. Mon. 254; *Walker v. Bernard*, Cameron & N. (N. C.) 82; *Morford v. Bliss*, 12 B. Mon. 255; *Preston v. Mann*, 25 Conn. 118; *Nantico Bank v. Dennis*, 87 Ill. 861.

Mr. Oliver B. Liddell, for appellees:

Bentley had no judgment for nearly three months after Gartner bid in the equity at sheriff's sale, while the representation or concealment necessary to raise an estoppel must in all ordinary cases have reference to a present or past state of things.

Langdon v. Doud, 10 Allen, 433; *White v. Ashton*, 51 N. Y. 280; *Brightman v. Hicks*, 108 Mass. 246.

The answers do not show that defendant had not equal knowledge with plaintiffs at all times.

See Bigelow, *Estoppel*, p. 532, as to what is necessary in pleading; also *Lash v. Rendell*, 72 Ind. 480; *Robbins v. Mages*, 76 Ind. 890; *Wood v. Ostram*, 29 Ind. 177; *Pomeroy*, Rem. § 712; *Terrell v. Grimmell*, 20 Iowa, 898.

The doctrine of estoppel can have no application where everything was equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights spring.

Fletcher v. Holmes, 25 Ind. 458; *Long v. Anderson*, 62 Ind. 537; *Greensburgh, M. & H. Turnp. Co. v. Siderner*, 40 Ind. 424; *Anderson v. Hubble*, 93 Ind. 578.

Thomas v. Bowman, 30 Ill. 84, is very much nearer like the case at bar as to its facts, and by analogy, than any case cited by appellant.

There can be no merger unless the two estates unite in one and the same person and in the same right.

Pratt v. Bank of Bennington, 10 Vt. 298.

It has long been the practice in courts of equity to hold the legal and equitable title distinct, although both were vested in the same person, whenever it could be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And whenever the nature of the case shows that such severance of the legal and equitable title is evidently to the interest of the holder, such intention will be presumed.

Besser v. Hawthorn, 3 Or. 129, citing *Roberts v. Jackson*, 1 Wend. 478; *James v. Morey*, 2 Cow. 246, 284, 300; *Gardner v. Astor*, 3 Johns. Ch. 53, 1 N. Y. Ch. L. ed. 540; *Cooper v. Whitney*, 8 Hill, 95.

There could be no merger in this case, nor could there be any estoppel.

Jones, Mort. § 848 *et seq.*; 2 Washb. Real Prop. 180; 1 Hilliard, Mort. p. 539, § 7; 4 Kent, Com. 3d ed. pp. 99-103; *Southworth v. Scofield*, 51 N. Y. 513; *Grellet v. Heilshorn*, 4 Nev. 536; *Sherman v. Abbott*, 18 Pick. 448; *Pratt v. Bank of Bennington*, *supra*; *Wickensham v. Reese*, 1 Iowa, 412; *Howe v. Woodruff*, 12 Ind. 215; *Mal-*

Jory v. Hitchcock, 29 Conn. 127; *Knowles v. Lawton*, 18 Ga. 476; *Freeman v. Paul*, 3 Me. 260; *Crosby v. Taylor*, 15 Gray, 64; *Edgerton v. Young*, 48 Ill. 464; *Lyon v. McIlwaine*, 24 Iowa, 9; *Davis v. Pierce*, 10 Minn. 876; *Mills-paugh v. McBride*, 7 Paige, 609, 4 N. Y. Ch. L. ed. 250; *Vanderkemp v. Shelton*, 11 Paige, 28, 5 N. Y. Ch. L. ed. 45; *Grover v. Thatcher*, 4 Gray, 526; *Evans v. Kimball*, 1 Allen, 240; *Besser v. Hawthorn*, *supra*; *Polk v. Reynolds*, 31 Md. 106; *Fithian v. Corwin*, 17 Ohio St. 118; *Duncan v. Drury*, 9 Pa. 352; *Slocum v. Castlin*, 23 Vt. 187; *Hunt v. Hunt*, 14 Pick. 374.

Helm, Ch. J., delivered the opinion of the court:

These appeals are considered together, as the view of the court, hereafter expressed, is decisive of both. It is unnecessary to critically analyze the pleadings. The answer contains many supposed denials, and it also sets up supposed affirmative defenses. But we shall address ourselves to the question whether or not the facts that appear in the pleadings without contradiction warranted the decree rendered by the court below. If we shall discover that the decree was proper under the pleadings as they stood at the time it was rendered, no error was committed by the court in its ruling upon the demurrer to the second defense.

Though the mortgage originally described eight lots, the sale to a third party in satisfaction of a prior trust deed entirely divested of its value the mortgagees' lien upon the four lots sold; and their security was narrowed to the remaining four lots, which alone are the subject of the present controversy. Appellant relies upon the doctrine of equitable estoppel, *i. e.*, an estoppel created by the conduct of appellees. His position is that appellees, by levying execution upon and selling the mortgaged lots, waived their rights to enforce the mortgage lien as against him or his vendor; but he cites no case that recognizes such waiver or estoppel under circumstances similar to those before us. By statute in this State, the mortgagor's interest in land is expressly made subject to execution sale; and there is no doubt but that a stranger to the mortgage might have

levied his execution upon the premises in question, and have sold the same, to satisfy his judgment. The mortgage lien would not, in such case, have been divested, and the purchaser would have taken title subject thereto. To all intents and purposes, after issue of the sheriff's deed he would step into the shoes of the mortgagor. We know of no reason why the mortgagee has not the same rights in this respect as other creditors. Suppose his mortgage debt is not due. The mere fact that he happens to have a prior lien, given to secure a different debt which has not yet matured, would not, either upon principle or authority, prevent his proceeding in the premises as any other judgment creditor. The mortgagee must not make a fraudulent use of his superior lien, secrete its existence, or otherwise mislead others to their disadvantage; but the mere isolated fact that he, instead of another, subjects his mortgagor's remaining interest to judicial sale in satisfaction of an independent debt, does not of itself work the estoppel contended for. The acts of appellees do not constitute a fraud in law; and we scan the record before us in vain for such *indicia* of fraud in fact as will sustain appellant's contention. Appellees do not appear to have done anything, either by word or act, or by omission to speak or act, tending to mislead or deceive appellant. Their mortgage was regular in form. It correctly described the property, and was duly recorded. Thus all parties were visited with constructive notice of its existence, and the lien created thereby. It was not released of record, and nothing was said or done by appellees to fairly justify an inference that the mortgage notes had been paid. On the contrary, the complaint avers that appellant had notice, when he purchased, that the foreclosure suit was pending. The denial that his vendor, Bentley, had "legal notice" thereof, "so as in any way to affect . . . the title derived," etc., was no denial, even as to Bentley. We fail to discover in these transactions the essential elements of an equitable estoppel. Defining such elements, see *Bigelow, Estop.* 2d ed. 437; 2 Pom. Eq. Jur. § 805; *Griffith v. Wright*, 8 Colo. 243.

The judgments of the court below in both cases are affirmed.

FLORIDA SUPREME COURT.

Eliza SIMMONS *et al.*, Appts.,

v.

L. W. SPRATT.

(.....Fla.....)

*1. A will which provides that the residue of the testator's estate shall be equally divided between his children, but directs when the division is made one of the children, naming her, shall have her share set off to her in other kind of property than slaves, does not vest the legal title of the residue of his real estate in his executors, but vests it in the children as tenants in common until the partition shall be made.

*Head notes by RANNEY, Ch. J.

● L. R. A.

2. Where a devisee, who is a tenant in common with other devisees, dies leaving a will by which he devises his estate to his niece, the legal title to his undivided interest in the land devised to him passes under his will to the niece.

3. Although an instrument executed by executors, and purporting to "set apart, distribute and convey unto the estate of D. W. H., deceased," one of the devisees of the testator, lands described therein, does not convey the legal title of the land to the niece of D. W. H., yet the purpose shown by this deed (considered in connection with the will of the original testator, and that of D. W. H., devising his interest in the land to his niece, and proceedings instituted in the probate court by the executors for the partition of the land, in which proceedings the administrator *cum testamento annexo* of D. W. H.

acted for his estate, bidding in certain lands for it under a system of bidding or so-called sales, adopted for ascertaining the value of the lands, all of which instruments and proceedings connect themselves), is to set apart the lands described in it as the separate share which she, as the person entitled to hold under D. W. H., should take in severalty.

4. **Where a deed, ineffectual to convey a legal title, has been executed by executors, and, when considered in connection with other instruments and proceedings, it shows an intent to partition the lands of the testator and to set apart certain lands as the share which the person entitled to the interest of the deceased son of the testator should take in severalty, and after the lapse of about eleven years the person so entitled, the niece and devisee of the son, mortgages part of the land included in the deed, her husband joining in the mortgage, and subsequently the mortgage is foreclosed and the land sold, a legitimate deduction to be drawn from the execution of the mortgage is the acceptance and ratification by the niece of the partition intended by the proceedings; and in the absence of any showing to the contrary, it is to be assumed that she relied on the partition for her right to mortgage the land in severalty.**
5. **A stranger to the common title cannot question the rightfulness of the exclusive possession of one tenant in common as against his co-tenants, and where there has been an actual partition, such stranger cannot make the irregularity or invalidity of the partition proceedings a defense to a recovery by the party to whom the exclusive possession of the land in question has been given. If the legal title to the entire part assigned in severalty did not pass, his title to the extent of his undivided interest is sufficient to maintain or assert his exclusive possession to the whole land assigned him, or any part thereof.**
6. **Where there has been an actual partition of land among tenants in common, and one of them conveys by metes and bounds a part of that assigned to him in severalty, the grantee has, as to the part so conveyed, the same rights against a stranger to the common title as his grantor had. Though the deed should prove void as to other co-tenants, it is good as against the grantor and a stranger to the common title.**
7. **A bill of exceptions containing evidence of a witness who testified on a former trial of the same cause and has since died, is not admissible to prove of itself what his testimony on that trial was.**
8. **Where there is error which cannot be said to be without injury, as it cannot be where testimony contributing to the weight of evidence on a point as to which there is conflict of testimony has been erroneously admitted, the judgment must be reversed.**

(July 24, 1890.)

A PPEAL by defendants from a judgment of the Circuit Court for Duval County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

The case sufficiently appears in the opinion. **Mr. George Wheaton Deans** for appellants.

Messrs. W. Cockrell & Son for appellee.
9 L. R. A.

Raney, C. J., delivered the opinion of the court:

On the former appeal in this case (20 Fla. 495) it was held that if the intended grantee in a deed is not named he should be ascertained by description so as to distinguish him from all other persons, and that a deed purporting to set apart, distribute and convey a described lot of land "to the estate of Daniel W. Hart," he being dead, does not pass the legal title to his niece, his devisee entitled to his estate.

The remaining question, therefore, as to title shown is, says the opinion, p. 500, whether plaintiff, Spratt, proved title in Daniel W. Hart, because, if so, the testimony of Caulk must be held to identify the land in question as being devised by Daniel W. Hart to Lula Dearing, whose interest passed to Spratt under the foreclosure sale; and hence the question is, whether D. W. Hart or his devisee took such an estate under what is here called the deed of distribution of the executors of Isaiah D. Hart as can sustain an action of ejectment. And again, after stating the recitals of the deed, it is said (p. 504): "The question is, Does a deed of conveyance by the executors of I. D. Hart (who, under his will and an order of the court, are authorized to distribute I. D. Hart's estate), conveying and setting apart this lot to the estate of Daniel W. Hart, vest such title in the devisee of Daniel W. Hart, who alone under the terms of his will could acquire it, as would enable such devisee to maintain ejectment? It is insisted that these terms passed no estate; that the legal title here is still in the executors of I. D. Hart, if it was there before this deed."

In response to these questions it is observed (pp. 504, 505) that the description of the grantee as "the estate of Daniel W. Hart" in the deed is too vague and uncertain to constitute a competent grantee at law; that there is no grantee by name or otherwise; and that the court was without the most remote reference to the will of D. W. Hart or anything by which it could be contended that his niece, Mrs. Dearing, was the grantee in the deed from the executors of I. D. Hart; and that the will of I. D. Hart was not in evidence to identify his legatees or devisees; that the grant was to an estate, without definition of this expression, and that the executors (meaning, of course, those of I. D. Hart) connect nothing with the description, by way of reference, to enable identifying evidence to come in; that it cannot be said that the word "estate" refers to the devisee under D. W. Hart's will, and for the reason that there is nothing to connect the deed and the will, as there was in *Webb v. Den*, 58 U. S. 17 How. 579 [15 L. ed. 37], where the deed was to the "legatees and devisees of the late Anthony Bledsoe;" and it was concluded that Spratt had acquired no legal title under his mortgage purchase "for want of legal title in the mortgagor," Mrs. Dearing.

This court had before it when it made the above decision the "deed of distribution of the executors of I. D. Hart," of June 16, 1866, and the will of Daniel W. Hart, executed August 15, 1865, and admitted to probate on the 15th day of the following December, by which he devised his property to his niece, then Miss Lula Spear, and requested his executors to act as trustees of the same and keep it in their pos-

session until she should become of age, and then to deliver it to her personally. On the subsequent trial in the circuit court the plaintiff, Spratt, introduced, in addition to these instruments, the will of Isaiah D. Hart, and the proceedings in the probate court upon which the deed of his executors purports to be founded.

The will of Isaiah D. Hart was executed March 20, 1861, and admitted to probate the 27th day of the following September, and after making special bequests and devises, provides by its ninth item as follows: "All the remainder of my estate to be equally divided between my children Ossian, Laura, Daniel, Julia and Mary, except such as I have already given and bequeathed in this my last will and testament, or any that I may hereafter by codicil or codicils made by me."

By a codicil made on the tenth of April, 1861, he directs that his daughter Laura have her share of the estate, when it is divided, set off to her in other kind of property than slaves. The tenth item directs that his estate be settled up as soon as it can be done without loss or sacrifice of property, and without law if possible. "Anything that my executors cannot settle, leave it to arbitration, without the interference of clerks, sheriffs, lawyers or marshals. . . ."

The probate court proceedings, upon which the "deed of distribution" is founded, are in substance as follows: The executors of I. D. Hart filed a petition on the 16th day of November, 1865, showing, among other things, some indebtedness of the testator, and alleging that there was a large number of vacant town lots in the City of Jacksonville, for which there was great demand, and that by a sale of these lots money could be raised to meet all the liabilities of the estate, and the balance be more equitably distributed amongst the legatees by their bidding for their respective shares than by any other method of distribution, and that a large part of the real estate belongs, under the will, to three minors to be distributed to them, and praying an order of sale. The judge of probate being absent from the county, the clerk of the circuit court, acting under the Statute of January 8, 1848, chapter 154, made an order on the day the petition was filed, reciting that thirty days' notice of the application had been given in a newspaper published in the city, and adjudging that the executors should sell the real estate mentioned in the petition. On the 16th day of January, 1866, the executors filed a report to the effect that, after advertising the sale of the lands for thirty days in a newspaper published in the city, they proceeded on the first Tuesday in the said month to sell the same; that Laura Farrer was one of the legatees and a resident of South Carolina, and died, as they were informed and believe, four days after the death of the testator, leaving two minor children, George and Laura, residing with their father in that State. That the father was not present at the sale, and that the only way in which the interests of the children were represented was that Halstead H. Hoeg, the mayor of Jacksonville, a man as well informed as to the value of town lots there as any other man, and one Hardy W. Phillips, an old citizen, also well qualified, undertook at

the request of the executors, to represent the interest of the children at the sale, and that they bid off for them certain lots. The report also represents that Daniel W. Hart died in September, 1865, and that William Caulk, administrator with the will annexed, bid off for his estate certain lots, and that William Caulk, the husband of Julia, bid off for her certain lots, and for himself certain other lots. That certain lots were purchased by different persons, and further that the executors bid off for the estate certain lots. The numbers of the respective lots, and the price at which they were bid off, are stated in the report; and the prayer of the report is that an order be made for them "to make distribution" of the land "so bid off at said sale by said legatees, and by representatives of legatees, and by representatives of heirs and estates of legatees, amongst said legatees and heirs and legal representatives of deceased legatees, according to the values ascertained at and by said auction sale, having due regard to the equal distribution thereof contemplated and required by the last will and testament of I. D. Hart," and to convey to other purchasers the land bid off by them upon payment of the purchase money.

On the 18th of January an order was made by the judge of probate, Aristides Doggett, for the faithful application of the moneys arising from the sales, in the payment of all debts of the estate, and "that the executors make distribution among the legatees and others entitled under the will, etc., of the lands bid off at said sale by the legatees and by representatives of legatees and by representatives of heirs," and "convey to other persons the lands purchased by them."

The "deed of distribution," after reciting the above order of November, 1865, as one made to sell the vacant town lots for the purpose of paying the debts of the deceased and distributing the estate more equally among the legatees mentioned in the last will and testament, and the report of sale, and the order of the judge of probate therein, reads thus: "Now, know ye, that we, Ossian B. Hart and Ozias Buddington, executors of the last will and testament of said Isaiah D. Hart, deceased, by virtue of said last will and testament, and of said order and decree of said court of probate, do hereby set apart, distribute and convey unto the estate of Daniel W. Hart, deceased, who was one of said legatees, the following described lots and parts of lots," describing them. The lands are all those reported by the executors to have been bid off by Caulk, administrator, for the estate as above set out, as well as some of those reported to have been bid off by the executors, the lot in controversy, lot No. 2 of block 184 being included, as in fact was the entire block, in the former class.

In view of the new features introduced into the case since the former decision of this court, it is not necessary to say anything about the incapacity of the so-called deed of distribution to convey a legal title to Mrs. Dearing.

The legal title to the land in controversy is shown to have been in Isaiah D. Hart at the time of the execution of his will, and does not appear to have been parted with by him prior

to his death. His will disposed of the residue of his estate, of which the land in question was a part, in the manner indicated above. It is said in the opinion in the former case, as is shown above, that the legal title is still in the executors of I. D. Hart, if it was there before the deed of distribution. Whether it was ever in them is to be answered by the will of I. D. Hart, which was not before the court in the former case, and the law applicable thereto. Had he died intestate as to this land the legal title would have descended to his heirs, but he died testate as to it. The law is that the legal title does not pass by the will to the executor unless there are express words to that effect, or such title is essential to the performance of the trust imposed on him. 3 Redfield, Wills, p. 137, note 1.

In Williams on Executors, p. 725, 6th ed., it is said that a devise of land to executors to sell passes the interest in it, but a devise that executors shall sell the land, or that land shall be sold by the executors, gives them but a power; and in a note on the same page we find that authority to executors in a certain contingency to sell real estate and divide the proceeds among certain persons does not vest the estate in the executors, but simply confers on them a power, and the estate passes at once to the heir if not devised, or to the devisee if devised, subject only to the execution of the power. *Marsh v. Wheeler*, 2 Edw. Ch. 156, 6 N. Y. Ch. L. ed. 349; *Herbert v. Smith*, 1 N. J. Eq. 141; *Dabney v. Manning*, 8 Ohio, 321; *Martin v. Martin*, 43 Barb. 172; *Vernon v. Vernon*, 53 N. Y. 851; *Dunn v. Keeling*, 2 Dev. L. 288; *Haskell v. House*, 8 Brev. 242; *Doe v. Shottler*, 8 Ad. & El. 905; *Dos v. Homfray*, 6 Ad. & El. 206.

The Pennsylvania decisions to the contrary are the result of a statute enacted in 1792 providing that where a naked power to sell is given to an executor he should have the same interest in the land as if it was devised to him to be sold. *Allison v. Wilson*, 18 Serg. & R. 330; *Morrow v. Brenizer*, 2 Rawle, 184; *Hannah v. Swarner*, 8 Watts & S. 838.

The effect of the devise made by the above item of Isaiah D. Hart's will was to vest the title of the real estate in his children as tenants in common until there should be a partition, and this is so, independently of our Statute, § 11, p. 47 (McClellan's Dig.), abolishing survivorship in joint tenancies. *Freeman, Co-tenancy and Partition*, § 28; *Heaths v. Heaths*, 2 Atk. 121; *Stewart v. Garnett*, 3 Sim. 898; *Briscoe v. McGee*, 2 J. J. Marsh. 370; *Emerson v. Outler*, 14 Pick. 114; *Denn v. Gaskin*, Cowp. 657; *Morley v. Bird*, 8 Vea. Jr. 630; *Goodman v. Winter*, 84 Ala. 410.

Daniel W. Hart, one of the devisees, died more than four years subsequently to his father, Isaiah, leaving the will by which he devised his estate to his niece. There is nothing in this will to raise a doubt that it transferred to her the interest, with the title thereto, which he had in his father's estate. The request that his "executors act as trustees of the property, and keep it in their possession until she becomes of age, and then deliver it to her personally," has no effect upon the transfer of the title to her.

It is evident that one purpose of the probate

proceedings was to distribute the real estate among the surviving devisees and those entitled to the interests of the devisees who had died since the testator, and that the public sale was adopted as a mode of ascertaining the value of the lands to the end that they should be "equally divided" as contemplated by the will. The language of the order of the court does not seem to have contemplated a conveyance of land to anyone except such purchasers as were strangers to the estate, but only a distribution or equal division of the land under the will, or an ascertainment of the share or portion that each devisee, or his or her representative, or representatives, should hold in severalty, and a setting apart of the same to them, and that no technical conveyance was necessary, but that upon each share being identified and the division actually consummated, the legal title thereto in severalty would vest in a living devisee by virtue of the devise, and in the heirs or devisees of those deceased by or through such original devise, and the law of descents, or the former and the will of a deceased devisee. *Goodman v. Winter*, 84 Ala. 425, 426.

In view of the fact that the will of I. D. Hart shows that D. W. Hart was a child and devisee, and that in the probate sale proceedings William Caulk, the administrator *cum testamento annexo* of Daniel W. Hart, represented the latter's estate in the manner indicated in the report of the sale, all of which instruments, and proceedings, and the deed of distribution, connect themselves, it is clear that the purpose of the deed, considered with reference to the other proceedings, was to set apart the lands described in it as the separate share which the person or persons entitled to hold under Daniel W. Hart should take in severalty. The foreclosure proceedings contained in the record further show that about eleven years after the date of the deed of distribution, the devisee of Daniel W. Hart, and her husband, Mr. Dearing, mortgaged the lot in question and nineteen other lots, with parts of two lots, covered by the deed of distribution, and that, upon the maturity of the indebtedness secured thereby, the mortgage was foreclosed and the mortgaged property sold to appellee, the master's deed to him bearing date January 16, 1879. A legitimate inference to be drawn from the execution of this mortgage is the acceptance and ratification by Mrs. Dearing of the partition intended for the proceedings.

Whether or not the partition proceedings were originally legal as against an attack by either of the parties beneficially interested therein, or whether or not a formal deed of conveyance was essential to vest title to the lands in severalty in the devisees of I. D. Hart, or the heirs or a devisee of those deceased, and what effect the lapse of time may have had upon any original right to assail the distribution, are questions we need not answer. An entirely legitimate inference, from the partition proceedings and the mortgage, and the foreclosure proceedings, is that Mrs. Dearing ratified and accepted the partition. In the absence of any showing to the contrary it must be assumed that she relied on this partition for her right to mortgage the land in severalty. Possession under these partition proceedings held by Caulk, as administrator of Daniel W. Hart,

or otherwise, for her, was in fact possession in severalty, and, in view of the ratification shown by the mortgage, must be regarded as held for her benefit. Such exclusive possession as against other devisees cannot be assailed by a stranger. As against a stranger, a tenant in common or joint tenant is entitled to the possession of the entire joint premises or any part of them. *Freeman, Co-tenancy and Partition*, §§ 843, 844; *Robinson v. Roberts*, 81 Conn. 145; *Sharon v. Davidson*, 4 Nev. 416; *Hibbard v. Foster*, 24 Vt. 542; *Stark v. Burritt*, 13 Cal. 361; *Touchard v. Crow*, 20 Cal. 150; *Hart v. Robertson*, 21 Cal. 346; *Roue v. Bacigalluppi*, Id. 638; *Smith v. Starkweather*, 5 Day, 297; *Bush v. Bradley*, 4 Day, 298; *Hardy v. Johnson*, 68 U. S. 1 Wall. 371 [17 L. ed. 502].

Where there has been an actual partition, though by parol, it must necessarily follow, from the above principle, that a stranger to a common title cannot make the irregularity or invalidity of such partition proceedings a defense to a recovery by the party to whom the exclusive possession of the land in question has been given by such proceedings. This view is strengthened by the disposition of the courts to maintain actual partition as between the parties, even where such partitions are held to be within the Statute of Frauds. *Frederick v. Frederick*, 81 W. Va. 566; *Kennemore v. Kennemore*, 28 S. C. 251; *Moore v. Kerr*, 46 Ind. 468; *Bruce v. Osgood*, 113 Ind. 860, 12 West. Rep. 195; *Wright v. Jones*, 103 Ind. 17, 2 West. Rep. 290; *Shepard v. Binks*, 78 Ill. 188; *Brazee v. Schofield*, 2 W. T. 209; *Baker v. Prewitt*, 64 Ala. 351; *Yarborough v. Avant*, 66 Ala. 526; *John v. Sabattis*, 69 Me. 473; *Nave v. Smith*, 95 Mo. 596; *Hazen v. Barnett*, 50 Mo. 506.

If the legal title to the entire part assigned in severalty did not pass, he still has his legal title to the extent of his undivided interest (*Tomlin v. Hilyard*, 43 Ill. 300; *Buzzell v. Gallagher*, 28 Wis. 678); and this title is surely sufficient to maintain or assert his exclusive possession to the whole land assigned him, or any part of it, as against a stranger; and where there has been a conveyance of a part of such lands by metes and bounds, or other like description, the grantee thereof has, as against a stranger, the same right as to the part so conveyed to him. The fact that he might, as against the co-tenants of his grantor, not be entitled to the land on a new partition, is no reason why he should not enforce and enjoy the same rights against a stranger which his grantor could if there had been no conveyance. Admitting the deed to be void as to other co-tenants, it is yet good as against the grantor. *Boston Franklin Co. v. Condit*, 19 N. J. Eq. 401; *Duncan v. Sylvester*, 24 Me. 482; *Gibbs v. Swift*, 12 Cush. 398; *Richardson v. Miller*, 48 Miss. 311.

That a stranger to the common title can have any superior right to the grantor, or that he should be permitted to question an actual exclusive possession which does not appear to have been questioned by the other tenants in common, we do not see the reason for. He is confined to a superior title or one by adverse possession, and cannot raise or found a defense upon questions affecting no one but tenants in common as between themselves. *Freeman*, 9 L. R. A.

Co-tenancy and Partition, §§ 200, 204; *Gates v. Salmon*, 46 Cal. 862; *Wade v. Deray*, 50 Cal. 376; *Glasscock v. Hughes*, 55 Tex. 461.

II. In the course of the trial the court permitted plaintiff to introduce as evidence the bill of exceptions taken on the first trial of the cause, and purporting to contain the evidence of Caulk, mentioned above, and who had died since the first trial, to prove to the jury what Caulk had testified to on the former trial. The law, as we find it, does not justify this action of the court. Notes of the testimony taken by a judge on the trial are not *per se* evidence to establish what was sworn to by a deceased witness. They can only be resorted to as a memorandum to refresh his memory the same as in the case of any other witness. *Miles v. O'Hara*, 4 Binn. 106; *Schafer v. Schafer*, 93 Ind. 586; *Asher v. Mitchell*, 9 Ill. App. 335; *People v. Chung Ah Cheu*, 37 Cal. 567.

The evidence of a witness as set forth in a bill of exceptions is in itself nothing more than a certificate of the trial judge or a subsequent statement by third parties without the sanction of an oath, of what the testimony was, and it is not admissible of itself to prove the testimony of a deceased witness. *Greenleaf*, Ev. § 166; *Breder v. Feurt*, 70 Mo. 624; *Kirk v. Mowry*, 24 Ohio St. 581; *Davis v. Cline*, 96 Mo. 401, 2 L. R. A. 78; *Jaccard v. Anderson*, 87 Mo. 95; *Seville v. Hannibal & St. J. R. Co.* 94 Mo. 86, 13 West. Rep. 97; *Robinson v. Lane*, 14 Smedes & M. 161; *Shotwell v. Hamblin*, 23 Miss. 156; *Dwyer v. Rippetos*, 72 Tex. 520; *Reid v. State*, 81 Ga. 760; *Carpenter v. Tucker*, 98 N. C. 816; *Stern v. People*, 102 Ill. 540; *Mott v. Ramsay*, 92 N. C. 152; *Pittsburgh O. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 1 West. Rep. 648; *Lipscomb v. Lyon*, 19 Neb. 511; *Mitchell v. State*, 71 Ga. 128; *State v. Fitzgerald*, 63 Iowa, 268; *Hepler v. Mount Carmel Sav. Bank*, 97 Pa. 420; *Costigan v. Lunt*, 127 Mass. 354; 2 Phill. Ev. 2d ed. pp. 181, 182.

In view of the admissibility of a bill of exceptions in aid of memory under the above authorities, there can hardly be any difficulty in proving by living witnesses, under oath, who heard Caulk testify, what his testimony was. Assuming that an affirmative showing of inability to prove the testimony of a deceased witness, otherwise than by a bill of exceptions *per se*, will under any circumstances render such proof admissible, the fact is that no such showing is made by the record before us, and hence nothing further may be said on the point.

For this error the judgment must be reversed, as in view of the testimony of Caulk, thus introduced, both in regard to possession under the deed of distribution, and as contributing to the weight of testimony against Simmons on the issue of title in Robinson by adverse possession, upon which point there is conflict of testimony, the error cannot be said to be one without injury. *Smith v. Shoemaker*, 84 U. S. 17 Wall. 630, 639 [21 L. ed. 717, 719]; *Deery v. Cray*, 72 U. S. 5 Wall. 796 [18 L. ed. 653]; *Moore v. Citizens Nat. Bank of Piqua*, 104 U. S. 625, 630 [26 L. ed. 870, 872]; *Gilmer v. Higly*, 110 U. S. 47, 50 [28 L. ed. 62, 63].

The judgment will be reversed, and the cause remanded for proceedings not inconsistent with this opinion.

ALABAMA SUPREME COURT.

Lucy RICHARDSON *et al.*, Appts.,

v.

WOODSTOCK IRON CO. *et al.*

(....Ala.....)

The acknowledgment by a widow of a deed executed by her deceased husband for the purpose of conveying his homestead, will be ineffectual as against his heirs-at-law under Code, §2508, requiring the separate acknowledgment of the wife to render a conveyance of the homestead valid.

(May 22, 1890.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Calhoun County in favor of defendants in an action brought to recover possession of certain real estate. *Reversed.*

The land in controversy was on January 5, 1880, owned and occupied by Winfrey Bond and his family as a homestead. On that day he and his wife executed a deed of it to C. A. Sprague. Both signed the deed but there was no separate examination and acknowledgment by the wife as required by statute. The land subsequently came into the possession of the defendants in this action.

In 1884 Bond died leaving plaintiffs surviving him as his heirs-at-law.

In 1889 there was a separate examination of the wife and a separate acknowledgment by her in the regular statutory form, that she had executed the deed of January 5, 1880, voluntarily and of her own free will and accord and without fear or constraint on the part of her husband.

The case further appears in the opinion.

Mr. Cecil Browne, for appellants:

The deed of the husband to the homestead, not having been acknowledged by the wife, was, at the time of his death, an absolute nullity.

Smith v. Pearce, 85 Ala. 264.

There was, at the time of his death, no obstacle to prevent the immediate vesting of his title in his heirs. This right of property in the heirs was a vested right, which could not be defeated by the subsequent acknowledgment of the wife.

Alford v. Lehman, 76 Ala. 526; *Striplin v. Cooper*, 80 Ala. 256.

The husband's deed to the homestead is absolutely null and void, without the separate acknowledgment of the wife.

McGuire v. Van Pelt, 55 Ala. 344; *Haleo v. Sowerright*, 65 Ala. 481; *Scott v. Simons*, 70 Ala. 352; *Hood v. Powell*, 78 Ala. 171.

This acknowledgment is a vital part of the deed itself and its execution. Until this acknowledgment is made the deed is wholly unexecuted.

Balkum v. Wood, 58 Ala. 649; *Miller v. Mara*, 55 Ala. 322-338.

There being no alienation of the property by the owner during his life, it was not in the power of the widow by any act of hers to alienate from his estate, or heirs, the lands of which he died seised and possessed.

Messrs. Kelly & Smith also for appellants.

Messrs. Knox & Bowie for appellees

McClellan, J., delivered the opinion of the court:

The bill of exceptions as to one point reserved is in the following language: "The defendants then asked the court to give the following charge, which was in writing, viz.: 'If the jury believe the evidence they must find for the defendant;' and plaintiff objected to the giving of this charge. The court overruled plaintiff's objection, and gave the charge to the jury, to the giving of which charge the defendants jointly and severally excepted." The recital quoted, that the defendants excepted, is so manifestly a clerical misprision that we will treat the exception as having been properly reserved by the plaintiffs. We entertain no doubt that, under the facts adduced on the trial, the land in controversy constituted the homestead of Winfrey Bond on January 5, 1880, the date of the attempted conveyance by him and his wife to Sprague. *Smith v. Pearce*, 85 Ala. 264.

The one other question presented by this record is whether in case the wife fails to acknowledge a conveyance of the homestead, as required by section 2508 of the Code, at the time of its execution, or subsequently, during the life of the husband, she may do so efficiently, as against the heirs, after his death. The point has not been decided in this State or elsewhere, that we are aware of. It has been several times adjudged that the certificate of such acknowledgment may be added, and that the acknowledgment itself may be made, at any time after the signing of the deed, and be effectual by relation from the date of signature, provided the rights of purchasers or creditors have not supervened. *Johnson v. McGeehee*, 1 Ala. 186; *Nelson v. Holly*, 50 Ala. 8; *Hendon v. White*, 52 Ala. 597; *Balkum v. Wood*, 58 Ala. 642; *Cahall v. Citizens Mut. Bldg. Assn.* 61 Ala. 232; *Smith v. Pearce*, *supra*; *Vandevere v. Wilson*, 78 Ala. 387.

And in some of these cases it is said that such after acknowledgment and certificate will have relation back to the delivery of the instrument, and validate the otherwise void conveyance from that time as against the grantor and his heirs. *Hendon v. White*, *supra*.

We apprehend, however, that what was meant by this reference to heirs was no more than this, when applied to a case like the present; that where the subsequent acknowledgment was made in the lifetime of the husband neither he nor his heirs after his death could impeach the deed thus perfected. The acknowledgment involved in that case was made by the grantor himself, and hence no question arose, or could have arisen, as to the vested rights of his heirs. No other of the cases refer to heirs at all, and the question now presented is, we repeat, new to this court, and entirely an open one, so far as adjudications in this or other States are concerned. On principle, however, it seems to us clear that the acknowledgment relied on here cannot have the effect claimed for it.

This conclusion, it may be admitted, is to the last degree inequitable, in that it involves payment to the ancestor for lands which, notwithstanding, pass to the heirs, but it cannot be avoided without violence to well-settled legal doctrines. The deed of Bond and wife to Sprague being of the homestead, and not acknowledged by the wife as required by the Statute, was absolutely void. Code, § 2508; *Crim v. Nelms*, 78 Ala. 804; *De Graffenreid v. Clark*, 75 Ala. 425.

The husband at the time of his death had a perfect title to the land. The deed had no operation, by way of estoppel or otherwise, against him. It was an utter nullity. *McGuire v. Van Pelt*, 55 Ala. 845; *Halseo v. Seawright*, 65 Ala. 481; *Alford v. Lehman*, 76 Ala. 526.

Upon his death his perfect title passed instantly into his heirs, the plaintiffs in this suit. With the title thus lodged in Bond's children his widow had no connection. In the lands she had no interest except in recognition of the title of the heirs. No estate then existed out of the heirs which she could convey, except by way of release to the heirs themselves. It would be an anomaly, indeed, to hold, under this state of law and fact, that the widow, thus without alienable interest of any kind or to any extent in the land, could, by the mere acknowledgment of a deed which was essentially a nullity when the heirs took a perfect title, defeat their rights, and in legal effect convey their lands into third persons. We do not think

it can be done. We apprehend that the power to give vitality to such a void conveyance by after acknowledgment ceases whenever the estate, assuming the invalidity of the deed, has passed into third persons, or rights of third persons have attached to it. We cannot conceive that it can be material whether these third persons are heirs, devisees, purchasers or creditors, or whether their estates or rights have accrued by descent, devise, sale or judgment liens. The conclusion, we think, is enforced by a consideration of two clearly established propositions of law: *first*, a deed cannot be delivered after the death of the grantor; *second*, that the mere fact that a deed of the homestead, void for the lack of the wife's privy acknowledgment, is given into the possession of the nominal grantee is only a conditional delivery, and a conditional delivery, unless it be in escrow, is in legal contemplation no delivery at all. From these postulates, it results that the deed had never been, and could never be, delivered, and nothing that the widow could do could in any way affect the title of the heirs. *Cahall v. Citizens Mut. Bldg. Assn.* 61 Ala. 246; *Jackson v. Leek*, 12 Wend. 105; *Shoenberger v. Zook*, 84 Pa. 24; *Fisher v. Hall*, 41 N. Y. 416; *Pay v. Richardson*, 7 Pick. 91; *Woodbury v. Fisher*, 20 Ind. 887; 5 Am. & Eng. Encyclop. Law, 450, 451.

These views necessitate a reversal of the judgment and remandment of the cause. *Reversed and remanded.*

TEXAS SUPREME COURT.

MORRIS, *Appt.*,

v.

MISSOURI PACIFIC R. CO.'

(....Tex....)

1. A state court will not entertain jurisdiction of a suit between nonresidents to recover damages for injuries to real property located outside of the State.
2. Jurisdiction of a transitory action may be refused by a state court where the parties are nonresidents of the State and the cause of action originated beyond its limits; and it will be refused where the cause of action arises out of matters connected with Indian lands.

(June 17, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Grayson County, sustaining a demurrer to the complaint because of want of jurisdiction in an action brought to recover damages for injuries to plaintiff's property by fire, alleged to have been negligently set out by defendant. *Affirmed.*

The facts are fully stated in the commissioner's opinion.

Messrs. Hare, Edmundson & Hare for appellant.

Messrs. R. C. Foster and A. E. Wilkinson for appellee.

9 L. R. A.

Hobby, C. filed the following opinion:

The plaintiff in the court below (who is the appellant here) instituted this action for the recovery of damages for injuries to certain real property in the Choctaw Nation of the Indian Territory, which he alleged were caused by defendant's negligence in permitting fire to be communicated thereto. Plaintiff's rights in the property grew out of the fact that he had acquired, by marriage with an Indian woman, membership in the said Choctaw Tribe. Plaintiff resided in said nation, and defendant is a Missouri corporation, having an office and agent in the county where this suit was brought. The allegations were that under the laws of the Choctaw Nation now in force, and in force at the time of said fire, plaintiff by marrying into said tribe became a member thereof, without relinquishing his rights as a citizen of the United States; that under the laws of said nation marriage with a member of said tribe conferred upon the person so marrying all rights possessed and enjoyed by other members thereof; that under the laws of said nation and treaties with the United States no member of said tribe, or other person, can own lands lying in said Choctaw Nation, but under the laws of said nation any member thereof, whether native born or acquiring membership by marriage, might fence and inclose all the lands he might desire, and all lands so fenced and in-

closed immediately become subject to the exclusive beneficial possession and occupancy of the person so inclosing, with privilege to transfer the possession and occupancy by sale, gift or devise; that the lands mentioned were fenced and inclosed as a pasture by plaintiff after his adoption into said tribe, and that by so fencing, inclosing and occupying the same he became entitled to the exclusive beneficial occupancy and enjoyment thereof. He claimed damages against defendant in the sum of about \$6,000 for injury by fire from a defective engine in the Choctaw Nation to property of which plaintiff was, under the laws of said nation, entitled to the exclusive beneficial use and possession, the damages by fire being as follows: 1,000 acres of growing grass of the value of \$5 per acre, the grass on the ground being worth \$2 per acre, and the damage to said grass for future use during the time that plaintiff would have been entitled to the same being \$3 per acre; posts destroyed, \$17.20; amount paid hands for fighting fire, \$21; amount paid for gathering cattle that had been scattered by the fire, \$501—in the aggregate, \$5,539.20. Defendant interposed a demurrer in the nature of a plea to the jurisdiction on the ground that the cause of action was local, and not within the jurisdiction of the Texas courts; and, *second*, that the enforcement of the rights of plaintiff, as a member of the Choctaw Tribe of Indians, was within the exclusive jurisdiction of the federal government, and not cognizable in the courts of Texas. This demurrer being sustained, plaintiff has assigned the ruling as error, and asserts, in substance, the following propositions: "That a suit lies in the Texas courts in favor of a nonresident against a nonresident corporation, having an office and agent in the county of the suit, for injury to lands beyond the limits of the State; that damages resulting from negligent burning of plaintiff's premises are transitory and actionable here so far as they embrace only expenses, as of gathering cattle or fighting fire, caused by the injury to the premises, as distinguished from injury to the premises; that members of the Indian tribes resident in the Indian Territory can sue in the courts of Texas for redress of injuries to property rights enjoyed by them as members of such tribes." Each of these propositions is controverted by appellee.

If the action brought by the plaintiff is of that class known as local actions, the well-established doctrine is that it must be brought in the county where the right of action accrued. The briefest, as well as the clearest, distinction between this class and transitory actions is thus stated: "If the cause of action be one that might have arisen anywhere, then it is transitory; if it could only have arisen in one place, then it is local. As, for example, an action of trespass to the person or for the conversion of goods is transitory. But an action for flowing particular lands is local, because the land can only be flooded where it is situated. For the most part, the local actions consist of those instituted for the recovery of real estate, or for injuries thereto, etc., for easements." Cooley, Torts, 471.

That actions for trespass on lands in a foreign country cannot be sustained is settled law in England and in this country. *Ibid*.

9 L. R. A.

The decision of Chief Justice Marshall in *Livingston v. Jefferson*, 1 Brock. 208, upon this question appears to have been followed in numerous cases. See note 5, p. 471, Cooley, Torts.

The action was for damages for trespass upon land charged to have been committed in Louisiana brought in Virginia. It was held that it could not be maintained because the damage and the act causing it occurred beyond the jurisdiction of the court in which the suit was brought. Such is the case before us. The only case to which we have been referred as questioning the authority of the foregoing doctrine is that of *Armendias v. Stillman*, 54 Tex. 627. While there may be expressions in the opinion in that case which would give force to the contention of appellant that it is decisive of this case, we do not understand it to decide the question here raised. There is an entire absence of analogy between the case last cited and the present in several essential features. In the former case the question was rather one of venue than jurisdiction. The parties were residents of Cameron County, in which the suit was brought. In the present case the plaintiff is a resident and member of the Choctaw Nation, in the Indian Territory (having under the laws of the nation become a member of the tribe, by reason of his marriage with an Indian woman), and the defendant is a foreign corporation, both, therefore, being nonresidents. In the case cited the act resulting in the injury to the land was committed by the defendant in Cameron County, within the court's jurisdiction. In accordance with this decision will be found *Rundie v. Delaware & R. Canal*, 1 Wall, Jr. 275, where it was held that, if a wrongful act committed in one State injured real property in another, action for damages may be brought in the former. So in *Thayer v. Brooks*, 17 Ohio, 489, an action was sustained for diversion of water in Pennsylvania resulting in injury to land in Ohio. In the case under discussion the alleged negligence causing the damage was committed beyond the limits of the State. In *Armendias v. Stillman*, *supra*, the suit could have been brought alone under the eighth section of article 1198, regulating the venue of suits, which authorized a suit in any county where a trespass was committed, affording a cause of action for damages. In that case the fact that the plaintiff was a citizen of Texas, and as such was guaranteed a remedy through the agency of the judicial tribunals of his State by Organic Laws, was an important reason against the interpretation of article 1198 as denying him a remedy for an injury done him in this State with respect to his property. And the legislative department, in affording this protection to the citizen by statutory provisions as to venue, would not be restricted by the technical rules of the common law distinguishing between transitory and local actions. But this Statute applies to such causes of action necessarily as arise within the territory legislated for, and cannot be construed as having any reference to resident citizens of a foreign country or State, or to any cause of action arising in such State or country. Hence it is that *Armendias v. Stillman*, *supra*, cannot, we think, have any application to the case disclosed by the record before us.

It is claimed that if the injury to the land was a local action, still, under plaintiff's allegations to the effect that his fence was destroyed, and a large number of his cattle scattered, etc., subjecting him to expense in gathering them, the action would be transitory, and therefore the court would take jurisdiction. We do not think the facts alleged show the action to be transitory. But if so, it has been held in such actions, where the parties were nonresidents and the cause of action originated beyond the limits of the State, these facts would justify the court in refusing to entertain jurisdiction. *Great Western R. Co. v. Miller*, 19 Mich. 805.

Jurisdiction is entertained in such cases only upon principles of comity, and not as a matter of right. *Gardner v. Thomas*, 14 Johns. 136; Wells, Jur. § 115.

In the present case there are obvious reasons against the exercise and extension of this comity in the assumption of jurisdiction of a suit by a member of the Choctaw Nation against a nonresident corporation, for damages inflicted as alleged in the Indian Territory. From an examination of the United States Statutes at Large (vol. 7, p. 833), it appears that a treaty of friendship, cession and limits was entered into with the nation by the United States on the 27th of September, 1830, at Dancing Rabbit Creek. The lands now occupied by them were then acquired, and are held in common by the tribe, each member having an equal

undivided interest, and a complete right of possession and enjoyment. Members only of the tribe can acquire rights in these lands; and, by § 2116, Rev. Stat. U. S., they cannot be alienated. Plaintiff's right was acquired by virtue of his marriage into the tribe, under the Treaty of April 28, 1886, by which he became a member. By the Revised Statutes of the United States (art. 463) the commissioner of Indian affairs is invested with the power, under the direction of the Interior Department, over, and has entire management of, all Indian affairs, and of all matters arising out of Indian relations. Whether the Treaty and Statutes cited would have the effect to vest exclusive jurisdiction in the federal government in a case like the present, or would exclude the exercise of jurisdiction by the state courts, it is not necessary to determine. But we think they sufficiently indicate the impolicy of entertaining jurisdiction of this suit, upon principles of comity, even if any part of the act resulting in injury to the land in the Indian Territory could be so separated from it as to afford an independent, distinct cause of action, and possess also the characteristics of a transitory action.

For the reasons given we think the judgment should be affirmed.

Stayton, Ch. J.:

Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

KENTUCKY COURT OF APPEALS.

BOSQUETT & SELBURG, *Appts.*,

v.
Milt HALL.

(....Ky.....)

Children who are strangers in blood to, and who have no natural or legal claim for support on, a debtor with whom they reside are not members of his family so as to make him a bona fide housekeeper with a family, entitled to a homestead exemption.

(March 8, 1890.)

APPPEAL by plaintiffs from a judgment of the Circuit Court for Hardin County in favor of defendant in an action brought to recover possession of a certain house and lot. *Reversed.*

Plaintiffs recovered a judgment against defendant, issued execution thereon and levied upon and sold a house and lot belonging to appellee, becoming purchasers themselves. They then brought this action to recover possession of the property. Defendant set up a claim to a homestead exemption therein, which was allowed by the court below, which rendered judgment in his favor.

Defendant was an unmarried man and lived upon the property claimed as a homestead.

NOTE.—See *Moyer v. Drummond*, 7 L. R. A. 747, 32 A. C. 165; *Miller v. Finegan* (Fla.), 6 L. R. A. 813, and note; *Lee v. Moseley*, 2 L. R. A. 106, and note, 101 N. C. 811.

9 L. R. A.

He had no family of his own and no relatives living with him. But there were living in the house an old woman who was his housekeeper and some little girls who had been given to him by their mother at the time of her death, but who were in no way related to him and had never been legally adopted by him. The support of these children was in part at least furnished by him.

Messrs. Bush & Robertson and I. D. Irwin, for appellants:

A family, within the meaning of the Homestead Laws, must consist of a wife, children, father, mother or someone whom the one claiming the exemption is under a moral, natural or legal obligation to support.

McMurray v. Shuck, 6 Bush, 111; *Brooks v. Collins*, 11 Bush, 622; *Bell v. Keach*, 80 Ky. 42.

Mr. James C. Poston for appellee.

Lewis, Ch. J., delivered the opinion of the court:

To entitle a person to the benefit of homestead exemption, he must, when a debt against him is attempted to be satisfied, be a bona fide housekeeper with a family; whether such debt was created before or after the homestead was acquired. "In legal contemplation, whomsoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support, may be considered and treated as a member of his family." *Bell v. Keach*, 80 Ky. 42.

And accordingly an infant brother or sister, or aged and helpless parent, or even a bastard child, may and have been held to constitute a "family," in the meaning of the Statute. But the persons in this case residing with the debtor, though children, have no natural or legal obligation on the debtor for support, being strangers in blood to him. He may at any time separate from, and cease to support or care for, them, without violating any legal or natural obligation. And to so extend the operation of the Statute as to exempt the homestead in such case would be not only contrary to the policy of it, but

place it in the power of a debtor, by subterfuge and fraud, to defeat his creditors. The construction and operation of the Homestead Law must be determined by some well-defined rule that is reasonable and just, not according to the mere will or caprice of the debtor.

It seems to us appellee is not entitled to benefit of the homestead exemption, and *the judgment must be reversed, and cause remanded for further proceedings consistent with this opinion.*

Petition for rehearing overruled.

MISSOURI SUPREME COURT.

CITY OF CARTHAGE, *Resp't.*,

v.

August RHODES, *App't.*

(.....Mo.....)

The imposition of a license tax upon dogs as a matter of police regulation is not precluded by a constitutional provision requiring all property to be taxed in proportion to its value.

(June 16, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Jasper County affirming a judgment of the Recorder's Court for the City of Carthage, fining him for keeping a dog without having first obtained a license to do so. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. J. B. Haughawout, for appellant:

The city ordinance makes a person a culprit for owning that which the law recognizes as property, without paying for the privilege, which renders it unconstitutional and void.

Washington v. Meigs, 1 McArthur, 53, 29 Am. Rep. 578; *Harrington v. Miles*, 11 Kan. 480. See, on the general subject, *State v. Lymsus*, 26 Ohio St. 400; *Ward v. State*, 48 Ala. 161.

Under the Constitution of Missouri all property should be taxed according to its value.

Mo. Const. art. 4, § 10.

Mr. J. W. Halliburton, with **Mr. J. R. Shields**, *City Atty.*, for respondent:

The ordinance is valid under the general power of all cities to make proper and sufficient police regulations.

See Cooley, *Taxn.* ed. 1876, chap. 19, pp. 396, 397, 403-407, 410-412; *Carter v. Dow*, 16 Wis. 299; *Tenney v. Lenz*, Id. 567; *Blair v. Forehand*, 100 Mass. 136; *Morey v. Brown*, 43 N. H. 373; *Mitchell v. Williams*, 27 Ind. 62; *Fairbault v. Wilson*, 84 Minn. 254; Dillon, *Mun. Corp.* ed. 1872, par. 825, 826, 827, 833, and note 2, 835 and note 1; *Ex parte Cooper*, 3 Tex. App. 439, 30 Am. Rep. 153.

NOTE.—*License on privilege to keep dogs.*

Municipal corporations are authorized to levy a tax on the privilege of keeping dogs. *Oranston v. Augusta*, 61 Ga. 573; *Shelby Twp. v. Randles*, 57 Ind. 300; *Dodson v. Mock*, 4 Dev. & B. L. 146; *Perry v. Phipps*, 10 Ired. L. 269; *State v. Holder*, 61 N. C. 537; *Mowery v. Salisbury*, 23 N. C. 175.

§ L. R. A.

Brace, J., delivered the opinion of the court:

This is an appeal from the judgment of the Circuit Court of Jasper County on an appeal from the judgment of the Recorder's Court of the City of Carthage, imposing a fine upon the defendant for keeping a dog without having obtained a license from said City for so doing, in violation of the ordinances thereof. The case has been certified here from the Kansas City Court of Appeals as involving a constitutional question.

By section 11, art. 5, of the Charter of the City of Carthage (Sess. Acts 1875, p. 169), it is provided that the City shall have power "to tax, regulate, restrain and prohibit the running at large of dogs or cats, and provide for the impounding or destruction of either, or both, or all of them, when found running at large contrary to ordinance." The power granted in this section is to tax dogs, and regulate dogs, and is not limited simply to the power to restrain and prohibit dogs from running at large; and the question is, Can the City exercise the power to tax or regulate dogs by requiring the owner or keeper of a dog to pay a specific sum for a license to keep such dog within the city limits, or, in other words, by imposing a tax *per capita* upon dogs, by way of a license? There being an express grant of power to regulate, there can be no question as to the power in the City to regulate by way of a license, for which a specific sum may be charged, unless the exercise of the power is precluded by the constitutional provision requiring all property to be taxed in proportion to its value. Const. art. 10, § 4.

Taxation may be for the purpose of raising revenue, or for the purpose of regulation. Where for the purpose of regulation, it is an exercise of the police power of the State. They are both distinct co-existent powers in the State, and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the City of Carthage as to the dogs

It is not a charge on property for revenue purposes, but is a constitutional exercise of the police power. *Woolf v. Chalker*, 31 Conn. 121; *Hendrie v. Kalthoff*, 48 Mich. 306; *Morey v. Brown*, 42 N. H. 373; *Carter v. Dow*, 16 Wis. 317; *People v. Salem*, 20 Mich. 452. See 2 *Desty, Taxn.* 1404.

of that City. The dog-license tax required by its ordinance is easily referable to the exercise of the police power granted. While, in a sense, dogs are property, and the owner may invoke the aid of the law for their protection as property by civil action, and by statute they have been made the subject of larceny, yet they are a base sort of property, having no market or assessable value, do not enter into the estimate of the appreciable wealth of the State, and never have been considered proper subjects of taxation for revenue. On the other hand, their almost utter worthlessness in a crowded city for any purpose except to please the whim or caprice of their owners, the half savage nature and predatory disposition of so many of them, rendering them destructive of animals of real value, and their liability to the fatal malady of hydrophobia, which in so many instances has sent them abroad as mes-

sengers of death to man and beast, point them out as subjects peculiarly fit for police regulation. The ordinances in question, being an exercise of the police power granted by the State, are not obnoxious to the constitutional provision quoted, which is not a limitation upon the police power, but upon the taxing power, of the State. Without discussing the question further, it is sufficient to say that the foregoing propositions are sustained by the great weight of authority, from which we cite the following: *Holst v. Roe*, 89 Ohio St. 840; *Van Horn v. People*, 46 Mich. 188; *Cole v. Hall*, 103 Ill. 80; *Ex parte Cooper*, 8 Tex. App. 489; *Tenney v. Lenz*, 16 Wis. 586; *Blair v. Forehand*, 100 Mass. 136; *Mitchell v. Williams*, 27 Ind. 62; *Faribault v. Wilson*, 34 Minn. 254.

The judgment is affirmed.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Frederick WARREN

v.

William LYONS *et al.*

(.....Mass.....)

The liability of one who guarantees the payment by lessees of rent for whatever time they may hold the premises after the expiration of the lease at the same rate reserved therein will be discharged if the lessees and the landlord enter into a new arrangement by which the lessees retain possession of the premises after the

lease expires, as tenants at will, at a monthly rent different from that mentioned in the lease.

(October 24, 1890.)

REPORT from the Supreme Judicial Court for Suffolk County (Holmes, J.) for the consideration of the full court of an action brought under Pub. Stat., chap. 186, § 29 *et seq.*, to charge the residuary devisees and legatees of John Nagle, deceased, upon his guaranty of payment of rent under a lease. *Bill dismissed.* The facts sufficiently appear in the opinion.

NOTE.—Liability of surety or guarantor.

The liability of a surety is limited by the terms of the contract executed by him. *Simonson v. Grant*, 38 Minn. 429; *Ferguson v. Davis*, 9 West. Rep. 322, 65 Mich. 677; authorities cited in *Post v. Losey*, 9 West. Rep. 620, 111 Ind. 74; *Graeter v. De Wolf*, 10 West. Rep. 841, 112 Ind. 1; *Knopf v. Morel*, 10 West. Rep. 414, 111 Ind. 670; *Bostwick v. Bryant*, 13 West. Rep. 303, 112 Ind. 443; *Vinyard v. Barnes*, 13 West. Rep. 377, 124 Ill. 346. See note to *Anderson v. Bellinger* (Ala.) 4 L. R. A. 680.

A surety is "a favored debtor." His rights are zealously guarded both at law and in equity. *Magee v. Manhattan L. Ins. Co.* 32 U. S. 93, 23 L. ed. 699; *Prink v. Southern Exp. Co.* 8 L. R. A. 432, 38 Ga. 42. See note to *Best v. Johnson* (Cal.) 8 L. R. A. 168.

A surety has a right to stand upon the precise terms of the contract, and if a variation is made without his consent it is fatal, although he may sustain no injury thereby. *Simonson v. Grant*, *supra*; *Wier Plough Co. v. Walmsley*, 9 West. Rep. 60, 110 Ind. 242; *People v. Buster*, 11 Cal. 220; *McDonald v. Felt*, 49 Cal. 855; *Carter v. Mulrein*, 32 Cal. 169; *Ellis v. McCormick*, 1 Hilt. 316; *Bangs v. Strong*, 10 Paige, 11, 4 N. Y. Ch. L. ed. 366, 7 Hilt. 260.

Any variation in an agreement signed by a surety, made without the surety's knowledge or consent, will discharge the surety. *Smith v. United States*, 49 U. S. 2 Wall. 219, 17 L. ed. 788; *United States v. Conklin* ("Rogers v. The Marshal"), 69 U. S. 1 Wall. 444, 17 L. ed. 714; *Wylie v. Hightower*, 74 Tex. 306.

A material alteration, although favorable to the surety complaining, will release him from liability upon the contract. *Simonson v. Grant*, *supra*.

The contract of a surety is to be strictly con-

strued, and his liability is not to be extended by implication beyond its terms. *Miller v. Stewart*, 23 U. S. 9 Wheat. 680, 6 L. ed. 189; *Sprigg v. Bank of Mt. Pleasant*, 39 U. S. 14 Pet. 201, 10 L. ed. 413; *United States v. Boyd*, 40 U. S. 15 Pet. 187, 10 L. ed. 706; *Leggett v. Humphreys*, 62 U. S. 21 How. 63, 16 L. ed. 60; *United States v. Boecker*, 38 U. S. 21 Wall. 652, 22 L. ed. 472; *United States v. Hough*, 103 U. S. 71, 26 L. ed. 305; *United States v. Ulrick*, 111 U. S. 33, 28 L. ed. 344.

In order to discharge a surety by anything short of payment of the debt, there must be some dealing between the creditor and the principal changing the cause of the action or suspending the right of action. *Hagood v. Blythe*, 37 Fed. Rep. 242.

Guarantor of lessee.

On a lease which provided that if the premises should be destroyed by fire the lease should thereupon terminate, where the tenant still held the site after destruction of the building, and refused to surrender, the surety was discharged. *Taylor v. Hortop*, 22 U. C. C. P. Rep. 542.

Where the principal held over the premises for a year after the term expired, without demand for possession by lessor, the surety was not liable for rent during the holding over. *Kyle v. Proctor*, 7 Bush. 493.

Where a yard, shed and frame dwelling-house were rented, and a stranger guaranteed the rent, and subsequently the lessor took back the dwelling-house and rented it to another, and reduced the rent of the lessee for the remainder, the guarantor was thereby discharged. *Penn v. Collins*, 5 Robt. (La.) 213.

Mr. George E. Betton, for complainants:

There is no evidence of any agreement that the lease or guaranty, with its clear provision, that in case of holding over the rent should be paid, should be discharged, nor of any claim by the tenant or the representatives of Nagle that the lease or guaranty was discharged by the reduction of rent.

See *Mill Dam Foundery v. Hovey*, 21 Pick. 429; *Twopenny v. Young*, 3 Barn. & C. 208.

Such reduction did not operate by law to discharge the guarantor.

Chitty, Cont. 11th Am. ed. 779; *Goring v. Edmonds*, 6 Bing. 94; *Ellis v. McCormick*, 1 Hilt. 818; *Preston v. Huntington*, 10 West. Rep. 875, 67 Mich. 189; *Scott v. Swain* (Pa.) Jan. 17, 1887; *Fell, Guaranty and Surety*, 507; *DeColyer, Land Guaranty*, 2d ed. 895; *Clark v. Sicker*, 64 N. Y. 281.

An act which will discharge a surety must be legally injurious, or inconsistent with his legal rights. Mere indulgence is not sufficient.

McKecknie v. Ward, 58 N. Y. 541; *Schroepell v. Shaw*, 8 N. Y. 446; *Deck v. Leonidas Works*, 18 Hun, 266; *Farmers Bank of Canton v. Reynolds*, 18 Ohio, 85; *Trent Nas. Co. v. Harley*, 10 East, 84; *McCann v. Dennett*, 18 N. H. 531.

Messrs. Charles F. Donnelly and Charles F. Paige, for respondents:

The agreement of a guarantor is a separate undertaking of a person in which the principal does not join. The original contract of the principal is not the guarantor's contract, and he is not bound to take notice of its nonperformance.

Brandt, Suretyship, chap. 1, § 1.

The contract of a guarantor is collateral and secondary. It differs from the contract of a surety, which is direct.

Kearnes v. Montgomery, 4 W. Va. 29; *McMillan v. Bulls Head Bank*, 32 Ind. 11; *Gaff v. Sims*, 45 Ind. 262; *Virden v. Ellsworth*, 15 Ind. 144; *Harris v. Newell*, 42 Wis. 687, 690, 691; *Oxford Bank v. Haynes*, 8 Pick. 423.

The undertaking of Nagle was to do a thing which lay within the peculiar knowledge of the opposite party, and notice should have been given.

Vinal v. Richardson, 18 Allen, 533.

A new contract was made between lessor and lessee, a new tenancy supervened and the guarantor was discharged.

W. Allen, J., delivered the opinion of the court:

The defendant, in consideration of the execution of the lease, guaranteed the payment of the rents in the manner therein mentioned. The lease provided for the payment of a certain rent during the term. No question arises in regard to this. It also provided for the payment of rent at the same rate for such further time as the lessees should hold the premises. If the tenant held over under no other agreement than was contained in the lease he would be tenant at sufferance, and the covenant which he made and which the defendant guaranteed was in effect that he would pay rent at a certain rate while he continued tenant at sufferance. Pub. Stat. chap. 121, §§ 8-5; *Edwards v. Hale*, 9 Allen, 462; *Rice v. Loomis*, 9 L. R. A.

189 Mass. 302; *Salisbury v. Hale*, 12 Pick. 416; *Emmons v. Soudder*, 115 Mass. 367.

Neither the covenant nor the guaranty embraced a holding under a new lease. Before the expiration of the term the landlord and the tenant made an agreement the effect of which was that at the expiration of the term the tenant came into the occupation of the premises as tenant at will at a monthly rent different from that mentioned in the lease, and that occupation continued for nearly two years before there was any default in the payment of rent.

The question here is not merely whether the creditor has done some act which impairs the security or enhances the risk of the guarantor; but it relates to the subject matter of the guaranty,—whether the contract broken is the contract the performance of which is guaranteed. The guarantor cannot be held to a contract different from the terms of his guaranty, even though it be apparently more beneficial to him.

In *Bacon v. Chesney*, 1 Stark. N. P. 192, there was a guaranty of goods to be supplied on eighteen months' credit. The goods were furnished on twelve months' credit and at the end of eighteen months the guarantor was called on. Lord Ellenborough held that he was not liable, saying: "The claim as against a surety is *strictissimi juris* and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with."

In *Holmes v. Brunsell*, L. R. 8 Q. B. Div. 495, where a surrender of a small part of the leased premises and a corresponding reduction of rent, which the jury found to be immaterial, was held to discharge a guarantor, the court says: "If it is not self evident that the alteration is unsubstantial or one which cannot be prejudicial to the security, the court will not in an action against the security go into an inquiry as to the effect of the alteration or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is prejudicial to the party, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged." To the same effect is *Whitcher v. Hall*, 5 Barn. & C. 269.

Miller v. Stewart, 22 U. S. 9 Wheat. 681 [6 L. ed. 190], which was against a surety on the bond of a deputy collector reciting his appointment as collector for eight townships, decided that an alteration to nine townships was fatal, on the ground that there was an alteration of the subject matter. *Mr. Justice Story* says of the surety: "To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal." See also *Dobbin v. Bradley*, 17 Wehd. 422, and *Birchhead v. Brown*, 5 Hill, 684.

In the case at bar there is no provision for the

renewal or extension of the lease, and the provision is for the payment of rent for further occupancy after the expiration of the lease. The covenant is to pay the rent specified, or at that rate, while holding over the term, not while occupying under a new contract and another lease. As before said, while holding over the term, without a new contract the tenant would be tenant at sufferance and as such liable to pay rent to which his covenant would apply. When by a new contract he should become tenant at will he would cease to hold over the term and would be in under the new contract to which the covenant to pay rent would not apply.

In *Salisbury v. Hale*, *supra*, the provisions in regard to rent did not differ much from those in the case at bar. Mr. Chief Justice Shaw said: "The natural import of the language is, a covenant not only to pay the rent during the term, but, in the contingency of holding over the term, to pay the same rent for such further time as he should hold over." It was found that no new lease or express contract was made between the landlord and tenant, and the defendant was held liable for rent that accrued two years after the expiration of the lease, on his guaranty that the tenant would perform his covenants.

Edwards v. Hale, *supra*, was an action to recover two quarters' rent. The defendant had entered under a lease very similar in its provisions in regard to rent to the case at bar, except that the rent was payable quarterly and the covenant was to pay the quarterly rent. The lessee held over after the expiration of the lease, and fifteen days thereafter informed the lessor that he intended to vacate the premises. The lessor claimed that the lessee was tenant at will and must give notice. The lessee claimed that he was tenant at sufferance and could quit at any time. The lessee continued to occupy until two and a half months after the expiration of the lease, when he left, the lessor refusing to accept a surrender of the premises. At the expiration of one quarter after the term the lessor demanded a quarter's rent, and the lessee tendered him the amount *pro rata* to the time he quit the premises. The action was by the lessor, after the expiration of another quarter, to recover two quarters' rent. The question was whether the lessee was tenant at will or tenant at sufferance, after the expiration of the written lease. The court says: "If the lease had been silent as to such holding over the defendants would have been tenants at sufferance. . . . In order that a new estate at will shall exist there must be a new contract, either express or implied from the dealings of the parties. . . . But the lease in present case contains certain stipulations on the subject of holding over, and it is necessary to consider their effect. After stating the provisions of the lease the court proceeds: "These covenants for the payment of rent, in case the lessees shall hold over, do not give them any right to hold over."

In *Salisbury v. Hale*, 12 Pick. 422, it is said by Shaw, Ch. J., that if a party covenants to pay rent beyond the term, though it does not enlarge or alter the term, it is still a valid contract and the law will give it effect. As it does not enlarge or alter the term, neither does it

create an estate at will at the expiration of the term. The holding over is without right on the part of the tenant, and it is through the laches of the landlord and not by his agreement (4 Kent, Com. 6th ed. 117). He may at any time enter and expel the tenant; and the correlative right of the tenant is to quit at any time. Neither is bound to give notice to the other of his intent to terminate the occupancy. The effect of the covenant is to fix the amount of the rent which the tenant shall pay for his "holding over." The court said that the facts did not show that an estate at will was created by any new contract, express or implied, and that the plaintiff was entitled according to the terms of the lease only to a *pro rata* rent during the time the defendant held over.

Rice v. Loomis, *supra*, was an action upon a guaranty for the payment of rent which the lessee covenanted to pay monthly during the tenancy, and also for such further time as the lessee might hold the same. The lessee held over and the action was for rent which accrued several months after the termination of the term. The defendant was held liable. The court says: "The holding over was continuous, and without any new contract between the lessor and the lessee. No change was made to take the case outside of what was provided for in the lease. No new tenancy supervened."

In *Emmons v. Scudder*, *supra*, it was held that a tenant who continued in possession after the expiration of a lease for years was a tenant at will because he occupied under a new agreement. The court says that when a lessee remains in possession at the expiration of his term and no new agreement is made he becomes a tenant at sufferance, but when there is a new contract, express or implied from the acts of the parties, and the tenant occupies under it, he becomes a tenant at will.

In neither of the cases against guarantors just cited does the court refer to the question what dealings between the lessor and the lessee in paying and receiving rent after the termination of the lease may be sufficient to prove the new relation of landlord and tenant at will between them, and there is no occasion to consider that question here. The report finds that before the lease expired the rent after the term was by mutual agreement reduced to \$100 a month, and that after one year it was increased. This occupancy with the consent of the lessor at an agreed rent means a lease at will by a monthly rent, which neither party can terminate except by the notice required to terminate a lease at will. There was a new contract and a holding different from the holding over contemplated by the covenant, and which was detrimental to the guarantor in that neither the lessor nor the lessee could determine it without a month's notice, and differing also in the rent reserved. The decrease in rent, while it would diminish the extent of the liability of the guarantor if he continued liable, was detrimental to him because it offered an inducement to the tenant. It was for the interest of the guarantor that the rent should not continue after the expiration of the term. Offering the premises at a lower rent after the lease expired was in effect paying the tenant a premium to continue as tenant at will, and might discharge the guarantor even if the lessee

remained Hable on his covenant to pay rent. But it seems that the lessee was not liable on his covenant for the rent which accrued after the expiration of the term. His covenant was to pay the rent reserved in the lease,—\$108.30 a month. He clearly was not liable for that, because he occupied, not as holding over the lease, but under a verbal agreement to pay \$100 a month. He was not liable on his covenant for a rent of \$100 a month, because that was not the rent reserved in the lease and which he covenanted to pay. Had he been sued on his covenant the larger sum must have been demanded as the rent reserved, and he could not defend by setting up a verbal agreement that the rent reserved should be less; his defense would be that he was not holding over the lease, but was occupying under a new agreement and a new tenancy, to which the covenant in the lease did not apply. But, however it may be as to the lessee, we think that the guarantor is not liable for the rent which accrued after the termination of the lease and made under the new agreement by which the lessee became tenant at will to the lessor at a different rent from that reserved in the lease

Bill dismissed.

CITY OF LOWELL, *Petitioner*,
v.
COUNTY COMMISSIONERS OF MIDDLESEX.
—
SAME v. SAME.
—
MERRIMACK MANUFACTURING CO.,
Petitioner,
v.
SAME.
—
TREMONT & SUFFOLK MILLS, *Petitioner*,
v.
SAME.
—
MASSACHUSETTS COTTON MILLS,
Petitioner,
v.
SAME.

(....Mass....)

1. The question of disproportionate taxation is open upon appeal from assessors to county commissioners for an abatement of taxes on the ground of overvaluation of property, but it is limited to whether or not more than a fair cash value has been put upon the property; and the inquiry cannot be extended to whether or not the property has been valued relatively more or less than similar property of other persons, since the statute requires a fair cash valuation of all property for taxation.

2. Evidence as to the valuation by assessors of other similar property cannot be considered by the county commissioners, upon an appeal to obtain an abatement for overvaluation of certain property, for the purpose of determining the proportionate, as distinguished from the actual, cash value of the property, where the statute requires a fair cash valuation of all prop-

erty for taxation; but the admission of such evidence for the purpose of determining actual cash value will not cause a quashing of the proceedings.

3. Writs of certiorari to quash proceedings of county commissioner acting as boards of appeal from decisions of tax assessors are not usually issued for mere mistakes in the admission of evidence when substantial justice appears to have been done.

4. The admission in evidence by the county commissioners sitting as a board of appeal to review a decision of assessors valuing property for taxation, of their own valuation of the same property upon a similar appeal in the preceding year, will not cause a quashing of the proceeding unless it appears that injustice has thereby been done, although such former valuation could not be taken by the board as conclusive of the present value, and therefore did not constitute such evidence as they were compelled to receive.

5. The fact that water power is expressly excluded from consideration in the determination of the value of buildings for purposes of taxation by the clause relating to them in a statute which contains directions to assessors as to the method of arriving at the taxable value of real estate, and is not elsewhere referred to, will not prevent its being valued and taxed with the land to which it is appurtenant and in connection with which it is used.

6. A return of an assessment as being "on land and water power" does not show that the water power was assessed independently of the land.

7. County commissioners have no power upon appeal to them from a decision of assessors placing a valuation on property for the purpose of taxation to interfere with the assessment on the ground that the assessors neglected to comply with the statutory provisions as to separate description and valuation of certain kinds of property.

8. The mere fact that one person has a right to have certain canals through land of which another owns the fee kept open for the passage of water will not entitle the latter to exemption from taxation upon the land covered by the water which flows in them, at least where he has the right to use water from them to any extent short of interference with the rights of the former.

9. A land owner is not subject to taxation upon land covered by a canal running through his property, the fee of which is in a third person, although he has acquired the right to maintain buildings over such canal, above high-water mark, for a term of ninety-nine years.

(October 27, 1890.)

RESERVATION from the Supreme Judicial Court for Middlesex County (Holmes, J.) for the consideration of the full court of petitions for writs of certiorari to review proceedings of the County Commissioners of Middlesex County sitting as a board of appeal from the decision of the assessors placing a valuation on certain property for purposes of taxation. *Writs granted in first and fourth cases, and refused in the other cases.*

The facts sufficiently appear in the opinion. *Messrs. L. T. Trull, City Solicitor, and William S. Knox for the City of Lowell. Messrs. T. L. Livermore and C. S. Lil-*

ley for the Merrimack Manufacturing Co., the Boott Cotton Mills, the Massachusetts Cotton Mills and the Tremont and Suffolk Mills.

Field, Ch. J., delivered the opinion of the court:

In the first case it appears that the respondents, the County Commissioners for the County of Middlesex, abated a part of the tax assessed on the real estate and machinery of the Merrimack Manufacturing Company, and the petitioner avers that the respondents in their proceedings erred in law in the following respects, to wit:

1. In ruling that the question of disproportionate taxation was open in this proceeding, and in admitting evidence tending to show disproportionate taxation.

2. In ruling that there was any competent evidence before them to prove disproportionate taxation, and in finding that the said Merrimack Manufacturing Company was disproportionately taxed by the assessment aforesaid.

3. In ruling that the copper rolls were not parts of the machinery of said Merrimack Manufacturing Company and taxable as such, and in abating the tax to the amount of their value.

4. In ruling that the mills and dies were not parts of the machinery of said Merrimack Manufacturing Company and taxable as such, and in abating the tax to the amount of their value.

The assessors of the City of Lowell, acting under Pub. Stat., chap. 11, § 18, and § 20, cl. 2, valued, for the purpose of taxation, the real property and machinery of the Merrimack Manufacturing Company on May 1, 1887, at \$3,480,408, and assessed a tax upon this valuation. The tax commissioner of the Commonwealth, acting under Pub. Stat., chap. 18, §§ 89, 40, valued the same real estate and machinery on said May 1 at \$2,675,000. The Manufacturing Company thereupon, in pursuance of Pub. Stat., chap. 18, § 41, made an application to the assessors of the City of Lowell for an abatement and the assessors refused to grant an abatement, whereupon an appeal was taken to the respondents in accordance with Pub. Stat., chap. 11, § 71. Pub. Stat., chap. 11, § 71, is as follows: "If the assessors refuse to make an abatement to a person he may within one month thereafter make complaint thereof to the county commissioners by filing the same with their clerk, and if upon a hearing it appears that the complainant is overrated the commissioners shall make such an abatement as they deem reasonable."

The duty of the assessors when an application is made to them for an abatement is defined in Pub. Stat., chap. 11, §§ 69, 72-74. Section 69 is as follows: "A person aggrieved by the taxes assessed upon him may apply to the assessors for an abatement thereof; and if he makes it appear that he is taxed at more than his just proportion or upon an assessment of any of his property above its fair cash value, they shall make a reasonable abatement."

A person may be taxed at more than his just proportion either because he is taxed at a disproportionate rate, or for property which he does not own, or because his property is disproportionately valued. By Pub. Stat. chap. 11, § 1. R. A.

§ 45, the assessors are required to "make a fair cash valuation of all the estate, real and personal, subject to taxation," in the city or town. See Id. §§ 41, 59; Stat. 1885, chap. 856, §§ 1, 2. The provision that "all property liable to taxation in this Commonwealth shall be assessed at its fair cash value" was first enacted in Stat. 1853, chap. 319, § 1. Rev. Stat., chap. 7, § 80, provided that the list of the valuation and assessment of property should contain, among other things, the names of the inhabitants assessed, "the true valuation of their real estate," "the reduced value of their real estate," "the true value of their personal property," and "the reduced value of their personal property;" and by section 80 the assessors were authorized to make an abatement to any person "if he shall make it appear to them that he is taxed at more than his just proportion," etc. The same language was used in Gen. Stat., chap. 11, § 48. The meaning of the words "reduced value," found in the Revised Statutes, is explained in *Torrey v. Millbury*, 21 Pick. 64. It is a matter of common knowledge that formerly the assessors of cities and towns often assessed property at a valuation less than its fair cash value, although the usage was not warranted by the statutes, and it was to prevent this that Stat. 1853, chap. 319, was passed. The effect of this Statute upon the duty of county commissioners in hearing petitions for abatement was considered in *Chicopee v. Hampden County Comrs.*, 16 Gray, 88. The words "overrated," or "more than his just proportion," as applied to the valuation of the estate of a person for the purpose of taxation and the abatement of his taxes, have come down from the early statutes. See *Newburyport v. Essex County Comrs.* 12 Met. 211. Gen. Stat., chap. 11, § 43, was amended by Stat. 1877, chap. 160, § 2, by inserting the words "or upon an assessment of any of his property above its fair cash value," which are now found in Pub. Stat., chap. 11, § 69. It appears from the return of their proceedings by the respondents that the Merrimack Manufacturing Company contended before them "that by the said assessment of taxes upon it by said assessors it was taxed at more than its just proportion; and in support of this contention offered to show the valuation placed by said assessors for said year upon certain pieces of property in said Lowell owned by other corporations and individuals, as compared with their valuation of certain like pieces of property of the complainant;" and evidence to show this was admitted. It is obvious from the Statutes now in force, which have been referred to, that it was the duty of the County Commissioners to value the real property and machinery of the Company at its fair cash value, and that they would have no right to value it at less, even if the other similar real property and machinery in the City of Lowell had been valued by the assessors at less than their fair cash value. For the purpose of determining the "true value" of the corporate franchise of the Merrimack Manufacturing Company as the basis of the tax to be levied under Pub. Stat., chap. 18, it is immaterial on what basis the property and machinery of other corporations in the City of Lowell had been assessed by the assessors, and, apart from this, it is a violation of the Statutes knowingly to make a valuation

of property for the purpose of taxation at less or more than its full and fair cash value. See Stat. 1885, chap. 355, §§ 1, 3. The just proportion intended by the existing Statutes is attained by assessing the property of different persons at a uniform rate, and upon its fair cash valuation. Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of opinion that in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and of disproportionate taxation arising from such overvaluation, the question is whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons. If, then, the respondents admitted the evidence objected to for the purpose of determining the proportionate value as distinguished from the actual cash value of the property of the Merrimack Manufacturing Company, we think that they erred in the rule of law which they adopted as the standard or test to be applied in determining whether the Company had been overrated. If, however, the valuation of the assessors of similar pieces of property of other corporations and persons was admitted only as evidence of the actual cash value of the property of the Merrimack Manufacturing Company, then the admission of this evidence would not necessarily require that the proceedings should be quashed. If we assume that such evidence would be held incompetent in proceedings in court, still, the proceedings before county commissioners acting as a board of appeal from the decisions of the assessors are not in all respects subject to the same rules as trials of causes in court, and a writ of certiorari to quash their proceedings is not usually issued for mere mistakes in the admission of evidence when substantial justice appears to have been done. Upon an examination of the return of the respondents we think that it appears that the question was distinctly raised whether overrating within the meaning of the Statute did not include a valuation relatively greater than that put upon the property of other persons as well as a valuation in excess of the fair cash value of the property, and that the Commissioners ruled that it included both kinds of overvaluation, and therefore admitted the evidence objected to and found that the property of the Merrimack Manufacturing Company had been overvalued for the purpose of taxation. This was the adoption of a double standard of value and was erroneous, and we cannot say that substantial justice has been done, because it may be that the County Commissioners found that the valuation of the assessors was not in excess of the fair cash value of the property, but only that the property had been disproportionately valued by the assessors. The result is that the abatement made by the County Commissioners must be annulled and they must proceed anew upon the complaint of the Merrimack Manufacturing Company to determine the fair cash value of its real estate and machinery according to law. See *Lowell v. Middlesex County Comrs.* 6 Allen, 181; Pub. Stat. chap. 186, § 9.

9 L. R. A

It was a mixed question of law and fact whether the copper rolls and the mills and dies were a part of the machinery of the Merrimack Manufacturing Company. There are intimations in our reports that by machinery in the provisions of the Statute we are considering was meant machinery in some manner affixed to real property. See *Boston & S. G. Co. v. Boston*, 4 Met. 181; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298, 309.

However this may be, we see no error of law in the findings of the Commissioners in the matter of the rolls, mills and dies, and we are inclined to think that on the facts reported we should have found the same way.

Writ of certiorari to issue.

The second case relates to the valuation of the real estate and machinery of the Boott Cotton Mills on May 1, 1887. The tax commissioner put a less valuation upon them than that of the assessors of the City of Lowell. The corporation applied to the assessors for an abatement, which was refused, and thereupon it made complaint to the County Commissioners pursuant to Pub Stat., chap. 11, § 71. At the hearing before the Commissioners the corporation called Mr. Cumnock, its agent and manager, and against the objection of the City of Lowell was allowed to prove by him, as the return states, "that the property in question and the condition thereof were the same on the first day of May, 1887, as on the first day of May, 1886; that if any change had taken place it was on the side of depreciation by reason of wear and use; that there was no different property in the mill yard of the complainant on the first day of May, 1887, than on the first day of May, 1886, except that 4,284 spindles, 4 Platt mules, 8 fly frames and 1 loom had been added to the machinery of the complainant, and the witness gave the cost of this additional machinery. There was no cross-examination of the witness by the respondent." After this, the Boott Cotton Mills "offered in evidence a duly attested copy of the record and return of said County Commissioners of their proceedings upon a former complaint to them by the complainant" similar to the complaint then before the Commissioners, wherein they determined the value of the real estate and machinery of said Boott Cotton Mills for the purpose of taxation to be on May 1, 1886, \$1,290,920. This was a less sum than the valuation of the assessors for 1887, or than the valuation of the tax commissioner for 1887. This copy was admitted in evidence against the objection of the City of Lowell. The return in the case at bar recites that "there was no other evidence as to the value of said real and personal estate offered by complainant than as hereinbefore set forth, and the respondent introduced no evidence whatever." The commissioners "having examined the property of the complainant at the conclusion of the said hearing," reduced the valuation below that made by the assessors and abated a part of the tax assessed by them.

The valuation of property for the purpose of taxation is an inquest by public officers for public purposes. Although the property may remain specifically the same from year to year, yet the value of it may change from causes which are independent of the condition of the

property. The assessors in the first instance make their estimate of value according to their judgment and usually without a hearing. When a person makes application for an abatement of taxes the Statutes provide that "if he makes it appear that he is taxed at more than his just proportion, or upon an assessment of any of his property above its fair cash value, they shall make a reasonable abatement." This provision implies that the assessors are to grant him a hearing. On complaint made to the County Commissioners under Pub. Stat., chap. 11, § 71, the provision is that "if upon a hearing it appears that the complainant is overrated the Commissioners shall make such an abatement as they deem reasonable." See Pub. Stat. chap. 18, § 41.

But although the Commissioners are to grant a hearing, they can still examine the property to be assessed and on their own judgment modified as it may be by any evidence produced before them estimate its value. It was not the intention of the Statutes that such an administrative board as assessors or county commissioners should when they grant a hearing be required to proceed exactly in accordance with the rules which have been established in judicial courts for the trial of causes. Some of those rules have been established for the sake of convenience in jury trials, in order that the parties may not be taken by surprise, or the jury be distracted by collateral issues, or the trial be so far prolonged that the jury cannot remember the testimony. The final judgment of the County Commissioners is conclusive upon all the world as to the valuation to be put upon the property, for the purpose of the assessment for which the value is determined, and it resembles a judgment *in rem* rather than a personal judgment; but it was never intended that such a judgment should be conclusive as to value in reference to future assessments, even if the assessors or County Commissioners should be of opinion that the values were the same at the different times when the assessments were made. If assessors or county commissioners who have estimated the values of property for the purpose of assessment in one year are of opinion the next year that, although the value has not changed, the valuation of the preceding year was too low or too high, they are bound by the Statute to estimate the value for the next year "according to their best skill and judgment" at the time they make the valuation. It may well be doubted whether in actions at law the doctrine of *res judicata* includes the assessment of damages when applied to subsequent proceedings between the same parties on another cause of action. Suppose that it has been determined in an action of trover between A and B that the value of a horse on January 1, 1889, when B converted it to his own use, was \$100, and judgment is entered for this sum with interest, which B pays, whereby the horse becomes his. A year afterwards A buys the horse of B for what it is reasonably worth, and there is evidence in a suit by B for the value of the horse that it was worth the same at the time of the purchase as at the time of the conversion the year before. It may well be doubted whether it would be the duty of the court at the trial to admit the former judgment in evidence, and then to

instruct the jury that if they found the value of the horse to be the same when purchased as it was when converted, they must take the value as determined by that judgment to be conclusive. Judgments *in rem* are not conclusive upon all the incidental issues which are involved in the judgment, although this has been sometimes put upon the ground that one or all of the parties to the subsequent proceedings were not actually parties to the proceedings *in rem*. See *Barney v. Tourtellotte*, 188 Mass. 106; *Brigham v. Fayerweather*, 140 Mass. 411, 1 New Eng. Rep. 786.

Evidence of the assessed value of property has always been excluded in this Commonwealth in suits or proceedings before courts to determine the value of land, but no case exactly like the present has arisen. See *Kameron v. Henry*, 101 Mass. 153; *Flint v. Flint*, 6 Allen, 84; *Raynes v. Bennett*, 114 Mass. 424; *White v. Boston & P. R. Corp.* 6 Cush. 420; *Brown v. Providence, W. & B. R. Co.* 5 Gray, 85.

The exclusion of evidence of this kind has been sometimes put upon the ground that the assessment is *res inter alios*, and it is argued in the present case that the parties are the same as they were in the proceedings of the previous year, and that the valuations were made for the same purpose. The real parties in interest are the Commonwealth, the County of Middlesex, the City of Lowell and the Boot Cotton Mills. The proceedings, however, are *sui generis* and are not in the nature of a suit between persons, and we think that the Statutes plainly contemplate that an independent valuation of property should be made each year, according to the judgment of the assessing boards for that year. In this view the assessments for previous years are only conclusive with respect to the taxes assessed for those years, and with reference to assessments for subsequent years they can only be considered as the opinion of the assessing boards concerning the value of the property in the years when they were made. In the view of a court they are not, strictly speaking, admissible as evidence of value in making future assessments. But in considering the duty of such a board as that of the assessors or of the County Commissioners we see no impropriety in their consulting their own records to ascertain what values have been previously put upon property with the view of forming the best judgment they can of its present value. Such board has a right to inform itself in any reasonable manner of many circumstances which may affect the judgment of its members, and when it does not adopt wrong standards of value their proceedings ought not to be set aside merely because they have considered evidence which a court would not admit. This is only another way of saying that a writ of certiorari, when used to review proceedings like those in this case, is not a writ of right but of discretion, and that it will not be issued to quash the proceedings when substantial justice has been done, although some evidence has been rejected or admitted which a court would have admitted or rejected. The evidence admitted here was only evidence of the opinion of the same persons upon the value of the same property the year before, and was not of a nature likely to do substantial injury to any party to the proceedings. See *Lowell v. Middlesex County Commrs.*

146 Mass. 408, 412, 6 New Eng. Rep. 69, 72.

In this case the petition must be dismissed.

The third case relates to the same property and the same valuation as the first case, but the petition is by the Merrimack Manufacturing Company, and not by the City of Lowell. The Company complains that notwithstanding the abatement made by the County Commissioners it is still overrated, and that errors in law to the prejudice of the Company appear in the proceedings of the Commissioners. The first error alleged is that the Commissioners refused to admit as evidence a duly attested copy of the record of their proceedings upon a complaint made to them by the petitioner upon an appeal from the decision of the assessors upon the value of its property for the purpose of taxation on May 1, 1886, which was the year before the assessment made in this case. In that record appeared the value put by the Commissioners upon the real estate and machinery of the petitioner for the purpose of taxation for the year 1886. The reason apparently why the record was rejected as evidence in this case, while in the second case we have considered a similar record was admitted, is that in the present case when it came on to be heard Samuel O. Upham had been elected commissioner in place of A. M. Lunt, so that the two hearings were not had before the same persons as commissioners, while in the second case it appears that the two hearings were had before the same persons. We are of opinion, however, as we have said in the second case, that the valuation of the previous year, even if made by a board composed of the same persons, is not evidence which the board the next year was compelled to receive, and therefore, that even if the distinction taken by the Commissioners between the two cases cannot be considered as sound, no error of law is shown in the present case.

The petitioner asked the Commissioners to rule "that the water power belonging to the complainant is not subject to assessment and taxation as water power by the City of Lowell, and the assessment thereof was illegal and void." The Commissioners refused so to rule, and ruled "that if the value of the complainant's land in the mill yards was enhanced by the ownership and use of the water power appurtenant to the land and the mill buildings standing thereon, the same might be taken by the assessors at such enhanced value for the purpose of taxation." The counsel for the Company contend in their argument that the return of the Commissioners shows that they "assessed the water power as such," and not as a part of the land. The assessors entered on their books and valued the land and water power in the following manner, to wit: "land in cotton yard, with water power, \$319,086; land in print-works yard, with water power, \$211,857." The Commissioners reduced this valuation and entered this reduction on their records in the following manner, to wit: "on land and water power in cotton yard, assessors' valuation, \$319,086, reduced to \$230,414; on land and water power in print-works yard, assessors' valuation, \$211,857, reduced to \$189,425." Pub. Stat., chap. 11, § 53, provides that "the assessors shall enter in the books furnished in accordance with the provision of 9 L. R. A.

the preceding section the valuation and assessment of the polls and estates of the inhabitants assessed in the following order: in column number fifteen: the true value of buildings enumerated in the preceding column placed opposite the description of the same, including water wheels, such value to be exclusive of land and water power and the machinery used in said buildings;" in column No. 7, they are required to enter "the true value of machinery used in all kinds of manufacturing establishments;" and in columns Nos. 16, 17 and 18 they are required to enter a description, by name or otherwise, of each and every lot of land assessed, "the same placed opposite the name of the person or party to whom it is taxable, with the number of acres or feet in each lot, the number of quartz sand beds, of stone quarries and ore beds and the true value thereof;" in column No. 14 they are required to enter buildings of all kinds, to be described in the order named, which includes "cotton factories with the number of spindles and looms used in the same," and "print works." These provisions were first enacted by Stat. 1861, chap. 167, and from that Statute have been incorporated into the Public Statutes. The argument is that before the passage of this Statute water power useful for mill purposes could not be taxed as a distinct subject of taxation; and that when it was used in connection with mills it could only be taxed with the mills as parcel of the mills or appurtenant to them; and that since the passage of this Statute water power, even if appurtenant to mills, cannot be taxed at all because by the Statute it has been excluded as a subject of taxation. But the Statute means that in valuing the buildings the value of the "water power and machinery used in said buildings" shall not be included, not that the machinery shall not be valued and taxed or that the water power which is parcel of or is appurtenant to land, and is used in connection therewith, shall not be valued and taxed with the land. The decisions before this Statute were that water power was "a capacity of land for a certain mode of improvement which cannot be taxed independently of the land." *Boston Mfg. Co. v. Newton*, 22 Pick. 22; *Lowell v. Middlesex County Comrs.* 6 Allen, 181.

There is nothing in the Statute of 1861, or in the Public Statutes, indicating that water power used in connection with land should not be taxed with the lot of land of which it is parcel, or to which it is appurtenant; and we think that the County Commissioners rightly construed the Statute. See *Fraz Pond Water Co. v. Lynn*, 147 Mass. 31, 6 New Eng. Rep. 319; *Fall River v. Bristol County Comrs.* 125 Mass. 567; *Pingree v. Berkshire County Comrs.* 102 Mass. 76.

The form of the assessment does not show that the water power was taxed independently of the land.

It appears by the return that the Merrimack Manufacturing Company owned certain buildings and structures "in which the manufacture of cotton cloth is carried on through all of its processes from the primary treatment and preparation of the raw cotton to the finished fabric," and that these buildings and structures were situated in what was called the cotton yard. It also owned certain other buildings

and structures "in which the business of printing cotton cloth is carried on through all its processes," which were situated in what was called the print-works yard. The Company does not print all the cotton cloth which it manufactures, but sells some of it unprinted. These two yards "are not separated by any continuous fence or other divisional structure, but the boundaries of each yard are marked by the sides and ends of buildings and structures standing in the one or the other yard, and in part by fences, and are well known and established." In the list of its property which the Company furnished each building and structure was separately described and the machinery in each. The assessors in their valuation book described the land with the water power in these two yards in the manner which has been hereinbefore recited, and the machinery as follows, to wit: "156,480 spindles and printing machinery, 4,607 looms;" and they valued the machinery used in these yards in a lump, at \$1,353,000, without separately designating the machinery used in each building, or separately valuing it. The buildings in the two yards they did not separately describe and value, but under a general description they valued them at \$9,000,000. The petitioner requested the commissioners to rule as follows: "That the method of valuation of the buildings and machinery of the complainant in the cotton yard and print-works yard adopted by the assessors for the year 1887, and the method of entering said buildings and machinery and the valuation thereof in the valuation books of the assessors for the year 1887, adopted by them were irregular, illegal and contrary to law; and that the assessors' assessments for said year of said buildings and machinery were illegal and void, and that such part of the total taxes paid by the complainant for the year 1887 as was assessed upon said buildings and machinery should be abated."

This ruling the Commissioners refused to make, but they reduced the valuation of the said buildings and machinery and abated a part of the tax assessed thereon.

Pub. Stat., chap. 18, §§ 39-42, do not require any separate valuation of the different lots of real estate and machinery, and it is argued that in proceedings under this chapter it is immaterial whether the different lots are separately valued or not. It has been held that in an appeal to county commissioners under Pub. Stat., chap. 18, § 41, the provisions of Pub. Stat., chap. 11, § 73, are inapplicable (*Lowell v. Middlesex County Comrs.* 146 Mass. 408, 6 New Eng. Rep. 69); but it is also held in the same case that when the assessors have made separate valuations of different lots or parcels, and the corporation complains of overvaluation of some, but not of all, of the parcels, the Commissioners are confined to the question of the overvaluation of the parcels specified, and must reduce the valuation if they find them overvalued, although other parcels in their opinion have been undervalued, by the assessors. It is still the law that if any part of a tax assessed to a person upon his real estate is valid, although other real estate has been assessed to him for which he is not taxable, the remedy is by abatement and not by action. *Schwartz v. Boston*, 151 Mass. 226.

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But the remedy by abatement is by Pub. Stat., chap. 11, § 69, confined to cases where it is made to appear that the person is "taxed at more than his just proportion or upon an assessment of his property above its fair cash value," or by § 71, 1d., when it "appears that the complainant is overrated." A person is overrated when he is taxed for property for which he is not taxable, or when the property for which he is taxable is overvalued; but he is not, strictly speaking, overrated when he is taxed at a fair valuation on only the property for which he is taxable, although the property for which he is taxed is described generally, but not as specifically as the Statute requires. It has been often held that if no list of the property is brought in a tax is not invalid because the property on account of which it is assessed is not particularly described. See Pub. Stat., chap. 11, § 41; *Noyes v. Hale*, 137 Mass. 266; *Tobey v. Wareham*, 2 Allen, 594; *Lincoln v. Worcester*, 8 Cush. 55.

The argument is that when a list is brought in and all necessary inquiries are answered under oath, and when this list contains the particulars required by statute, the assessors must receive it as true except as to valuation, and must value separately the different items of property contained in it according to the directions of Pub. Stat., chap. 11, § 53. It is plain that Pub. Stat., chap. 18, § 41, was enacted for the purpose of preventing what in effect would be something like double taxation. If the assessors put one valuation upon the real estate and machinery of the corporation and the tax commissioner puts a less valuation, and the corporation does not apply to the assessors for an abatement, both valuations probably would remain valid for the purposes respectively for which they were made. If the corporation proceeds for an abatement pursuant to Pub. Stat., chap. 13, § 42, the decision of the County Commissioners would be conclusive as to value both for the purpose of local taxation and the taxation of the corporate franchise. If the corporation does not proceed for an abatement within one month from the date of the notice by the tax commissioner of his determination of the value of the real estate and machinery, it may apply to the assessors for an abatement if it files a list and makes application within six months from the date of its tax bill, pursuant to Pub. Stat., chap. 11, §§ 69, 72, 74; but in this case the decision of the County Commissioners, if an appeal is taken to them, probably would affect only the valuation for the purpose of local taxation. In the case at bar the proceedings were under Pub. Stat., chap. 18, § 41. The suggestion is that as the complainant can select in its complaint for an abatement the particular items which it thinks have been overvalued, omitting those which have been undervalued, and as the County Commissioners cannot revalue the whole property, but are confined to the particular items, the complainant has been deprived by the action of the assessors in this case of certain advantages which it would have had if the assessors had specifically described and valued the different parcels of its real estate and machinery. These advantages, however, are, we think, merely incidental, and Stat. 1861, chap. 187, could not have been enacted for the pur-

pose of enabling taxpayers to have their whole property ultimately valued at less than its fair cash value for the purpose of taxation. See *Lowell v. Middlesex County Comrs.* 8 Allen, 546.

It was suggested in *Lincoln v. Worcester*, 8 Cush. 55, that the remedy for the correction of irregularities similar to those here complained of was by an application for abatement, but it was also said that the objections were to matters of detail, "which do not go to show that either the tax on the real estate or the tax on the personal estate is void," and the decision was that assumpsit would not lie to recover the amount of the tax which had been paid.

In all the cases to which our attention has been called, the want of a more specific description of land and buildings has never been such as to render the tax void. Many of the provisions of Pub. Stat., chap. 11, § 53, if not all, are regarded as directory. *Bemish v. Caldwell*, 143 Mass. 299, 8 New Eng. Rep. 430; *Noyes v. Hale*, 187 Mass. 286; *Westhampton v. Searle*, 127 Mass. 502; *Tobey v. Wareham*, 2 Allen, 594; *Torrey v. Milbury*, 21 Pick. 64; *Sprague v. Bailey*, 19 Pick. 436.

In *Boston Water Power Co. v. Boston*, 9 Met. 199, 204, it is said that "there is no provision of law that a tax shall be void when two or more parcels of real estate belonging to the same owner and in his own occupation are assessed together when they might have been severed, or are assessed separately when they might have been united."

In *Jennings v. Collins*, 99 Mass. 29, 31, it is said that "when lands are separated either by the use or purpose to which they are devoted or by the mode of their occupation, or are disconnected in location, a tax laid generally upon an entire valuation cannot be made a lien upon each separate parcel, even when they are all owned or occupied by the same person,"—citing *Hayden v. Foster*, 18 Pick. 492.

But the distinction between a void tax and a tax which does not create a lien on specific real estate has been noticed in *Hove v. Boston*, 7 Cush. 273, and in other cases. We are aware of no case in which a tax assessed upon a valuation in the gross of separate lots of land, or of separate buildings upon them, or of machinery in them, has been held to be void when the lots are contiguous and the lots, buildings and machinery are owned by and are in the possession of the same person. The irregularities in the assessment here complained of are in the proceedings of the assessors in making the original assessment, and not in the proceedings of the County Commissioners which are before us. No authority appears to be given to the County Commissioners to correct any failure of the assessors to comply with the provisions of Pub. Stat., chap. 11, § 53.

The duty of the Commissioners under Pub. Stat., chap. 13, § 14, is to determine the value of the real estate and machinery of the corporation, and under Pub. Stat., chap. 11, § 71, to determine whether the corporation has been overrated and to make such abatement as they may deem reasonable. Undoubtedly if the corporation has been assessed for real estate or machinery for which it is not taxable, the County Commissioners must exclude it; but if it has been taxed only upon property for which

it is taxable, and the tax is lawful and proportional, the question for the County Commissioners is whether this property has been overvalued so far as complaint is made of the valuation. It is not necessary, we think, in this case to decide what the remedy is, or whether there is any remedy, if assessors neglect to follow the provisions of Pub. Stat., chap. 11, § 53, with reference to the separate description and valuation of the kinds of property mentioned in that section. We do not intimate that we think that the irregularities complained of in this case make the assessment void or voidable, but we are of opinion that this question was not one for the County Commissioners to consider and decide, and that they rightly refused to rule as requested. It is conceded that what appears in the papers as the third ruling requested was in fact given, and that by some mistake it appears by the return as the papers have been printed to have been refused.

The petition in this case must be dismissed.

The fourth case relates to the assessment of the real estate and machinery of the Tremont and Suffolk Mills. It appears by the return of the Commissioners that the petitioner made five requests for rulings, which were refused. The first relates to the assessment of water power in connection with the land and the second to the want of a separate and specific description and valuation in the valuation books of the assessors of the two lots of land called the Suffolk yard and the Tremont yard, and of the buildings and structures situated in each of these yards, and of the machinery contained in the buildings. The questions of law involved in these requests have been considered in the preceding cases and for the reasons hereinbefore given we think that the rulings of the Commissioners are correct.

The fourth ruling requested is to the effect that the buildings belonging to the complainant which stand over the Western Canal "are not legally assessable to the complainant." At the argument in this court the objection to the refusal of the Commissioners to make this ruling was waived. There remain, therefore, only the third and fifth requests for rulings which were refused. The fifth request is for a ruling that the land under and in the canals passing through the Suffolk yard and Tremont yard is not legally assessable to the complainant. These canals supply the water for the water-wheels of the complainant in the Suffolk yard and in the Tremont yard. These water-wheels are placed near the head of the canals and the canals also serve as tail raceways for the complainant's mills, and are then used to convey water to the premises of the Lawrence Manufacturing Company, which are situated northerly of the yards of the complainant. The complainant cannot, under its title deeds, fill up or obstruct these canals, and is required to permit the water to flow through the same "whether its wheels are in use or not." "Over certain portions of the said canals in said Suffolk yard the complainant has erected and maintains certain of its buildings aforementioned in that yard, and over the whole of said canals in said Tremont yard it has erected and maintains certain of its buildings aforementioned in that yard." It appears, therefore,

that the complainant owns the fee of the land under and in the canal and has a right to use the water subject to the right of other persons to have the water flow through the canals for use beyond the premises of the complainant. Clearly, the complainant is taxable for this land. No question arises in the case as to the proper methods of determining its value.

The third request is for a ruling that the land under and in the Western Canal over which certain buildings of the complainant have been erected "is not legally assessable to the complainant." We understand that the fee of this land is not in the complainant, but that it remains with the proprietors of the locks and canals on Merrimack River. The complainant does not draw water from this canal, but the canal is used for conveying water to the premises of the Lawrence Manufacturing Company. The complainant, by an indenture with the proprietors of the locks and canals, has acquired the right for ninety-nine years from the year 1877, to "erect, keep up, support and maintain buildings above high-water mark over said canal," and over a strip of land ten feet wide which adjoins it and lies between the canal and Suffolk Street, the proprietors of the locks and canals reserving to itself and excepting from the grant "all of said canal below high-water mark," and all rights therein and the right at any time to widen, deepen and enlarge the canal, and for that purpose to take down and remove any of the buildings erected by the complainant. The words "real estate and machinery owned by each corporation and subject to local taxation," in Pub. Stat., chap. 18, § 89, must mean the same thing as the real estate and machinery which by chapter 11 are to be taxed to the corporation. It has been decided that buildings affixed to land cannot be taxed as real estate apart from the land to which they are affixed. *McGee v. Salem*, 149 Mass. 288.

If by the indenture the complainant had an estate in possession in the land under and in the Western Canal this land might be taxed to the complainant. See Pub. Stat. chap. 11, § 18.

But if the complainant was not the owner or was not in possession of this land, it could not

be taxed to the complainant. See *Flax Pond Water Co. v. Lynn*, 147 Mass. 81, 6 New Eng. Rep. 319.

A majority of the court are of opinion that it appears from the return of the Commissioners that the complainant was not in possession of this land within the meaning of Pub. Stat., chap. 11, § 18; that although its buildings extended over it resting upon other land the right to maintain them so long as the right existed was in the nature of an easement, and resembled a right to have buildings project over the land of another, and that by the indenture there was not granted to the complainant any estate in or right of possession of the land in and under the Western Canal. As the complainant was not in possession of the land in the canal and had no right to use the waters, this third request of the complainant should have been granted by the Commissioners. For this reason a writ of certiorari should issue to quash the proceedings of the Commissioners so far as concerns their valuation of the land in the mill yards, in order that it may be revalued excluding the land in and under the Western Canal.

Writ of certiorari.

The fifth case relates to the valuation of the real estate and machinery of the Massachusetts Cotton Mills, and the application for abatement is made wholly under Pub. Stat., chap. 11, § 69, without reference to any proceedings by the tax commissioners. The questions in this case relate to the taxation of the water power in connection with the land of the corporation and the want of a specific description and valuation of the lots of land, buildings and machinery of the corporation as required by Pub. Stat., chap. 11, § 58. The two yards of the complainant were separated from each other by a public street or by land of the complainant on which tenement blocks had been erected, but in other respects the case does not differ from that of the Merrimack Manufacturing Company. These questions have been already considered, and we see no error of law in the proceedings of the Commissioners.

Petition dismissed.

VERMONT SUPREME COURT.

Charles E. BATES and Wife
v.
VILLAGE OF RUTLAND.

(Vt.)

1. No action can be maintained against a municipality to recover damages sustained by individuals on account of defects in its streets in the absence of express statutory provisions imposing liability on it for such defects.
2. The trustees and street commissioner of a village are public officers and not agents of the village so as to render it liable for their acts of negligence while engaged in preparing material for the repair of streets, where the village charter constitutes it a highway district of the town in which it is located and provides that highway taxes shall be paid to the

treasurer to be expended by the village trustees in maintaining the streets, which shall be under the superintendence of a commissioner to be appointed and controlled by the trustees.

(July 18, 1890.)

EXCEPTIONS by defendant to a judgment of the Rutland County Court in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence in failing to maintain one of its highways in a safe condition. *Sustained.*

The negligence complained of was in the location and use of a stone crusher owned by the Village and used by its trustees and street commissioner in preparing material for the repair of village streets. The crusher was lo-

cated just outside of the village limits near to and partly upon a highway at a place where there was a dangerous embankment in the highway. Plaintiff's horse while being driven along the highway became frightened at the crusher and sprang over the embankment throwing plaintiff's wife from the carriage and greatly injuring her. To recover damages for the injuries thus received this action was brought.

The case further appears in the opinion.

Messrs. F. M. Butler and T. W. Money, for defendant:

The proceedings should have been against the town, and not against the Village.

Landon v. Rutland, 41 Vt. 681; *Parker v. Rutland*, 56 Vt. 224.

The street commissioner and the trustees themselves are, so far as the expending of the highway fund and the repair of its highway with that fund is concerned, not officers of the Village, but of the Town of Rutland or the State.

2 Dillon, Mun. Corp. §§ 974-976, 979, and cases cited; *Tone v. New York*, 70 N. Y. 157, 459; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Hill v. Boston*, 122 Mass. 344, 372.

The duty which was being exercised was plainly public, and not private and special to the corporation, and the corporation, as such, derived no special benefit or profit therefrom.

Mead v. New Haven, 40 Conn. 72; *Maximilian v. New York*, 62 N. Y. 160.

No town is liable at common law, "for damages occasioned by the wrongful act of the surveyor himself in performing his official duty." The surveyor himself is only liable in damages for wanton, malicious or improper acts in making or repairing highways.

Walcott v. Swampscott, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570; *Judge v. Meriden*, 58 Conn. 90; *Rouse v. Addison*, 84 N. H. 806; 2 Dillon, Mun. Corp. § 979.

There can be no corporate liability when the act complained of is one in no sense authorized by the charter.

2 Dillon, Mun. Corp. 969; *Albany v. Ouncliff*, 2 N. Y. 165; *Smith v. Rochester*, 76 N. Y. 506; *Ouyler v. Rochester*, 12 Wend. 165; *New York & B. S. M. & L. Co. v. Brooklyn*, 71 N. Y. 580; *Baxter v. Winoski Turnp. Co.* 22 Vt. 114; *Felch v. Gilman*, Id. 88.

The care of the streets and highways, and the duties in respect to them, are purely governmental in their nature, and the Village cannot be held liable for negligent acts of the corporation or the nuisances created by it, in the exercise of its governmental function.

Weller v. Burlington, 60 Vt. 28; *Welsh v. Rutland*, 56 Vt. 228.

The right to repair streets carries with it the right to impede the travel for that purpose, and to employ tools, machinery and materials therefor.

Baxter v. Winoski Turnp. Co. 22 Vt. 114.

The doctrine of *respondet superior* does not apply, and no liability can be imposed upon the corporation except by statute.

Welsh v. Rutland, 56 Vt. 236, and cases cited.

There is no common-law liability of towns for insufficiency of highways or for nuisances created by them in the discharge of their duties in respect to highways.

9 L. R. A.

Baxter v. Winoski Turnp. Co. 22 Vt. 114.

The building and repairing of highways are held to be acts "governmental and political" in their character.

Parker v. Rutland, 56 Vt. 224; *Welsh v. Rutland*, 56 Vt. 234; 2 Dillon, Mun. Corp. § 965; *Hill v. Boston*, 122 Mass. 344, and *note*.

The duty of keeping highways in repair is a continuing one and carries with it all the power and authority necessary to perform it.

Smith v. Washington, 61 U. S. 20 How. 135, 148, 15 L. ed. 858, 861.

A nuisance cannot be predicated of that which the law authorizes.

Northern Transp. Co. of Ohio v. Chicago, 99 U. S. 685, 25 L. ed. 836; 8 Bl. Com. 5, 216.

It has long been settled that towns are not liable for neglect of duty of their officers in this respect.

2 Dillon, Mun. Corp. § 962; *Weller v. Burlington*, 60 Vt. 28; *Parker v. Rutland*, 56 Vt. 224.

Messrs. Lawrence & Meldon and J. C. Baker, for plaintiffs:

In purchasing, setting up and operating the crusher the trustees were acting as agents of the Village. For all such acts the Village is liable.

Deane v. Randolph, 183 Mass. 475.

If the village corporation was acting as agent of the town, or as highway surveyor, yet it would be liable in erecting and maintaining a nuisance upon or beside the highway.

Nowell v. Wright, 8 Allen, 166; *Griffith v. Pollet*, 20 Barb. 630; *Tearney v. Smith*, 86 Ill. 891.

The Village is not in any sense a highway surveyor of the town nor are the trustees or street commissioner.

Parker v. Rutland, 56 Vt. 224; *Campbell v. Fair Haven*, 54 Vt. 236; *West v. Brockport*, 16 N. Y. 170, *note*; *Conrad v. Ithaca*, 16 N. Y. 158.

A principal is liable for the malfeasance or torts of the agent, committed in the course of the agency.

Lee v. Sandy Hill, 40 N. Y. 442; *Joliet v. Harwood*, 86 Ill. 110.

A municipal corporation is liable to the same extent as a private individual for acts done by its authority, or ratified by the corporation or its officers.

Lacour v. New York, 8 Duer, 406; *Waldron v. Haverhill*, 8 New Eng. Rep. 683, 143 Mass. 582; *Thayer v. Boston*, 19 Pick. 511; Wood, Nuis. pp. 288, 339, 341; *Little v. Madison*, 43 Wis. 643; *Wilson v. New Bedford*, 108 Mass. 261; *Harper v. Milwaukee*, 80 Wis. 365; *Hawks v. Charlemont*, 107 Mass. 414.

The defendant is liable for the wrongful acts and neglects of its agents in erecting, maintaining and operating the crusher.

Winn v. Rutland, 52 Vt. 481; *Wilkins v. Rutland*, 61 Vt. 336; *Moulton v. Scarborough*, 71 Me. 267; *Barton v. Syracuse*, 36 N. Y. 54; *Sullivan v. Holyoke*, 135 Mass. 278.

Tyler, J., delivered the opinion of the court:

The defendant is a municipal corporation, organized under a charter granted by the Legislature in November, 1882. Section 1 of its charter defines its boundaries. Its corporate

relation to and control of the streets and highways within its limits are set forth in section 46, which is as follows: "All the territory embraced within the limits of said Village is hereby constituted a highway district of the Town of Rutland, and all the highway taxes assessed upon the polls and ratable estate thereof shall be paid in money; and the selectmen of the Town of Rutland shall make out a tax-bill thereof, and deliver the same seasonably, as required by law, with a warrant for its collection, to the collector of said Village, who shall collect the same as other taxes of said Village are collected, and pay the same over to the treasurer of said Village, which money shall be drawn from said treasury by said trustees, and shall be expended by them in building, constructing, maintaining and repairing the streets, highways, walks, alleys, sewers and lanes of said Village; and no surveyors of the said highway district shall be required or chosen by said town." It is provided that its trustees may appoint and remove at pleasure, among other officers, a street commissioner, who shall superintend the construction and repair of streets, walks, culverts, sewers and drains, subject to the authority and discretion of the trustees.

It will be observed that the charter imposes no liability on the village corporation for damages sustained by individuals upon its streets and highways in consequence of defects therein; and it has long been settled law that in the absence of express statutes declaring liability such defects are not actionable. In *Hill v. Boston*, 122 Mass. 844, Mr. Justice Gray makes a very thorough examination of the authorities on the subject, and says: "The result of this review of the American cases may be summed up as follows: There is no case in which the neglect of a duty imposed by general law on all cities and towns alike has been held to sustain an action by a person injured thereby against a city when it would not against a town. . . . In the absence of such binding decisions we find it difficult to reconcile the view that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the State is to exercise a part of its powers of government." See also *Parker v. Rutland*, 56 Vt. 224; *Weller v. Burlington*, 60 Vt. 28.

The Town of Rutland was bound by law to maintain all the streets and highways within its boundaries. It maintained those within the Village of Rutland through the instrumentality of the village corporation, which was a mere highway district of the town.

It is needless to decide or discuss the question whether the defendant had a legal right to purchase a stone crusher. Pursuant to the provisions of the charter all the highway taxes

assessed upon the polls and ratable estate of the Village were collected and paid into the village treasury, and were drawn out by the trustees, and expended by them in maintaining walks, streets, etc. The question is whether the trustees and street commissioner, while engaged in work upon the streets, were public officers or servants and agents of the Village. If the former, the defendant is not liable. If the latter, it is liable for their acts of negligence. It must be conceded that the defendant corporation is a political subdivision of the State, chartered and organized mainly for governmental purposes. Then, were the trustees and street commissioner at the time of the accident engaged in a public service, or in a work that was for the peculiar benefit of the defendant in its local or special interests? The character of the employment is determinative of the defendant's liability for the acts of these officers. This subject is elaborately discussed in *Bailey v. New York*, 8 Hill, 581, and in *Scott v. Manchester*, 2 Hurlst. & N. 204, and *Hill v. Boston*, *supra*.

In the case last cited Justice Gray says: "The result of the English authorities is that when a duty is imposed upon a municipal corporation for the benefit of the public without any consideration or emolument received by the corporation it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give private action for a neglect in its performance is to be presumed." 2 Dillon, Mun. Corp. § 974 *et seq.*; *Weller v. Burlington*, *supra*.

By an Act of the Legislature of Massachusetts the selectmen of towns were authorized to establish and maintain such drinking troughs within public highways as in their judgment public necessity and convenience required, and towns were authorized to raise and appropriate money to pay the expense of the same. In a case where troughs painted in such a manner as to frighten horses were put up by selectmen, it was held that the selectmen were public officers, that the town was not liable, that it had no corporate interest in the work.

The line of distinction between corporate duties that are governmental and performed in behalf of the public, and those that inure to the special advantage of municipalities, is defined in *Welsh v. Rutland*, 56 Vt. 228, and *Weller v. Burlington*, *supra*.

The reasoning of the chief justice in the former case is applicable to the facts in the one at bar. The defendant was engaged in the public work of repairing its streets. The officers by whom the work was being performed were for this purpose public officers, and for their negligent acts an action does not lie against the defendant. This view is in accordance with the decision in *Wilkins v. Rutland*, 61 Vt. 896.

We think the court should have directed a verdict for the defendant as requested; therefore the judgment is reversed, and judgment for the defendant.

PENNSYLVANIA SUPREME COURT.

Daniel ROTHERMEL, Who Sues for Himself, as well as for the Commonwealth of Pennsylvania, *Appt.*,

John MEYERLE.

(....Pa....)

1. The exaction of a license fee for the privilege of purchasing goods to be shipped to another State is not unconstitutional as a tax upon interstate commerce, since at most it is simply a tax on the goods at the time of their purchase, at which time they are subject to state taxation, and so remain until the business of transportation has actually commenced.
2. A statute requiring the payment of a license fee for the privilege of purchasing certain kinds of produce in a certain county, to be shipped out of it, which fee is greater in the case of nonresidents of the county than of residents, is not obnoxious to U. S. Const., art. 4, § 2, entitling citizens of each State to all the privileges and immunities of the citizens of the several States.
3. Although a statute imposing a license fee for the privilege of buying certain produce in a particular county to be shipped out of it may be void as an interference with interstate commerce so far as it applies to produce purchased to be shipped out of the State, it is valid in its application to produce intended for shipment to places within the State.

(October 6, 1890.)

APPREAL by complainant from a judgment of the Court of Common Pleas for Berks County in favor of defendant in an action brought to recover the statutory penalty for buying produce in Berks County for shipment out of it without having first procured a license. *Reversed.*

The action was brought to recover the penalty of \$100 provided by the Act of April 8, 1861, entitled "An Act Relative to Hucksters in the Counties of Berks, etc." That Act required the payment of a license fee for the privilege of buying certain kinds of produce in the counties named "with intent to send the same for sale or barter to any other market out of said counties," and provided a penalty for failure to comply with its requirements. The fee was fixed at \$20 in case of persons residing outside the limits of said counties, and at \$10 in case of those residing within said counties.

The case further appears in the opinion.

Messrs. A. H. Rothermel, David Levan, J. H. Rothermel and Jefferson Snyder, for appellant:

A State may tax all property incorporated with the general mass of the property of the State.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

Goods the product of a State, intended for exportation to another State, are liable to taxation as part of the general mass of property of

NOTE.—Constitutional law; state taxes as affecting commerce.

State legislation may in a variety of ways affect commerce and persons engaged in it, without constituting a regulation of commerce within the meaning of the Constitution. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Sherlock v. Alling*, 98 U. S. 103, 23 L. ed. 820; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Pound v. Turek*, 95 U. S. 459, 24 L. ed. 525.

The power of the State to tax, control or regulate the business or trade carried on within the State is not incompatible with the power of Congress to regulate licenses to carry on trade within the State for internal revenue purposes. *License Tax Cases*, 72 U. S. 5 Wall. 462, 18 L. ed. 497; *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 29, 21 L. ed. 787.

A State may levy a tax on the business conducted within its limits. *Nathan v. Louisiana*, 46 U. S. 8 How. 73, 12 L. ed. 993; *State v. North*, 27 Mo. 439; *Biddle v. Com.* 13 Serg. & R. 406.

A State may regulate the sale of intoxicating liquors, may require a license for the same or may prohibit the sale altogether. *Bartemeyer v. Iowa*, 85 U. S. 13 Wall. 129, 21 L. ed. 529; *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256; *State v. Wheeler*, 25 Conn. 290; *Perdue v. Ellis*, 18 Ga. 558; *Anderson v. Com.* 13 Bush. 485; *Jones v. People*, 14 Ill. 196; *State v. Donehey*, 8 Iowa, 398; *Santo v. State*, 3 Iowa, 165; *O'Dea v. State*, 57 Ind. 31; *Keller v. State*, 11 Md. 523; *Com. v. Clapp*, 71 Mass. 97; *Com. v. Kimball*, 24 Pick. 359; *State v. Moore*, 14 N. H. 451; *Gloversville v. Howell*, 70 N. Y. 287; *Ingersoll v. Skinner*, 1 Denio, 540; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *State v. Peckham*, 3 R. I. 239; *City Council v. Ahrens*, 4 Strobb. L. 241; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346.

A state law imposing a tax on brokers dealing in foreign exchange is not in conflict with the Federal 9 L. R. A.

Constitution. *Nathan v. Louisiana*, 46 U. S. 8 How. 73, 12 L. ed. 993.

A tax by the State on its own corporations or their property or franchises is not in conflict with clause 3 of art. 1 of the Federal Constitution, even though the capital be invested in shipping. *State v. Tax Collector*, 2 Bailey, L. 654; *State v. Charleston*, 4 Rich. L. 239. See *Delaware R. R. Tax Case*, 85 U. S. 18 Wall. 232, 21 L. ed. 894.

An ordinance imposing a city tax is not a violation of the Constitution, even though the business extends beyond the limits of the State. *Osborne v. Mobile*, 83 U. S. 16 Wall. 432, 21 L. ed. 473; *Home Ins. Co. v. Augusta*, 98 U. S. 116, 23 L. ed. 525.

A tax on water craft in which goods are sold by retail is valid although the goods were brought from another State. *Harrison v. Vicksburg*, 3 Smedes & M. 531.

Licenses.

State license taxes are not a violation of the restrictive clause of § 8 of art. 1 of the Federal Constitution. *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256.

Nor is the authority of the State to tax property, business and persons within its limits affected by art. 1, § 10, cl. 2, of the Federal Constitution. *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 29, 21 L. ed. 791.

A license for the sale of goods, if imposed on all persons engaged in the same business, is not inconsistent with the commercial clause of § 8 of art. 1 of the Constitution of the United States, unless it discriminates against products of other States. *Ward v. Maryland*, 79 U. S. 12 Wall. 430, 20 L. ed. 452; *Conner v. Elliott*, 59 U. S. 18 How. 593, 15 L. ed. 498; *Woodruff v. Parham*, 75 U. S. 8 Wall. 123, 19 L. ed. 332; *Welton v. State*, 91 U. S. 275, 23 L. ed. 347.

A license given by a municipal corporation is not a regulation of commerce. *Chilvers v. People*, 11 Mich. 43; *People v. Babcock*, 11 Wend. 566.

the State of their origin, until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715.

The fact that an article was manufactured for export to another State does not, of itself, make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

Kidd v. Pearson, 128 U. S. 24, 32 L. ed. 351.

Defendant is not protected by U. S. Const., art. 1, § 8, because he is not engaged in interstate commerce.

See *State Freight Tax Cases*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Fargo v. Michigan*, 121 U. S. 241, 30 L. ed. 898; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 648, 32 L. ed. 314.

Messrs. Edwin Sassaman and Aug. S. Sassaman, for appellee:

Interstate commerce cannot be taxed at all by a State, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.

Robbins v. Shelby County Tax. Dist. 120 U. S. 489, 30 L. ed. 694.

The Act of April 8, 1861 (Pub. Laws, 258), is unconstitutional and void, for the reason that it is in conflict with art. 4, § 2, of the United States Constitution, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," because it required citizens of other States to pay a higher license fee than is required from citizens of Berks County.

Ward v. Maryland, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 523, 29 L. ed. 466; *Powell v. Pennsylvania*, 127 U. S. 634, 32 L. ed. 258.

The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

Robbins v. Shelby County Tax. Dist. 120 U. S. 489, 30 L. ed. 694.

If the purpose of an Act is "to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion."

Cooley, Const. L. p. 218.

The doctrine that an Act may be unconstitutional and void in part, or in one aspect, and yet be sustained in another, has no room where "it cannot be presumed that the Legislature would have passed the one without the other."

Cooley, Const. L. 9, p. 212; Endlich, Interpretation of Statutes, § 538.

Where so many of the provisions of an Act are unconstitutional that it cannot be reasonably assumed that the Legislature would have enacted the balance of them standing alone, without the unconstitutional ones, the whole Act must be held void.

Meyer v. Berland, 1 L. R. A. 777, 39 Minn. 498; *Utay v. Hiott*, 80 S. C. 860.

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Clark, J., delivered the opinion of the court:

The defendant was a resident of Montgomery County and for anything that appears was a citizen of this State. He was, in the year 1889, a huckster or peddler, and in the pursuit of his business bought articles of produce in Berks County, with the purpose of shipping the same for sale in Montgomery County, and in the City of Philadelphia. His residence and his business being wholly confined to the State of Pennsylvania he cannot of course be said to have been engaged in interstate commerce.

But it is contended that, as the Act of April 8, 1861 (Pub. Laws, 258), applies as well to the sale or barter in such articles of country produce in the markets of other States as in the markets of this State, outside of Berks County, and imposes a penalty for violation of its provisions, it is wholly unconstitutional and void, and imposes no obligation, even upon those not engaged in interstate commerce.

Article 1, § 8, cl. 3, of the Constitution of the United States provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States," and § 10 of the same article, cl. 2, "that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports."

As the "imports" and "exports" mentioned in the latter clause quoted have reference only to goods brought from or carried to foreign countries, and not to goods transported from one State to another (*Woodruff v. Parham*, 75 U. S. 8 Wall. 123 [19 L. ed. 382]; *Brown v. Houston*, 114 U. S. 623 [29 L. ed. 257]), no question can arise as to their application to this case. The articles mentioned in the Act are "butter, eggs, dried fruit, veal or other articles of produce." As the commodities particularly intended are specified, any "other articles of produce" would be restricted to articles *ejusdem generis*; it is scarcely reasonable to suppose that purchases for exportation from the country were in the mind of the Legislature. But the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations, and that power is exclusive, whenever the matter is national or admits of a uniform system or plan of regulation. No State has power to make any law which will affect the free and unrestricted intercourse and trade between the States. *Brown v. Houston*, *supra*.

In *Welton v. Missouri*, 91 U. S. 275 [23 L. ed. 347], it was held that a license tax required for the sale of goods is in effect a tax upon the goods themselves. "If such a tax," says the court in that case, "be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them, through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

In *Brown v. Maryland*, 25 U. S. 12 Wheat. 425-444 [6 L. ed. 680-687], it was sought to impose a license tax upon an importer of foreign goods, and it was held that the exaction of a license tax from the importer was simply the imposition of a tax on the goods imported, and that a state tax to this effect was in conflict with the commerce clauses of the Constitution. A tax on the occupation of an importer, as it must add to the price of the article to be paid by the consumer, or by the importer himself in like manner as a direct duty, was held to be the same as a tax on importation. Upon the reasoning of these and other cases, the appellee's contention is, that the exaction of a license fee under the Act of 1861 may in some sense be regarded as a tax upon the property purchased by the huckster, and as respects goods transported into other States as an impost on the goods exported. We cannot see how this contention can be sustained. The license fee at the best could only be treated as a tax on the goods at the time of the purchase, and they were then part of the general mass of property within the State, liable to taxation, and so remained, until the goods began to move as an article of trade from one State to another, at which time commerce in that commodity may be said to commence. The *Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999].

A commodity cannot be said to move as an article of trade from one State to another until the business of transportation is actually commenced; it does not cease to be part of the general mass of property of the State, subject as such to its jurisdiction and to taxation in the usual way, until it has been shipped, or entered with a common carrier for transportation to another State, or has been started upon such transportation in a continuous route or journey; hence logs cut and hauled to the place where they were to be floated to another State, but kept in that place until it was convenient to float them away, were not yet commodities of interstate commerce, but were taxable. *Coe v. Errol*, 116 U. S. 517 [29 L. ed. 715].

Even articles of import, as soon as the importer has so acted upon them that they become mixed in the general mass of property, are in like manner liable to taxation. If the commerce clauses of the Constitution cover such a case as this, under the Act of 1861, then it would seem that any statute, imposing a license or other tax upon any mercantile, manufacturing or other business pursuit, would be without authority of law and void, for the persons thus taxed may carry these into interstate commerce.

Of course no State can, by taxation or otherwise, discriminate against the citizens of other States, and in favor of its own citizens, as to the business carried on by them in the State. Article 4, § 2, of the Federal Constitution provides that citizens of each State are entitled to all the privileges and immunities of citizens of the several States. Citizens of other States, therefore, must be accorded the same rights under our laws as the citizens of Pennsylvania. But the discrimination contained in the Act of 1861 is

not against citizens of other States, more than citizens of our own State, nor against foreign markets more than domestic markets. It is directed, not against citizens of other States, but against nonresidents of the County of Berks, and against markets outside that county. Article 4, § 2, of the Constitution of the United States has nothing to do with the distinctions founded on domicile merely (*Lemmon v. People*, 20 N. Y. 608); and hence it is that nonresident suitors may be required to give bail for costs, when persons residing in the State are not so required, etc.

As to the purpose and effect of the section referred to, see *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *Howe Mach. Co. v. Gage*, 100 U. S. 676 [25 L. ed. 754]; *Am. & Eng. Encyclop. Law*, 548, and cases there cited.

But even if the Act of 1861 might, in the case of a purchase of goods for sale in the market of another State, be deemed obnoxious to the interstate commerce clauses of the Constitution, we are of opinion that no question of interstate commerce is involved in this particular case. The defendant's employment, as we have said, was one pursued exclusively within the State, and it is conceded that the State has power to pass laws imposing taxes upon avocations in no way connected with interstate or foreign commerce. As respects persons pursuing this employment wholly within the State, however it may be in other cases, it was certainly a valid and proper exercise of legislative power. A statute may be void only so far as its provisions are repugnant to the Constitution; one provision may be void, and this will not affect other provisions of the Statute. If the part which is unconstitutional in its operation is independent of, and readily separable from, that which is constitutional, so that the latter may stand by itself, as the reasonable and proper expression of the legislative rule, it may be sustained as such; but if the part which is void is vital to the whole, or the other provisions are so dependent upon it, and so connected with it, that it may be presumed the Legislature would not have passed one without the other, the whole Statute is void. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 208 [6 L. ed. 71]; *New York v. Miln*, 36 U. S. 11 Pet. 102 [9 L. ed. 648]; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80 [24 L. ed. 877]; *Tiernan v. Rinker*, 103 U. S. 123 [26 L. ed. 108]; *Presser v. Illinois*, 116 U. S. 252 [29 L. ed. 615]; *Lea v. Bumm*, 88 Pa. 237; *Re Ruan Street*, 132 Pa. 257; *Sedgw. Stat. and Const. L.* 413.

The constitutional and the unconstitutional provisions may even be contained in the same section of the law, and yet be perfectly distinct and separable, so that the former may stand though the latter fall; the question is whether the several provisions are essentially and inseparably connected in substance. *Hagerstown v. Dechert*, 32 Md. 369; *Am. & Eng. Encyclop. Law*, 677, and cases there cited.

Assuming the invalidity of the Act of 1861, in so far as in its operation it is supposed to affect interstate commerce, we are of opinion that the Act is valid as to per-

sons residing and doing business wholly within the State. That particular feature of the Act which, in its operation, is alleged to be unconstitutional is easily and readily separable from that which is valid; the Act can stand as well without as with it. The operation and effect of the Statute may be restricted to the proper constitutional limits and the object of the Statute attained within these restrictions; at all events, it will not be presumed that the Legislature would not have passed the Statute to operate within the limitations imposed by the Constitution.

The real purpose of the Act doubtless was to keep this kind of products for the home market, but in view of the proximity of the great City of Philadelphia, and of other markets in Eastern Pennsylvania, it is exceedingly probable that the Legislature intended that the Statute would accomplish its purpose within the bounds of the State.

In *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489 [80 L. ed. 694], a license tax was imposed, by the laws of Tennessee, upon all drummers, etc., not having a licensed house or business within the taxing district of Shelby County, which of course included drummers representing business houses, whether in or out of the State of Tennessee; but as the goods sold by such drummers as represented houses outside of the State were not within the jurisdiction of the State, until by the act of the importer they should become mixed with the mass of the goods within the State, the Supreme Court of the United States held that as to this class of drummers the Statute affected interstate commerce, and to that extent was void. Yet not only in the opinion of the court, but in the dissenting opinion also, although the question was not directly involved, the validity of the Statute as to drummers representing houses within the State was conceded. "To say that the tax, if invalid as against drummers from other States," says *Mr. Justice Bradley*, in the opinion of the court, "operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the State is not bound to tax its own drummers; and if it does so, whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal commerce, but that does not give it any right to tax interstate commerce."

Nor, for the reasons stated by the learned judge of the court below, is the Act of 1861 affected by the 14th Amendment. The case turns upon the effect of what may be termed the commerce clauses of the Constitution, and we are of opinion that the Act of 1861 was not in this case violative of these provisions, and that, therefore, judgment should have been entered for the plaintiff.

The judgment is reversed, and judgment is now entered on the case stated in favor of the plaintiff for \$100 and costs.

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Archibald R. MONTGOMERY, Admr.,
etc., of Jesse Gyger, Deceased, *Appt.*,

PHILADELPHIA CITY PASSENGER
R. CO. *et al.*

(....Pa....)

1. Although the word "railroads," when used in a statute, will generally be construed to embrace street passenger railways, yet art. 17, § 4, of the Constitution, which prohibits the consolidation of competing railroad and canal companies, when construed in the light of the remaining sections of that article as well as that of its manifest purpose, does not include such railways.

2. The fact that two street passenger railways run through parallel streets in the same city does not bring them within the provisions of art. 17, § 4, of the Constitution, which prohibits the consolidation of parallel or competing railroad or canal companies, since such railways are not competing in the sense in which that word is used in the article.

(*Storritt, J., dissents.*)

(October 6, 1890.)

APPEAL by plaintiff from a decree of the Court of Common Pleas, No. 2, for Philadelphia dismissing the complaint in an action brought to enjoin the consolidation of two street passenger railway companies. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Henry T. Dechert, Henry M. Dechert, Thomas H. Walker and L. B. Walker* for appellant.

Messrs. John G. Johnson and David W. Sellers for appellees.

Green, J., delivered the opinion of the court:

It is undoubtedly true, as we have several times decided, that the words "railroad" and "railway" are synonymous, and in all ordinary circumstances they are to be treated as without distinction of meaning. When either one or the other of these words is used in a statute, and the context requires that a particular kind of road is intended, that kind of road will be held to be the subject of the statutory provision. But if the context contains no such indication, and either of the words is used in describing the subject matter, the statute will be held applicable to every species of road which is embraced within the general sense of the word used. All of this was decided in the case of *Hestonville, M. & F. P. R. Co. v. Philadelphia*, where we held that the Act of May 16, 1861 (Pub. Laws, 703), entitled "An Act Relating to Railroad Companies," and authorizing the consolidation and merger of railroad companies, embraced within its meaning street passenger railroad companies as well as steam railroad companies. The reasoning of the opinion was principally upon the proposition that the expressions "railroad" and "railway" were in fact synonymous terms, and that there was nothing in the context of the Act inconsistent with the application of the word "railroad" to a street passenger road. It was conclusively shown in the opinion that the

Legislature was in the constant habit of using both words indiscriminately as expressing the same thing. No necessary inference is therefore to be drawn from the mere use of either word that a limited class of roads was intended. It follows that we must search the context of the 17th article of the Constitution in order to ascertain in what sense the word "railroad" was used in the fourth section. It is the contention of the appellant that the prohibition of the section against the amalgamation of competing roads applies to street passenger railroad companies as well as to those of steam roads, and if this contention is unsound the appellant has no case. The title of the article is "Railroads and Canals." This is, of course, sufficiently comprehensive to embrace all classes of railroads or railways, and we accordingly find that a number of the sections are applied to steam railroad companies exclusively, and at least one section, the ninth, is applied exclusively to street passenger railway companies. The first section provides that all railroads and canals shall be public highways; that any association organized for the purpose shall have the right to construct a railroad between any points within the State, and to connect at the state line with railroads of other States, and that every railroad company shall have the right to intersect, connect with or cross any other railroad, and shall receive and transport, each, the other's passengers, tonnage and cars without delay. It must be conceded at once that this section cannot possibly apply to street passenger railway companies, as all its provisions are utterly hostile to such a thought. Section third provides that all individuals, associations and corporations shall have equal right to have persons and property transported over railroads and canals, and no unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within this State, or crossing from, or going to, any other State. It is equally certain that this section also cannot embrace passenger railway companies, since such companies are, as a rule, though not always, without authority to carry freight and do not extend to state lines. The fifth section is also inapplicable to street railroad companies because it imposes disabilities upon carrying companies against engaging in mining or manufacturing articles for transportation over their roads; and as street passenger companies do not transport articles of manufacture over their roads as a regular business, they are not included within the manifest meaning of the section. The same remarks apply to the sixth section, which imposes the same disabilities upon officers as are imposed by the fifth section upon the companies themselves. The seventh section plainly relates to the transportation of merchandise or freights and hence is equally inapplicable to street passenger companies.

The eighth section prohibits any railroad, railway or other transportation company, from granting free passes to any persons but officers and employees. This section relates to the carriage of passengers only and it plainly includes street passenger companies as well as all others, because it expressly mentions "railroad" and "railway" companies. But because it uses both terms, "railroad" and "railway," a most

convincing argument arises that the convention considered it necessary to use both in order to embrace both, and hence it must be considered they did not intend to include both in the other sections where only one is used. The force of this argument is greatly strengthened when we consider the ninth section, which provides that "no street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities." It is perfectly clear that the convention did not regard the word "railroad" as synonymous with "railway" or "street passenger railway," when this section of the article was framed. It is equally conclusive that they were perfectly conscious of the difference between the two classes of roads, and that when they intended to make provision respecting "street passenger railways," they considered it necessary to use this kind of phraseology in order to designate them. Can the courts do any less? Can we attribute to them any other meaning than the one they have, by well chosen words, clearly expressed when they desired to make provision for this particular class of roads? Are we at liberty to infer in considering the fourth section, where they made a provision as to railroad and canal companies, that they intended, by that mode of description, to designate "street passenger railway companies" as well? We think not. Having a full knowledge of the precise manner in which they considered it necessary to express themselves when they desired to provide for "street passenger railway companies," we find that in the fourth section they entirely abstain from that mode of expression or from any similar phraseology. We must conclude that the reason for such abstention is that they did not intend to include them in the prohibition of the fourth section. This is the obvious and natural conclusion to reach, and we know of no reason why we should not regard it and be governed by it. If we consider the subject matter of the fourth section we are strengthened in the correctness of this conclusion. It provides that "no railroad, canal or other transportation company, or the lessees, purchasers or managers of any railroad or canal corporation shall consolidate the stock, property or franchises of such corporation with, or lease, or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning, or having under its control, a parallel or competing line." The subjects of the prohibition are railroad and canal companies. They are classed together as the subjects of a prohibition common to both. Railroads and canals are means of transportation which relate to, and cover, the territory of the State. In their ordinary understanding by the people they are regarded as methods of carriage of freights and passengers, most largely of freights, between distant points within the State, and to the borders of the State so as to connect with other similar systems of transportation without the State, to still more remote points. It would be a most strained and unreasonable conclusion to hold that the constitutional convention, when it plainly, and for wise reasons, prohibited the amalgamation of railroads and canals of this character, and parallel or competing with each other, had

any possible reference to the mere passenger travel over the streets of cities and towns. There is nothing in the section, or in article 17 itself, indicating that the convention had any such thought or any such purpose. There is no argument in support of such a theory except that which is based upon the generality of the word "railroad," but it has been already seen that there is no necessary essential force in that argument considered by itself alone, that it is always subject to the effect of the context when considered in connection, and that upon such a consideration in this particular case it falls to the ground.

We think also that it is quite clear that the sense of "compelling," which is the essential sense of the prohibition, is not applicable to the travel upon the streets of cities and towns over passenger railways. The competition of traffic between distant points by rival roads and canals tends to promote cheap transportation, and thereby tends to the public good. But if this is suppressed by the absorption of one of the competing lines by the other, the wholesome competition ceases and higher rates soon result. This is the evil which was sought to be prevented by the fourth section of the seventeenth article. It will be seen at once that it is inapplicable to the travel upon streets of cities and towns on passenger railways. The travel over parallel streets is not necessarily a competing travel. Each street has travel of its own which is conducted upon its own railway. That travel may be almost entirely conducted without competition with the travel upon another, though parallel, street. Nor do railways upon parallel streets have the same ter-

min. Many of them, though running upon parallel streets for a considerable distance, diverge altogether from such a course at their extremities. Two roads would be competing if laid upon the same street and running in the same direction; but that is not this case, and probably is not the case anywhere in the State. Moreover no freight is carried upon passenger railways, and it is the carriage of freight that was probably of principal importance in the design of the fourth article.

All the analogies which would liken the traffic upon the street railways with that upon the railroads and canals of the State are wanting, and hence we are without authority to impose upon the language of the fourth article a meaning which does not reside in its words and which does not result by any rational implication. The language used in the fourth section in designating the objects of its provisions is precisely the same as is used in all the other sections for the same purpose, and when passenger railways are intended to be indicated a different phraseology is employed. We find nothing in the fourth section indicating that the word "railroad" was there used in any other sense than that in which it was manifestly used in the other sections, and we are therefore not at liberty to give it any other meaning than is apparent in those sections. We think the court below was right in dismissing the plaintiff's bill.

The decree of the Court below is affirmed, and the bill of the plaintiff is dismissed at the cost of the appellant.

Sterrett, J., dissents.

ILLINOIS SUPREME COURT.

Emma T. HEALEY, *Appt.*

MUTUAL ACCIDENT ASSOCIATION of the Northwest.

(--- III. ---)

Death produced by poison, accidentally taken, is within the terms of a policy insuring against death by external, violent and accidental means. (June 12, 1890.)

Note.—Accident insurance; death by external, violent and accidental means.

An accident is the happening of an event without aid and the design of the person, and which is unforeseen. Paul v. Travelers Insurance Co. 8 L. R. A. 442, 112 N. Y. 472. See Barry v. United States Mut. Acc. Assn. 20 Fed. Rep. 712; Wabash, St. L. & P. R. Co. v. Locke, 11 West. Rep. 877, 112 Ind. 404.

Where death occurs by taking poison by mistake, it is accidental and within the terms of the policy. Hill v. Hartford Acc. Ins. Co. 22 Hun, 187; Pollock v. United States Mut. Acc. Assn. 105 Pa. 230.

In an action on a policy of insurance conditioned to extend only to death or personal injuries caused by external, violent and accidental means, plaintiff must show that the death of the insured was the result, not only of external and violent, but of ac-

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to recover the amount alleged to be due on a certificate of membership in a mutual benefit association. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Miller, Leman & Chase for appellant.

Messrs. Albert H. Veeder and Mason B. Loomis for appellee.

occidental, means Travelers Ins. Co. v. McConkey, 127 U. S. 601, 32 Ill. ed. 333.

Under a policy conditioned to be void where death is caused by intentional injuries inflicted by the insured or any other person, no recovery can be had for death caused by injuries inflicted by the insured intentionally or when insane, or if he was murdered. *Ibid.*

Death caused by a person hanging himself while temporarily insane is covered by a policy against "bodily injuries effected through external, accidental and, violent means," and is not within an exception of death caused by "bodily infirmities or disease or by suicide or self-inflicted injuries." Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740.

Under this clause a recovery on the policy may be had for death produced by the rupture of a

Craig, J., delivered the opinion of the court:

The question presented, although one of pleading, involves a construction of the policy upon which the action was brought; and in placing a construction on the contract, and in arriving at the intention of the contracting parties, regard must be had to the object and purpose which was intended by the contracting parties. A policy of accident insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied. *Rockford Ins. Co. v. Nelson*, 65 Ill. 420.

Thus a provision in a policy against loss by fire avoiding the policy if the property becomes incumbered has been held not to include incumbrance by judgment, although within the terms used. *Baley v. Homestead F. Ins. Co.* 80 N. Y. 21.

Again, policies of insurance being signed by the insurer, the language employed being that of the insurer, the provisions of the policy are usually construed most favorably for the insured in case of doubt or uncertainty in its terms. *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644.

"No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted." May, Ins. 2d ed. § 175.

Keeping in view these well-settled rules of construction, the question to be determined is whether the death in this case is one falling within the spirit of the policy. The death of John Healey, the assured, is a conceded fact, but it is said the policy is an assurance against death by external, violent and accidental means, and that death did not ensue from external, violent and accidental means within the meaning of the policy. Under the averments of the first and second counts it is manifest that death ensued by accidental means, as it is expressly averred that death was produced by accidentally taking and drinking poison. The demurrer admits this averment of the declaration, and the fact that death ensued from accidental means stands admitted by the

record. But, to bring the case within the terms of the policy, it devolved upon the plaintiff to aver and establish not only that death ensued from accidental means, but also from external and violent means. The next inquiry, therefore, to be determined is whether within the meaning of the policy death resulted from external and violent means. While the authorities in cases similar to the case before us are not entirely harmonious, yet we think that the decided weight of authority is in support of the view that death in this case was caused by external and violent means.

In *McGlinchey v. Fidelity & O. Co.*, 80 Me. 251, 6 New Eng. Rep. 450, the insured was riding in a covered carriage. The horse became frightened, and ran some distance before he could be controlled. In running, the horse came near collision with other teams, but no collision occurred, nor was the carriage upset or anyone injured. However, immediately after the runaway, the insured became sick, and died in an hour after the accident. The question arose whether death was caused from bodily injuries through external, violent and accidental means within the meaning of the policy, and the court held that it was. In the case cited the body of the deceased bore no marks of physical injury, nor did the body come in contact with any physical object during the time of the accident, but death no doubt resulted from physical strain and mental shock.

In *Accident Ins. Co. v. Orandal*, 120 U. S. 527 [80 L. ed. 740], it was held that an insane man who takes his own life dies from an injury produced by external, accidental and violent means.

In the cases of *Trew v. Railway Pass. Ins. Co.*, 5 Hurlst. & N. 211, and on appeal 6 Hurlst. & N. 839, 7 Jur. N. S. 878; *Reynolds v. Accidental Ins. Co.*, 22 L. T. N. S. 820, and *Winepear v. Accidental Ins. Co.*, 42 L. T. N. S. 900, 43 L. T. N. S. 459, affirmed, L. R. 6 Q. B. Div. 43,—it was held that death from drowning was caused by external and violent means within the meaning of an accident policy. In the *Trew Case*, which may be regarded as a leading one on the subject, it is argued: "Whereas, from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy." In reply to the argument the court said: "That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the

blood vessel caused by effort to save himself from injury when in imminent peril brought about by an accident. *McGlinchey v. Fidelity & O. Co.* 80 Me. 251, 6 New Eng. Rep. 450.

"External, violent and accidental means," within the meaning of an accident insurance policy, includes gas in the atmosphere, which causes the death of a person who breathes it while asleep. *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, and note, 113 N. Y. 472; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52.

Unintended act, not within exception in policy.

While intentional self-destruction will avoid a policy, yet a policy is not void on the ground that § L. R. A.

insured took his own life by a pistol shot, if the firing was not intentional, because he was unconscious that the act would take his life; the shooting in such case must be regarded as the result of an accident as much as if the pistol had gone off unexpectedly to him. *Mutual Ben. L. Ins. Co. v. Davies*, 87 Ky. 541.

Death from accident or from an unexpected or unintended act is not within the exception of death caused by the hand of the insured. *Northwestern Mut. L. Ins. Co. v. Hazlett*, 2 West. Rep. 608, 105 Ind. 212; *Penfold v. Universal L. Ins. Co.* 85 N. Y. 817; *Pierce v. Travelers L. Ins. Co.* 84 Wm. 389; *Burkhard v. Travelers Ins. Co.* 103 Pa. 288.

smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind in many cases where death resulted from accident would afford no protection whatever to the assured. We ought not to give those policies a construction which will defeat the protection of the assured in a large class of cases." 6 Hurlst. & N. 844.

In *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 8 L. R. A. 448, the policy was substantially like the one in question here, indemnifying against injuries caused by external, violent and accidental means. The insured died from inhaling illuminating gas. He was stopping at a hotel in New York City. He was found dead in his bed, the room being filled with gas. When found the deceased lay on his bed like a man asleep, without any external or visible signs of injury upon his body. An action on the policy was sustained, and in disposing of the question whether the injuries were caused by external and violent means the court said: "As to the point raised by the appellant that the death was not caused by external and violent means within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief sufficiently establish that as a proposition. *Trans v. Railway Pass. Ins. Co.* 7 Jur. N. S. 578; *Reynolds v. Accidental Ins. Co.* 22 L. T. N. S. 820; *McGlinchey v. Fidelity & O. Co.* 80 Me. 251, 6 New Eng. Rep. 450."

If, as held in the case last cited, death from inhaling poisonous gas is to be regarded as caused by external and violent means, upon the same principle death resulting from the accidental taking of poison must be regarded as resulting from external and violent means.

Again, where a person is drowned, having been suffocated by the action of the water in the lungs, if a death in such case is to be regarded as caused or produced by external and violent means, as held in the cases heretofore cited, for the same reason a similar rule must be applied where death resulted as alleged in this case. Here the death arose from accidentally taking and drinking poison, and we are constrained to hold, when such is the case, the injury resulting in death may be regarded as received through violent means. If a person should receive a gunshot wound in the body resulting in death, it would be conceded that death ensued from violent and external means. For a like reason poison taken into the stomach producing death may also be treated as an external, violent means. Indeed we are inclined to concur with what was said by the Court of Appeals of New York in the case last cited: "That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." We have been cited to a few cases holding a different rule. *Hill v. Hartford Acc. Ins. Co.* 22 Hun, 187.

This case was overruled by the later case of *Paul v. Travelers Ins. Co.*, cited *supra*.

Pollock v. United States Mut. Acc. Assn., 102 Pa. 280, is a case sustaining the position of the defendant. But while we recognize the high ability of the court in which the case was decided we are not disposed to follow the rule there adopted. We think the rule established by the Court of Appeals of New York is better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question.

The judgment of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court for further proceedings in conformity to this opinion.

GEORGIA SUPREME COURT.

Sudie HAYS, *Plff. in Err.*,
v.

J. JORDAN *et al.*

(.....Ga.....)

1. A married woman may make a binding contract for the purchase or acquisition of property whether sheh as a separate estate or not,

NOTE.—Contracts of lease as conditional sales.

A contract called a "lease" is manifestly a sale where it provides that the property is leased for a certain lump sum, and that ownership shall remain in the original owner until payment is made in full, with an agreement that possession shall revert as security on any default in payment. *Summerson v. Hicks*, 184 Pa. 566.

Where there was a written agreement between G and B that G should lease B a piano, and B should pay for the use thereof \$300 in advance and \$50 quarterly thereafter, with 7 1/2-10 per cent interest, until \$500 had been paid, when G agreed to give B a bill of sale; and G was authorized to enter

under a statute providing that all property acquired by the wife during coverture shall vest in and belong to her.

2. A transaction by which personal property is delivered by one person to another in consideration of the latter's notes, which together aggregate the full value of the property and are all to be paid within a few months, and which provide that the title to the

B's dwelling and remove the piano upon failure to make any payment,—the lease amounted to a conditional sale. *Gorham v. Holden*, 4 New Eng. Rep. 502, 79 Me. 317; *Murch v. Wright*, 46 Ill. 487; *Hervey v. Rhode Island Locomotive Works*, 98 U. S. 664, 23 L. ed. 1008; *Carleton v. Sumner*, 4 Pick. 514.

The sale may have been upon condition precedent, but the plaintiff could waive it if he saw fit; and whether he has done so is a question of fact to be determined by the evidence in the case. *Farlow v. Ellis*, 15 Gray, 229.

If the condition be waived the title passes to the vendee. *Seed v. Lord*, 65 Me. 580; *Stone v. Perry*, 60 Me. 48; *Whitney v. Eaton*, 15 Gray, 225.

property shall remain in the former until all notes are paid, when a bill of sale thereon will be given, to the latter, but on default in payment the property shall be returned to its owner, is a conditional sale and not a lease, although the notes purport to have been given for rent for use of the property only.

3. Where the vendor of personal property sold conditionally upon prompt payment of deferred installments of purchase money takes possession of it for default in payments he cannot retain the payments already made as rent, and if there is no express stipulation for their forfeiture he must return all above proper remuneration for the use of the property.

4. Where the vendor in a conditional sale of chattels brings an action of bail trover to recover possession of the property for default in payments gives bond and takes possession of the property, if an amount is found to be due the buyer in the transaction for unreturned purchase money judgment therefor may be entered upon plaintiff's bond.

(July 28, 1880.)

ERROR to the Superior Court for Early County to review a judgment in favor of plaintiffs in an action brought to recover possession of a certain piano alleged to have been sold to defendant upon a condition which had not been complied with. *Reversed.*

The facts are fully stated in the opinion.

Mr. R. H. Powell for plaintiff in error.

Mr. John R. Irwin for defendants in error.

SIMMONS, J., delivered the opinion of the court:

Jordan & Co. sued Mrs. Sudie Hays in bail trover for an "Opera piano," alleged to be of the value of \$350, and also, in the same action, sued her upon an alleged indebtedness for \$85 attorney's fees. The piano was seized by the sheriff, and, Mrs. Hays having failed to give the bond required by law to retain the same, the plaintiffs gave bond, and took possession of the piano. Mrs. Hays filed three pleas: (1) That at the time she made the contract with the plaintiffs she was a married woman, and had no separate estate, and for this reason the contract is void as to her. (2) That when the piano was purchased Jordan & Co. warranted the same to her for five years against any defects in workmanship, material or performance under fair usage. She claimed that there was a breach of warranty for the reason that the keys of the piano were so arranged and constructed as to make them too tight, and prevent the instrument from performing under fair usage, and that it was not a good, substantial and well-toned instrument, and that it was constructed so defectively as to allow mice to get into the keys and build nests therein. (3) The third was an equitable plea, in which she alleged that she gave to the plaintiffs her notes for the \$850, bearing date August 4, 1888, one being for \$100, due October 1, 1888, one for \$150, due December 1, 1888, and one for \$100, due February 1, 1889; and that she paid the first note when it fell due; but, upon ascertaining that the piano did not come up to the warranty, she offered to return it to the plaintiffs, if they would return the money she had paid thereon; and that they refused to do this. She prayed that, as

9 L. R. A.

they had elected to take a verdict for the return of the piano itself instead of a verdict for damages, she might have a judgment against them for the \$100, which she had paid upon the piano. Upon the trial, the jury, under the charge of the court, returned a verdict in favor of the plaintiffs for the piano. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled, and she excepted.

The third ground of the original motion and the fourth of the amended motion may be treated together. The defendant requested the court to charge the jury as follows: "If you should find from the evidence that the plaintiffs and the defendant made a contract for this piano sued for, and if you further find that, at that time the defendant was a married woman, and that she had no separate estate, then her contract would be void, and plaintiffs cannot recover in this case. . . . She can neither contract nor be contracted with during her marriage, and if during her coverture she becomes possessed of property in which she has no title, her possession, by operation of law, would become that of her husband; and for this reason plaintiffs cannot recover of defendant in this case." This the court refused to give, and, on the contrary, charged that a married woman is bound by her contracts whether she has a separate estate or not. On this proposition there is great conflict or diversity of opinion among the courts of different States; but this conflict arises from the different phraseology of the Statutes, no two of the Acts being alike, and the court in each case having construed the Act of the Legislature of its own State. See *Harris on Married Women*, where the decisions of the different courts are collated.

Our own Statute upon this subject, is stated what different from that of any other State, and this is the first time that the question here made has come squarely before us. We must construe the Act according to what we consider to be its true meaning, and the legislative intent. The language of the Act of 1866, as found in section 1754 of the Code, is as follows: "All the property of the wife at the time of the marriage, whether real, personal or choses in action, shall be and remain the separate property of the wife, and all property given to, inherited or acquired by the wife during coverture shall vest in and belong to the wife, and shall not be liable for the payment of any debt, default or contract of the husband." This Act was in substance incorporated into the Constitution of 1868 (art. 3, § 2), and also into that of 1877 (Code, § 4090). It will be seen that it declares that "all property given to, inherited or acquired by the wife during coverture, shall vest in and belong to the wife," etc. It is clear from the terms of the Act that all the property the wife had at the time of her marriage, and all property given to or inherited by her thereafter, belongs to her just as if she had never married; and we think that under the same Statute all that she may thereafter acquire besides that which is given to or inherited by her belongs to her in like manner. We think the intention of the Legislature, and of the framers of the Constitution, in the use of the word "acquired," was to confer upon the wife the same rights and privileges as to

acquiring property as she had before marriage. The law having thus given her the power to hold in her own right property given to or inherited by her, free from her husband, and without the intervention of a trustee, it gave her necessarily the power to contract and be contracted with. If she contracts and makes a profit, the profit thus acquired belongs to her; if she loses, the loss falls upon her. If the law deals thus generously with wives who were so fortunate as to own property at the time of marriage, or who have received or inherited property since, why will it not so deal with all wives? Why should it exclude one who had nothing at the time of her marriage, and who has since received and expects nothing by way of gift or inheritance? Why should she not be allowed to make a contract whereby she may acquire property? Why may she not be allowed, especially if she has an improvident husband, to contract and acquire property for the support of herself and her children? In our opinion there can be no doubt that if a woman has property at the time of her marriage, or afterwards acquires it by gift or inheritance, she has all the rights we have mentioned; and we can see no good reason to hold that the same rights were not conferred upon the wife who had nothing at her marriage, and has acquired nothing by gift or inheritance since. The Legislature, in our opinion, intended to put all wives upon the same footing in regard to contracts and acquiring property, and intended to allow them to make contracts whether they have separate estates or not, and to make these contracts binding whether executed or executory. A man can make a contract whether he has an estate or not. Why not allow a married woman to do the same? No one can possibly be injured. If she makes a contract the other party can easily ascertain whether she has a separate estate or not. If she has none the other party need not make the contract. If he does make it he takes the risk just as he would if he were contracting with a man who had nothing. He takes the risk of being able to enforce it. While this court has not heretofore decided this question squarely, the trend of our decisions since the Act of 1886 has been in this direction. We think, therefore, that the court did not err in refusing the request, and in charging as complained of in this ground of the motion.

2. The second ground of the amended motion complains that the court committed error in charging as follows: "If the plaintiffs sold the piano here sued for to the defendant, and retained the title in themselves until the notes given therefor were all paid, and if there yet remains any part of said purchase money unpaid after deducting from the price to be paid the amount paid by defendant and the damage sustained by defendant by reason of any defect in said piano, or failure of plaintiffs' warranty on said piano, you will find for plaintiffs the piano here sued for." This charge, under the pleadings and the evidence in this case, we think was erroneous. We presume the court was led into error by construing the contract between the parties as a lease, and not as a conditional sale. The note which the defendant paid, and which, except as to date and amount,

is identical with the others, each of them forming part of the same contract, contains the following stipulations:

\$100. Early Co., Ga., Aug. 4, 1888.

I promise to pay J. Jordan & Co., or bearer, one hundred dollars, for value received, for the rent of their Opera piano, style 8, No. 11,540, at the office of John T. Davis & Son, Columbia, Ala., in the following installments, to wit: One hundred dollars on the 1st day of October, 1888. The makers and sureties . . . agree that, if collected by an attorney by or without suit, the fees of such attorney shall be added and paid by the said makers and sureties, and may be included in any judgment that may be rendered against them on said note. It is agreed and understood . . . that the piano, for the use of which this note is given, is and shall remain the property of J. Jordan & Co., and in default of payment the said piano shall be returned to them or their agent in good order, and they or their agent are authorized to take possession of the same without process of law. On payment of this note (given for the use of this piano) a bill of sale will be given, and title of the same passed to the lessee; but until then the title to the piano shall remain in J. Jordan & Co. (Homestead, etc., waived.) [Signed] Studie Hays. [Seal.]

Attest: J. H. Simonton.

Purchaser's P. O. address: Cedar Springs, Ga.

Recorded in Book C, Mortgages, etc.

The court below must have regarded the \$100 paid by the defendant under this note as in the nature of rent for the use of the piano for the two months during which she had held it, and as lost to the defendant in the event of her failure to pay the remainder of the amount agreed upon. Although the contract does use the term "rent," and states that the notes are given for the "use" of the piano, we do not so construe it, but regard it, not as a lease or renting, but as a conditional sale with title reserved in the vendor until the purchase price is paid. *Guilford v. McKinley*, 61 Ga. 232.

The entire \$350 styled "rent," is made payable within six months from the date of the transaction, and is the stipulated value of the piano, and the consideration for a bill of sale to be given when the full amount is paid; and the sale of the piano, and not the renting thereof, is evidently the real end and basis of the contract. The Supreme Court of the United States, in passing upon a similar contract, says: "Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract courts will always look to its purpose rather than to the name given it by the parties." *Hervey v. Rhode Island Locomotive Works*, 98 U. S. 673 [28 L. ed. 1008].

Mr. Justice Davis, in the opinion, cites *Murch v. Wright*, 46 Ill. 487, in which it was held, as to a contract of this character, "that it was a mere subterfuge to call the transaction a lease," and says: "It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in *Murch v. Wright*."

There, the price of the piano was to be paid in thirteen months, and here, that of the engine . . . in one year. It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last installment? In both cases the stipulated price of the property was to be paid in short installments, and no words employed by the parties can have the effect of changing the true nature of the contracts." The courts now uniformly hold that such contracts are not leases, but are conditional sales. It was so held where parties expressly contracted that "no agreement of sale of said piano-forte is implied." *Gerow v. Castello*, 11 Colo. 560. See also *Miller v. Steen*, 30 Cal. 402; *Singer Mfg. Co. v. Cole*, 4 Lea, 439; *Knittel v. Cushing*, 57 Tex. 354; *Loomis v. Bragg*, 50 Conn. 228; *Manufacturing Co. v. Graham*, 8 Or. 17; *Lucas v. Campbell*, 89 Ill. 447; *Greer v. Church*, 18 Bush, 430; *Gerriah v. Clark*, 64 N. H. 492, 6 New Eng. Rep. 414; *Gorham v. Holden*, 79 Me. 817, 4 New Eng. Rep. 502; *Currier v. Knapp*, 117 Mass. 324; *Carpenter v. Scott*, 13 R. I. 477; *Sage v. Sleuts*, 23 Ohio St. 1; *Singer Sewing Mach. Co. v. Holcomb*, 40 Iowa, 38; *De Saint Germain v. Wind*, 8 Wash. Terr. 189; *Whitcomb v. Woodworth*, 54 Vt. 544; *Hintermister v. Lane*, 27 Hun, 497.

The contract being then a conditional sale, and not a lease, and the payments made thereunder not rent but purchase money, the plaintiffs have no right to retain them as rent; and there is no express stipulation that they shall be treated as a forfeiture. "Forfeitures are abhorred in equity, and are never favored in law," and provisions for forfeitures are regarded with disfavor, and construed with strictness when applied to contracts, and the forfeiture relates to a matter admitting of compensation or restoration. Where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. The law inclines to remedy breach of condition by damages rather than by forfeiture. Code, § 2295; Story, Eq. Jur. §§ 1812, 1814, 1816, *et seq.*

"On a sale reserving title till the price is paid, many of the cases hold that partial payments are forfeited on default of the residue; but in courts possessing equity powers the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price to retain only so much as will compensate him." Newm. Sales, § 806; *Pres-*

ton v. Whitney, 23 Mich. 260, 267; *Johnston v. Whittemore*, 27 Mich. 463, 470.

In this case, under the practice in this State, it was within the power of the court to mould the verdict so as to do full justice to the parties, and in the same manner as a decree in equity. Code, §§ 9082, 3562; Acts 1884-85, p. 86; Acts 1887, p. 64.

Although the plaintiffs elected to take the piano, and not to take a money verdict for damages, as they had a right to do under section 3564 of the Code, yet we do not think that they were entitled to recover the piano and retain all the money received from the defendant. We think that under our law the court should have instructed the jury to so mould their verdict as to do justice to all parties, and should have instructed them that if the plaintiffs elected to take the specific property, and a part of the purchase money had been paid, the plaintiffs were entitled to recover the property itself; but before they could recover they must return the money which the defendant had paid them, after deducting a proper amount for the use of the piano, if the use was of any value to the defendant, which amount the jury should arrive at from the evidence, finding the balance, with interest, in favor of the defendant against the plaintiffs, the piano to be returned to the plaintiffs upon the payment to the defendant of the amount thus found. Where the plaintiff obtains possession of the piano by bail process, as was done in this case, the court can enter judgment for the amount found for the defendant upon the plaintiff's bond. The ruling here made is not in conflict with that in the case of *Gusilford v. McKinley*, 61 Ga. 280. In that case the plaintiffs elected to take a money verdict for the damages, and not a verdict for the property. This court held that they could recover the balance of the purchase money, after deducting what had been paid, and damages for breach of warranty. When the court said in the latter part of the opinion in that case that "the plaintiffs had the right to recover it unless the balance of the price be paid," the court meant that the plaintiffs had the right to recover the balance of the purchase money after deducting what had been paid, and after deducting damages arising from defects in the piano, because the court adds: "Which payment may be in money, or by showing that the piano was a faulty instrument, and that the plaintiff had got all it was worth, owing to its defects."

Judgment reversed.

CALIFORNIA SUPREME COURT.

Wenceslao LOAIZA

v.

SUPERIOR COURT FOR the City and
County of SAN FRANCISCO.

(.....Cal.....)

1. The courts of a State have jurisdiction of a suit to rescind promissory notes, executed and made payable in that State to a resident
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thereof, which are secured by a mortgage, recorded therein, of land therein situated, although they were given to secure payment of the purchase price of land situated in a foreign country.

2. The facts that the parties to a contract for the purchase and sale of land are foreigners, and that the land is situated in a foreign country, will not prevent the courts of the State in which the contract was entered into from taking jurisdiction of a suit brought by the vendee, after repudiating the contract be

cause of the vendor's fraud, to compel the restoration to him of money and securities given in exchange for the land, which are within the jurisdiction of such courts, the vendee having voluntarily submitted himself to their jurisdiction and offered to do equity.

3. The fact that a vendor of foreign real estate is a nonresident and has not been and cannot be personally served with process will not prevent the courts of the State, in which the contract for purchase and sale was entered into, from taking jurisdiction of a suit brought by the vendee, after repudiating the contract because of the vendor's fraud, to regain possession of money and securities given in exchange for such real estate, all of which are within the jurisdiction and under the control of such state courts.

4. The superior court has jurisdiction under Code Civ. Proc., § 564, to appoint a receiver in an action brought by a vendee of land, after repudiating his purchase because of the vendor's fraud, to regain possession of the money and securities given for the land, for the purpose of preserving the property and keeping it within the jurisdiction of the court until the rights of the parties can be determined.

(July 14, 1890.)

APPPLICATION for a writ of review to set aside certain proceedings of the Superior Court for the City and County of San Francisco alleged to be void because of want of jurisdiction on the part of the court. *Dismissed.*

The facts are fully stated in the opinion.

Messrs. Wilson & Wilson, E. W. McKinstry and Stanly, Stoney & Hayes, with Messrs. Page & Bells and P. G. Galpin, for petitioner.

Messrs. R. S. Mesick and William F. Herrin for defendant.

Fox, J., delivered the opinion of the court:

This is a proceeding for a writ of review to set aside certain proceedings in the Superior Court of the City and County of San Francisco, Levy, *Judge*, in an action there pending, wherein the Oro Grande Company, Limited, and the Globe Mining Syndicate, Limited, are plaintiffs, and Manuel Aguayo, Leocadio Aguayo and W. Loaiza are defendants; and in which action such proceedings have been had as that orders for injunction *pendente lite*, and appointing a receiver, have been made, the plaintiff here claiming that in that case the court had no jurisdiction for such proceeding, and praying that the orders aforesaid be vacated and set aside.

In the action whereof the proceedings are sought here to be reviewed both the plaintiffs are foreign corporations organized under the laws of and resident in England, and the defendants Manuel and Leocadio Aguayo are both citizens and residents of the Republic of Mexico, absent from this State, the defendant Loaiza (plaintiff herein) being the only one of all the parties residing in this State, and the complaint showing upon its face that he is a simple stakeholder in the premises. The relief sought is in favor of artificial persons resident in England, and against natural persons, citizens of and resident in Mexico. As between such parties (it being conceded that personal

service of process has not been made upon any of the defendants except Loaiza, and that he is a mere stakeholder), it is claimed that the courts of this State have not, and can have no, jurisdiction. And the whole question to be resolved in this proceeding is that one of jurisdiction. If the court has jurisdiction, then the errors, if any, which have been or may be committed, are reviewable only on appeal.

Looking into the record which has been sent up on return to the writ issued herein, the following facts, briefly stated, appear, it being understood that no answer has been made to the complaint filed in the court below, and that for the purposes of this proceeding the allegations of the complaint, affidavits and deposition filed, are necessarily taken as true: In 1887-1889 the defendants Manuel and Leocadio Aguayo, brothers, were partners, owners and in possession of certain mining properties, and other adjuncts thereto, situate in the State of Sonora, in Mexico, and bounded the same for sale; that during this period of time, and with a view to effecting sale thereof, certain mining experts were called upon to make, and did make, an extensive and critical examination of the mines and mining property, as a basis for and upon the basis of which they made reports as to the character and value of the properties; that they were engaged for several weeks in taking samples of earth, rock and ores from the mines, and making assays thereof; that during all the time they were engaged in taking such samples the Aguayos, for the purpose of insuring high-grade returns from the assays, and thus securing a sale of the mines at a price largely in excess of their true value, persistently, wilfully, secretly and fraudulently, and without the knowledge of the experts, tampered with the samples taken, and mixed with them large quantities of fine gold, or, in the language of the miners, "salted the samples," or caused the same to be done, so that they fraudulently procured grossly exaggerated reports to be made as to the character and value of the mines, and that, too, without the knowledge of the experts who conducted the examinations and made the reports; that deceived and misled by the false and fraudulent reports so fraudulently procured and caused to be made, and relying upon the truth thereof, the plaintiffs (the corporations above named) in September, 1889, were induced to purchase, and did purchase, said mines and properties from said Aguayos at and for the price of \$1,575,000, depositing therefor in escrow, in San Francisco, \$710,000 in gold coin, and the promissory notes of Alvinza Hayward, a citizen of California, payable at future days, with interest at 6 per cent per annum, and secured by mortgage upon real estate situate in San Francisco, to the amount of \$865,000, all of which was subsequently delivered in pursuance of the conditions of the deposit, and upon receipt of information that possession of the mining properties had been delivered to the defendant Loaiza, who received the same as the agent and representative of the defendants Aguayos; that these notes and mortgages, and nearly all the money, or its immediate representative in securities in which the same had been invested by Loaiza for account of the Aguayos, remained in the

hands of said Loaliza, held for the benefit and account of the Aguayos, and within the jurisdiction of the courts of California, until the commencement of this suit in the superior court, when the transfer thereof pending suit, or the removal of the same beyond the jurisdiction of the court, was enjoined by order of the court, and a receiver was appointed to take possession thereof, and hold the same until the further order of the court. The plaintiffs in said suit, purchasers of the mining properties, did not discover the fraud which had been perpetrated upon them until within one month prior to the bringing of the suit. Promptly upon discovering these frauds they notified the Aguayos in writing that they "did rescind said purchase and sale," and demanded of said Aguayos "a rescission of the said purchase and sale," and then offered to restore to said Aguayos all the properties which had been conveyed to them, and everything of value which they had received from them, and to surrender the possession of all said properties, and to do and perform all acts and things which might be necessary or proper in order to fully restore to said Aguayos all properties and things of value received from them, as fully and completely as if said purchase and sale had never been made, upon condition that said Aguayos should restore the moneys and things of value received as the consideration for said purchase and sale. This demand and offer being rejected, a bill in equity was promptly filed setting out the facts, renewing the offer and praying a decree of rescission and of restoration of the moneys and things of value received by defendants from plaintiff as the consideration for such purpose and sale, an injunction pending the action to restrain the transfer of said moneys and securities, or the removal thereof beyond the jurisdiction of the court, and the appointment of a receiver pending the action to take charge of and hold said moneys and securities.

1. It is claimed in argument that this contract was made in Mexico, and can only be rescinded in and according to the laws of Mexico, and that no court has jurisdiction to adjudge a rescission thereof except the courts of Mexico. There is no more in the record to indicate that this contract was made in Mexico than there is that it was made in England, except that the mere act of delivering possession of the property sold was of necessity done in Mexico. The internal evidences furnished by the record all tend to show that the entire contract of purchase and sale was made in San Francisco. There the deposit in escrow was made of everything that was to be given in consideration of the purchase and sale pending actual delivery of possession. There the consideration was finally delivered to and received by the agent of the Aguayos, and there the consideration remained invested and seeking investment until impounded by the court at the suit of the parties defrauded into its delivery. The larger part of that consideration consisted of the promissory notes of a citizen of California, made and payable in California, and to a resident of the State (for all the notes were payable to the defendant Loaliza) and secured by mortgage of property in said State, made and executed by the maker of the notes, and recorded

in said State. These were certainly executory contracts, and if they could be rescinded at all it could be done in and according to the laws of the State where made, and where they were to be executed.

2. It is also insisted that the court in which said proceeding in equity was instituted has no jurisdiction, because the aid of the courts of this State cannot be successfully invoked in favor of nonresident foreign corporations against nonresident foreigners in an action affecting in any way title to lands in a foreign State. The unsoundness of this position grows out of the assumption that the object of the action is to compel the Aguayos to accept reconveyance and restoration of the properties in Mexico. Such is not the fact. The real object of the action is to compel the restoration to plaintiffs of so much of the consideration which they were fraudulently induced to give for these properties as may be within the reach of the compulsory power of the court, and for the rescission and cancellation of the executory contracts (the notes and mortgages) procured by the frauds aforesaid, they being confessedly within the jurisdiction of the court. This relief can only be given in equity, and will be given only upon the condition prescribed by the statute and offered by the plaintiffs,—that of restoration by the plaintiffs of the property for which the consideration was given. As to the lands the plaintiffs are to be the actors; the defendants are to be given the opportunity to receive. The plaintiffs have voluntarily submitted themselves to the court, offering to do equity, entitled to relief only as they do equity, and bound to obey the mandate of the court as a condition of receiving the relief which they seek. The nonresidence of plaintiffs is not material to the maintenance of the action. They have submitted themselves to the jurisdiction of the court by becoming suitors before it. They are amenable to its process, and must obey its commands before they can obtain relief. If conditions are attached to the relief awarded them, then performance by them can be compelled. *Cleveland v. Burritt*, 25 Barb. 532. Such voluntary appearance and submission made through the officers of the court—the attorneys-at-law—would be sufficient to enable the court to enforce the performance of an act imposed as a condition of relief; but in this case the plaintiffs are not here by simple representation by counsel. The record shows that they seek the equitable interposition of the court, and in court make the offer of restoration on their part required by our statute in person, through the person of one of their own directors, resident within the jurisdiction and by them made managing director, and their attorney in fact. Through him they not only make the offer, but through him they give all the securities that the court requires—and they are proportionate to the interests involved—for the protection of the defendants. This point, like the next one which will be noticed, is argued as if the object of the action was to compel a reconveyance of the lands in Mexico, and it is only by supposing that such is the object of the action that the cases cited in support of the argument can be held to be in point. But such is not the object of the action. If the parties were reversed, and the Aguayos were suing

the English companies for reconveyance and redelivery of possession, on the ground of frauds, committed by the English companies, resulting in a failure of consideration, then some of the authorities cited would support the proposition that the court here would have no jurisdiction to enforce its decree for a reconveyance and redelivery of property in Mexico, unless it first got jurisdiction over the persons of the defendants. The object of this action is to have the court use its compulsory process only to affect property within its jurisdiction, and then only upon the party seeking the aid of this process voluntarily, or in compliance with conditions which the court may impose personally, and in accordance with the laws of Mexico, doing whatever may be necessary to restore title and possession of the property there situate.

Counsel have cited numerous authorities in support of their argument in this behalf. We refer to a few of those upon which most reliance seems to be placed, by way of showing the distinction between the cases cited and the one here under consideration, and the reason why the rule there established does not apply to the present case.

Smith v. New York Mut. L. Ins. Co., 14 Allen, 886, was an action brought in Massachusetts by a citizen and resident of Alabama against a life insurance company of New York to compel the latter to restore to him certain rights under a policy of insurance upon his life, which the company claimed had been forfeited. This was an action *in personam*, pure and simple. There was neither person nor property in Massachusetts to be affected by the judgment. All the relief sought was to compel action of a certain kind on the part of a nonresident foreigner, and in a foreign country. The court properly held that it had no power to enforce such a judgment and consequently no jurisdiction to render one. The case bears no relation to the one here under consideration. Great stress is laid upon *Matthaei v. Galitzin*, L. R. 18 Eq. 840, in this connection. That case was brought by the plaintiff, a foreigner, against the Princess Galitzin, also a foreigner, for an accounting of profits made in the working of a mine in Russia, the mine being operated by an English company which was a mere stakeholder in the premises, and made a defendant solely for the purpose of preventing the payment of the profits over to the princess until the accounting was had, the plaintiff claiming that he was entitled to share in the profits by way of commission. The action was purely *in personam*, whether it involved the matter of accounting between plaintiff and the princess, or included the settlement as preliminary thereto of the question of whether or not the plaintiff was entitled to a commission as claimed. The contract relied upon was confessedly made in a foreign country, in relation to foreign property, between parties both of whom were foreigners, and all rights and liabilities under it were personal. We fail to perceive how the case has any bearing upon the questions involved in this case. The conclusion of the court was that "a foreign resident abroad cannot bring another foreigner into this court respecting property with which this court has nothing to do." That is not this case.

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Here the parties are brought into court to cancel a contract made and to be executed in this jurisdiction,—the notes and mortgage,—and in relation to property which is subject to the jurisdiction of the court. It is not proposed that the judgment of the court shall make the defendants actors in the disposition of property beyond its jurisdiction, or appoint anybody to act for them in the disposition of such property.

We are cited also to an opinion by an able jurist, *Mr. Justice Sharswood*, in *Coleman's App.*, 75 Pa. 442. We have carefully examined that case, and as we read it only these points are decided having any bearing upon the questions here involved: (1) That what is called a "foreign attachment" in that State will not lie for a demand founded in tort; that was a matter purely of statutory regulation, as it is here. (2) That, in cases where attachment will lie against a nonresident foreign defendant, the judgment can only be enforced against the property of defendant found within the jurisdiction, unless the defendant has been personally served within the jurisdiction, or has voluntarily appeared; but upon such service or appearance the proceeding against him may end in a judgment which will bind him personally, and may follow and be enforced against him extraterritorially. (3) "Where the claim of plaintiff is for goods or land [within the jurisdiction] in the constructive possession of a nonresident, by his agents or tenants, he has his remedy by writ of ejectment for the land, or by writ of replevin for the goods in like manner, summoning the person in possession as defendant." (4) In equity, "in cases where persons interested are out of the jurisdiction of the court, it is sufficient to state the fact in the bill, and pray that process may issue on their return. . . . The power of the court to proceed to a decree in their absence will depend on the nature of their interest, and the mode in which it will be affected by the decree. . . . If they are to be active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court, in their absence, cannot proceed to a determination against them." (5) That "though it is an undoubted principle that wherever a court of equity has jurisdiction it will go on to make a complete decree, so as to settle the entire controversy between the parties. . . . any subject of property within its reach will [not] give it jurisdiction of the person of a nonresident defendant, so as to authorize . . . a personal decree against him, if he does not appear, for the payment of money." And, after some further consideration, it concludes that branch of the discussion with the words: "We are of opinion that the bill must be confined, at least so far as the interest of the foreign defendant is concerned, to a prayer for a decree affecting only the property in question."

There is nothing in these conclusions, or in the reasoning of the learned justice which leads up to them, tending to show that the court whose action is now under consideration has not jurisdiction to proceed in the action before it, and grant the relief prayed, so far at least as it affects the property within this jurisdiction. As to that property, the defendants will not be called upon to be active in enforcing or

carrying into effect the judgment of the court. It may be that no personal judgment can be entered against them on account of moneys which they have secured, which could be enforced against them in the country of their residence; but it can be adjudged, if the proofs shall warrant it, that the consideration paid for the property in Mexico was procured to be paid by fraud, and so much of the money and property as remains within this jurisdiction and has been impounded by the court can be delivered up, and the securities and executory contracts requiring further payment to be made be canceled, without any conflict with the principles laid down in the case cited.

We are also cited to *Norris v. Chambers*, 29 Beav. 246, and *Cookney v. Anderson*, 31 Beav. 452. Neither of these cases are in point. In the former the English court sustained a demurrer on two grounds: (1) that there was no privity of contract between the parties plaintiff and defendant; (2) that the purpose of the bill was to decree a lien upon real property situate in Germany. In the other, the reason for holding that there was no jurisdiction was because the purpose of the action was to administer and wind up a trust created under a contract made in a foreign country by foreigners, to be executed wholly in that country, and in relation to property there situate. Neither of the cases are at all parallel to the one here under consideration. Nor is the case of *Moseby v. Burrow*, 52 Tex. 396, in point. No decree is sought in this case compelling the defendants to make conveyance of lands in Mexico. If any conveyance of that land is required it will be required of plaintiffs, who have submitted themselves to the jurisdiction of the court, and as a condition of granting the relief which they seek.

8. Dropping the element of nonresidence of plaintiffs, the petitioner here still insists, and the argument, even under other heads, is mainly directed to this proposition, that the court has no jurisdiction by reason of the nonresidence of the defendants Aguayos, and of the fact that personal service has not been, and cannot be, made on them within the State. The cases already considered are leading ones among those urged in support of this proposition. Added to them are many others, such as *Belcher v. Chambers*, 53 Cal. 685; *Anderson v. Goff*, 72 Cal. 73; *Pennoyer v. Neff*, 95 U. S. 714 [24 L. ed. 566], and others of that class, all of which discuss the question of the power of the court to render judgment in actions purely *in personam*, without personal service or appearance of the defendant; or others like *Hart v. Sansom*, 110 U. S. 155 [28 L. ed. 103], where the decree was to operate against the defendant *proprio vigore* to annul a deed or establish a title, or to compel the defendant personally to be an actor in the performance of some act prescribed by the decree, whether he desired to perform it or not. It is conceded that the court would have no power to render a decree in such cases, and of such a character, in the absence of the defendant, unless there had been personal service of process within the jurisdiction to which the court could send its process. But all this argument is based upon a misapprehension of the character and object of the action here under consideration, and of the re-

lation of the parties to each other at the time of the commencement of the action. To a correct understanding of the object of the action, and of the question of the right to maintain it, we must first correctly understand the relation of the parties to each other. The record does not bear out the proposition insisted upon on behalf of the petitioners here, that they are simply persons who were parties to an executed contract which was made and executed in Mexico. The preponderance of the evidence furnished by the record is in favor of the proposition that the contract of purchase and sale was made in San Francisco, within the jurisdiction of the courts of California. One act in its performance was necessarily performed in Mexico,—that of the delivery of the property sold. But that was not the last act in the performance of that contract. The entire consideration of the sale was subsequently delivered, and that delivery took place in San Francisco. It consisted in the delivery of money and of new contracts,—executory contracts to be performed in the future, which have not yet been performed, and performance of which is not yet due. These have always been, and still are, within the jurisdiction of our courts. These moneys and executory contracts were delivered in consideration of what is claimed to have been a contract of sale on the part of the Aguayos, now fully executed. But was that a contract at all? In this State—and, until the contrary appears, it will be presumed to be the same in Mexico—it is essential to the validity of a contract that there should be: *first*, parties capable of contracting; *second*, consent; *third*, a lawful object, and, *fourth*, a sufficient cause of consideration. Civil Code, § 1550.

To be consent it must be free, mutual and communicated by each to the other. Id. § 1553.

It is not free when obtained through fraud, undue influence or mistake. Id. § 1567.

If not free it may be rescinded by the parties in the manner prescribed by the chapter on rescission. Id. § 1566.

Consent is deemed to have been obtained by fraud, undue influence or mistake, when it would not have been given had such cause not existed. Id. § 1568.

The record shows that the consent of the purchasers to make this purchase, and deliver these moneys and securities in consideration thereof, was procured by fraud on the part of the Aguayos, and mistake on the part of the other parties, induced by such fraud, and that it would not have been given had not such cause existed. It therefore shows that there was no valid and binding contract between the parties, and that such as it was it might be rescinded by the parties. The acts of fraud are set out, and they show actual fraud within the meaning of § 1571, Civil Code. It was a misrepresentation of the value of property, knowingly made, and entitled the purchaser to a rescission. *Cruess v. Fessler*, 89 Cal. 836; *Bank of Woodland v. Hiatt*, 68 Cal. 284.

Having been induced to enter into this contract by fraud, and through mistake induced by such fraud, the parties could either ratify the same and sue for damages, or rescind. 1 Wharton, Cont. § 282; 2 Addison, Cont. *1218; *Alvarez v. Brannan*, 7 Cal. 503; *Pence v. Lang-*

don, 99 U. S. 578 [35 L. ed. 420]; Civil Code, § 1689; *Burke v. Levy*, 70 Cal. 254; *Fish v. Benson*, 71 Cal. 440; *Colton v. Stanford*, 82 Cal. 398.

If the suit were for damages it could not succeed and end in a judgment which could be enforced against the persons of defendants without personal service or appearance. But it is not for damages. It is upon and after rescission, and to enforce rescission, so far as the means of enforcing it are within the jurisdiction of the court. It does not require mutual consent of the parties to rescind. Under section 1689, either party may rescind when consent was given by mistake, or obtained by fraud. According to the record, the purchasers did actually rescind, and rescind promptly, before the action was brought, and did all that is required of them by section 1689, which gives them the right, and section 1691, which prescribes the mode, of rescission. They did not restore, because restoration was not accepted, but they offered to restore, and in the action they again offer to restore, everything of value received by them under the contract. This offer, with the prompt and proper notice, makes the rescission complete, and entitles them to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. To secure those results and fruits is the object of the action they have brought. Those results and fruits are the restoration of the moneys and things of value which they gave in consideration of the purchase. Most of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all ear-marked, so that they can be traced and identified, and were within the jurisdiction, and are now within the possession, of the court in which the action was brought. That the court has jurisdiction to afford the relief sought is supported by ample authority. See cases already cited, and *Fratt v. Fiske*, 17 Cal. 380; *Watts v. White*, 18 Cal. 821; *Morrison v. Lods*, 29 Cal. 881; *Barfield v. Price*, 40 Cal. 535; *Herman v. Haffenegger*, 54 Cal. 161; *Marston v. Simpson*, Id. 189; *Fite v. Bynum*, 55 Cal. 459; *Henderson v. Hicks*, 58 Cal. 864; *Collins v. Townsend*, Id. 608; *Hart v. Kimball*, 73 Cal. 268, and *Dunn v. Daly*, 78 Cal. 640,—in all of which this right of rescission upon offer to restore is recognized. We concede, as claimed by petitioner and decided in *Bohall v. Diller*, 41 Cal. 532, that the rescission must be *in toto*, and in this case it seems to have been so. The offer was to restore everything of value on the one side, and the demand that everything be restored on the other. The offer must be made good whenever the demand is complied with.

Incidentally, some authorities have already been cited tending to sustain the jurisdiction of the court in cases of this kind. The following may be referred to in addition:

In *Rourke v. McLaughlin*, 83 Cal. 196, this court holds that specific performance in equity will be decreed whenever the parties, or the subject matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court, and cites the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, where specific performance of a contract for lands in America was decreed in England, 9 L. R. A.

and *Ward v. Arradondo*, Hopk. Ch. 213, 2 N. Y. Ch. L. ed. 397, a case in many respects parallel to the one here under consideration, and in which the jurisdiction of the court was sustained.

In *Bonwell v. Otis*, 50 U. S. 9 How. 348 [13 L. ed. 169], the Supreme Court of the United States says: "Jurisdiction is acquired in one of two modes: *first*, as against the person of the defendant, by the service of process; or, *secondly*, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by attachment or by bill in chancery."

In *Cooper v. Reynolds*, 77 U. S. 10 Wall. 818 [19 L. ed. 932], the same court held, in a case where there was no personal service and the defendant was not within the territorial jurisdiction of the court, that the seizure of the property or the levy of the writ of attachment on it was the one essential requisite to jurisdiction, and that it unquestionably made the proceeding purely *in rem*.

In *Galpin v. Page*, 8 Sawy. 124, *Mr. Justice Field* held that proceedings which are in form personal suits, but which seek to subject property brought by existing lien, or by attachment, or by some collateral proceeding under the control of the court, and those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered, while not strictly proceedings *in rem* so far as they affect property in the State, are treated substantially as such proceedings.

In *Pennoyer v. Neff*, 95 U. S. 727 [24 L. ed. 570], which has become the leading case on the subject of jurisdiction acquired by publication, the Supreme Court of the United States says: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure, or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose."

In *Windsor v. McVeigh*, 93 U. S. 279 [23 L. ed. 915], where the same question was considered, the court says: "The theory of the law is that all property is in the possession of its

owner, in person or by agent, and that its seizure will therefore operate to impart notice to him."

The same principle is sustained in *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 301 [28 L. ed. 781], where the court adds to what had been said before that jurisdiction may be acquired by the mere bringing of the suit in which a claim is sought to be enforced against property situate within its territorial jurisdiction; that this may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.

Even in the case of *Arndt v. Griggs*, 134 U. S. 816 [38 L. ed. 918], cited by petitioner, the court says: "It [the state court] cannot bring the person of a nonresident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice."

If the state court has such power with reference to title to real estate held by a nonresident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our Statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civil Code, § 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded cestui que trust. That the court has such jurisdiction as is here claimed for it is fully sustained in *Felch v. Hooper*, 119 Mass. 52, where the case is clearly distinguished from that of *Spurr v. Scoville*, 57 Mass. 579, cited by petitioner; in *National Exch. Bank v. Sterling*, 81 U. S. 360;

Quarl v. Abbott, 102 Ind. 233; in *King v. Vance*, 46 Ind. 251, where the court says: "The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;" and in *Martin v. Pond*, 30 Fed. Rep. 15, where Mr. Justice Brewer says: "It may be conceded that notice to the defendant is necessary to divest him of his rights and interest. But the publication is notice,—it is equivalent to the personal service of summons."

4. It is specially insisted on the part of petitioner that the court had no jurisdiction to appoint a receiver; but the argument in support of that contention is based almost entirely upon the proposition that the court has no jurisdiction generally. If it has general jurisdiction in the case, as we conclude that it has, then error in the exercise of that jurisdiction would be reviewable only on appeal. The appointment of a receiver, however, might in some cases be more than error, even when the court had general jurisdiction. The case might be one in which there was no authority to appoint a receiver. But we do not think that this is such a case. The authority to appoint a receiver in such a case is clearly given in both the first and sixth subdivisions of section 564 of the Code of Civil Procedure. See also *Ex parte Cohen*, 5 Cal. 496; *People v. Norton*, 1 Paige, 17, 2 N. Y. Ch. L. ed. 544; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 440, 2 N. Y. Ch. L. ed. 981; *West v. Swan*, 3 Edw. Ch. 420, 6 N. Y. Ch. L. ed. 720; *Von Roun v. San Francisco Super. Ct.*, 58 Cal. 359; *Sacramento P. R. Co. v. San Francisco Super. Ct.*, 55 Cal. 453.

Such an appointment in no way affects the title of any party to the property involved, but simply preserves the property and keeps it within the jurisdiction until the rights of the parties can be determined.

Satisfied, as we are, that the Superior Court, defendant here, has jurisdiction to proceed in the case before it and here brought under review, and that thus far it has not acted in excess of its jurisdiction, the writ must be dismissed.

So ordered.

We concur: **Beatty, Ch. J., Sharpstein, J., McFarland, J., Paterson, J.**

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA, *ex rel.* Edson PENNELL,

C. D. ARMSTRONG *et al.*, Supervisors of Knox County.

(.....Neb.....)

*1. A county board cannot lawfully submit, to be voted upon at the same election, two propositions to erect from a county two new counties, when the territory described in one proposition embraces a part of that included in the other. When conflicting petitions for the submission of the question of

held notes by NORVAL, J.

9 L. R. A.

creating new counties are presented, it is the duty of the county board to grant the petition that is first filed, provided it meets all the requirements of the law, and refuse to submit the others.

2. New counties cannot be formed so as to reduce the county from which they are created to a less area than the constitutional limit.

(September 30, 1890.)

APPLICATION for a writ of mandamus to compel the Supervisors of Knox County to submit to the electors of said County the proposition to erect the County of Union out of territory now embraced in Knox County. **Granted.**

The facts are fully stated in the opinion.
Mr. J. C. Crawford for relator.
Mr. E. F. Gray for respondents.

Norval, J., delivered the opinion of the court:

This is an application for a writ of mandamus to require the Board of Supervisors of Knox County to submit to the electors of said County the proposition to erect the County of Union out of the territory now within the boundaries of the County of Knox. On the 9th day of July, 1890, a petition signed by the relator, and 606 other legal voters of Knox County, was filed with the county clerk of that County, and on July 15, 1890, another petition signed by 81 electors of said County was filed with said clerk, which petitions prayed that the respondents, the Board of Supervisors, submit to the electors of said County, at the next general election, a proposition to erect the County of Union out of the two southern tiers of government townships of Knox County. All of said petitioners were resident and legal voters of the territory out of which it is proposed to erect the new county, and it is alleged that they constitute a majority of the electors residing in said territory. It also appears that the proposed Union County comprises the extent of territory required by the Constitution and laws, and the remainder of Knox County has more territory than is required by the Constitution and laws. On July 14, thirty of the persons who signed the above petitions filed with the county clerk a remonstrance, and requested that their names be erased from said petitions. On July 15, these petitions were presented to the Board of Supervisors while in regular session, and were, by said Board, referred to a committee appointed from the membership of the Board, to ascertain and report to the full Board whether said petitions contained the names of a majority of the electors residing in the proposed Union County. On the next day the committee reported to the Board that said petitions contained the names of a majority of the legal voters residing in the territory proposed to be stricken from Knox County, after deducting the names of the thirty petitioners who asked to have their names stricken from the petitions. The respondents refused to grant the prayer of said petitions. On July 14, 1890, a petition was filed with the county clerk signed by 259 electors of Knox County, and on July 15 there was filed with said clerk another petition signed by 63 legal voters of said County, praying for the erection of Alliance County out of three of the eastern tiers of government townships of Knox County. On July 16 the respondents ordered submitted to a vote of the people at the next general election the proposition to create Alliance County, which county includes in its boundaries a portion of the territory proposed to be included in the County of Union. The relator prays for a mandamus to require the respondents to submit to a vote the proposition to create Union County, and compel them to recall the proposition to erect Alliance County. Sections 8, 9, 10, of the Constitution, are as follows: "Section 8. No new county shall be formed or established by the Legislature which will reduce the county or counties, or

either of them, to a less area than four hundred square miles, nor shall any county be formed of a less area. Sec. 9. No county shall be divided, or have any part stricken therefrom, without first submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same. Sec. 10. There shall be no territory stricken from any organized county, unless a majority of the voters living in such territory shall petition for such division, and no territory shall be added to any organized county without the consent of the majority of the voters of the county to which it is proposed to be added."

Section 10, art. 1, chap. 18, Comp. Stat. 1889, provides that "whenever it is desired to form a new county out of one or more of the then existing counties, and a petition praying for the erection of such proposed new county, stating and describing the territory proposed to be taken for such new county, together with the name of such new county, signed by a majority of the legal voters residing in the territory to be stricken from such county or counties, shall be presented to the county board of each county to be affected by such division, and it appearing that such new county can be constitutionally formed, it shall be the duty of such county board or county boards to make an order providing for submission of the question of the erection of such new county to a vote of the people of the counties to be affected at the next succeeding general election, of which the notice shall be given, the votes canvassed and the returns made as in case of election of county officers, and the form of the ballot to be used in the determination of such question shall be as follows: 'For new county,' and 'Against new county.'"

It is conceded by the respondents that the petitions presented to the County Board for the creation of Union County meet all the requirements of the above-quoted sections of the Constitution, and the statutes, excepting one. It is insisted by the respondents that it does not appear that these petitions contain the signatures of a majority of the qualified voters residing in the territory out of which it is proposed to erect the new county. If this be true, it is an insurmountable objection to the granting of the relief demanded by the relator, for, without the requisite number of petitioners, the County Board would be without jurisdiction to act. The relator in his petition for mandamus alleges that the petitions submitted to the County Board asking for the creation of Union County contained the signatures of a majority of the legal voters residing in the proposed county, and that there are not more than 1,000 legal voters in said territory. The respondents in their answer "deny that the two petitions for the creation of Union County contained any greater number than 607 names after deducting the names of those who asked to have their names stricken therefrom in their said remonstrance, and deny that said number was at the time of their action thereon aforesaid, or now is, a majority of the legal voters residing in the territory comprising the said proposed Union County; deny that the proposed Union County did not, at the time of

filling said petitions, or does not now, contain more than 1,000 legal voters." If there were before us nothing but the petition and answer, the denial in the answer would compel the dismissal of the action. Does the proof show that the petitions for the creation of Union County were signed by a majority of the legal voters residing therein? It is alleged in the petition, and not controverted by the answer, that the proposed Union County comprises the townships of Walnut Grove, Logan, Verdegria, Jefferson, Miller, Creighton, Valley, Central, Cleveland, Lincoln and the south 86 square miles of Dolphin, and the south 18 square miles of Washington and Morton. There is attached to both the petition and the answer certified copies of the abstracts of the total votes cast in said townships at the general election held in November, 1889, for the office of judge of the supreme court, and for and against township organization, from which abstracts it appears that the total vote cast in said townships for judges of the supreme court was 1,019, and 909 votes were cast therein on the question of township organization. These abstracts include the votes cast in Dolphin, Washington and Morton townships by those residing in said township north of the north line of the proposed Union County. There is also attached to the answer a certified copy of the abstract of the vote cast in said townships at a special election held therein on August 13, 1887, which shows the total vote cast at that election to be 1,834. It appears from this abstract that one third of Central Township, and two thirds of two other townships, as then constituted, are not included in the territory comprising the proposed Union County. Deducting from the total vote cast at that election 50 votes, being one third of the votes cast in Central Township, and 94, being two thirds of the votes cast in the two other townships, would leave 1,190 votes cast in 1887 in the territory comprising the proposed new County of Union. All of these abstracts of votes were before the Board of Supervisors at the time they declined to submit to the voters the question of creating Union County. But that is not all. There was likewise presented to the Board of Supervisors, before they took action upon the petitions, the affidavits of five residents of Creighton Township in Knox County, wherein each deposed that all the names signed to the petition praying for the erection of Union County are of legal voters residing in said territory, and constitute a majority of all the legal voters residing therein, and that there is not to exceed 1,000 legal voters residing in the proposed County. The abstracts of votes and these affidavits constituted the entire testimony before the County Board, and on the hearing in this court. Without any showing to the contrary, this testimony was sufficient to establish that the proposed Union County did not contain more than 1,000 legal voters. In addition to this, we have the report of the committee to whom the Board of Supervisors referred the Union County petitions. This report finds that the petitions were signed by a majority of the electors residing in the territory comprising the proposed new county. The two Union County petitions contained the names of 607 legal voters, after deducting the

80 signers who subsequently requested that their names be stricken from the petitions. This is a majority of all the legal voters residing in the territory comprising the proposed county.

It is urged that it was not for the best interest of the citizens of Knox County that the proposed Union County should be created, and that the petitions for the creation of that county conflict with those granted by the respondents for the erection of Alliance County, in that part of the same territory is included in both sets of petitions. The law is mandatory. When a petition is presented to a county board asking for the creation of a new county which, in all respects, complies with the law, and contains the requisite number of petitioners, it is the duty of the county board to submit the question to a vote of the people of the county. The law confers no discretion in the matter upon the county board. Was it the duty of the respondents to submit to a vote the proposition to create Union County, after having ordered the submission of the proposition to create Alliance County? The authority of the county board to submit at the same election more than one proposition to create new counties was sustained by this court in the case of *State v. Newman*, 24 Neb. 40. It appears from the statement of facts in that case that the county board of Cheyenne County had submitted to the voters of that county the proposition to create the Counties of Kimball, Deuel, Banner and Scotts Bluffs, out of the territory embraced in Cheyenne County. Before the general election was held, at which said questions could be voted upon, a proper petition was presented to the county board of Cheyenne County, praying that the proposition to establish the County of Potter be submitted to a vote at the same election. The county board refused to permit a vote to be taken thereon. On application to this court a mandamus was issued requiring the county board to submit the question of the proposed new County of Potter to a vote of the electors of Cheyenne County. It is stated in the syllabus in that case that "when it is sought to erect from a county more than one new county, and petitions for the submission of the proposition to erect such new counties are severally presented, they may be separately submitted at the same election, without reference to the number of propositions to be voted upon thereat." We adhere to that decision, but the facts in that case are so different from those presented by the record before us that that decision does not afford us any assistance in determining whether the propositions to create Union and Alliance Counties could both be lawfully submitted to a vote at the same election. It will be noticed that each of the proposed new counties contains territory embraced in the other. To be effective, it is clear but one of the propositions can be adopted. The questions are independent, and we are not aware of any law or statute that would prevent an elector from voting for both propositions. If each should receive the requisite vote, being irreconcilable and conflicting, both would be defeated. The Legislature never intended that such conflicting propositions should be submitted to a vote at the same election. It is certain that a fair construction of the language

used in section 10 of the Statute above quoted will not sanction the submission of such conflicting petitions.

There is another very good reason why both propositions could not legally be submitted at the same election. The territory embraced in the proposed new Counties of Union and Alliance would reduce the area of the County of Knox below that required by the Constitution. The Constitution provides that no new county shall be formed which will reduce the county to a less area than 400 square miles, nor shall a county be formed of a less area. It logically follows that the petitions to create new counties cannot be submitted when the territory included therein will leave the original with an area less than the constitutional limit. Having reached the conclusion that the county board had no authority to require a vote to be taken on both propositions, the question arises, Which one should have been submitted to a vote? It is conceded that the petitions for the creation of Alliance County were signed by a majority of all the legal voters residing in the territory embraced in the petitions; that such territory has over 400 square miles, and that the remainder of Knox County was more than the constitutional requirements. The question of creating Alliance County could therefore have lawfully been submitted, had not the petitions praying for the formation of Union Coun-

ty been presented. The record shows that the Union County petition containing 807 names was filed with the county clerk of Knox County on July 9, and, after deducting the names of those who signed a remonstrance, contained a majority of the voters residing within the proposed Union County. The first Alliance County petition was not filed until July 14, and it did not contain sufficient signers. On the day following, a second Union-County petition was filed, also another petition for the creation of Alliance County. Thus, it will be seen that those who petitioned for the erection of Union County would have been entitled to have had that question submitted, had the board been in session, before the petitions for the creation of Alliance County were filed. It makes no difference that the petitions last filed were first circulated and signed, as no duty rested upon the respondents until filed. The fact that the Board of Supervisors have submitted the Alliance County proposition does not relieve them of the obligation to submit the proposition first presented to the board. The respondent had no authority to submit the question of creating Alliance County.

A peremptory writ of mandamus will issue as prayed.

Judgment accordingly.

The other Judges concur.

NEVADA SUPREME COURT.

STATE OF NEVADA, *ex rel.* BOYLE, v. BOARD OF EXAMINERS.

(....Nev.....)

1. Where registration is not one of the qualifications for electors prescribed by the Constitution, the fact that the electors who voted at a special election, held for the ratification of a proposed constitutional amendment, and who to be entitled to vote were required by the Constitution to be qualified to vote for members of the Legislature, had not complied with the statutory requirements as to registration, so as to have been entitled on the day of such election to vote for a member of the Legislature, if one was to be elected on such day, will not render the election void.
2. The words "voting thereon," in the clause of the Constitution which provides that proposed amendments shall become a part of the Constitution when ratified "by a majority of the electors qualified to vote for members of the Legislature voting thereon," refer to the word "electors" as their antecedent, and do not restrict the right to vote on a proposed amendment to the electors who were qualified to vote for the members of the Legislature who voted to submit the amendment to the people.
3. A special election is not invalidated by the fact that the Legislature adopted the registry lists of a general election held three months previously as the one by which the right of electors should be established instead of requiring a new registration to be had, where registration is not a constitutional qualification for voters and the whole subject thereof has been

committed by the Constitution to the Legislature.

(August 1, 1890.)

APPPLICATION for a writ of mandamus to compel the Board of Examiners to order the publication of certain proposed constitutional amendments preliminary to their submission to the people for ratification or rejection. *Denied.*

The case sufficiently appears in the opinion. *Mr. William Woodburn* for relator.

Mr. J. F. Alexander, Atty-Gen., for respondent.

Belknap, J., delivered the opinion of the court:

This is an application for a writ of mandamus requiring the Board of Examiners to order the publication of certain proposed amendments to the Constitution of the State, preliminary to their submission to the people at the approaching general election. The proposed amendments are fourteen in number, and are those which were submitted to a vote of the people at the special election held upon the 11th day of February, 1889, under the provisions of a law providing for such election, approved January 19, 1889. Stat. 1889, p. 14.

The application is made upon the ground that the law authorizing the special election is unconstitutional and void, and that the proposed amendments were not, therefore, legally submitted to the voters of the State. The submission at the special election being invalid, it is now the duty of the Board, it is said, to or-

der publication under a general law of the State which provides that, whenever the conditions prescribed by the Constitution for its amendment have been complied with by the Legislature, the Board of Examiners shall order such proposed amendments to be published in a daily newspaper of general circulation for the period of ninety days preceding any general election. Stat. 1887, p. 122.

It is contended that the Statute under which the specific election was held is unconstitutional, in that it does not prescribe the qualifications imposed by the Constitution upon electors voting upon amendments to the Constitution. The Constitution defines the course to be pursued by the Legislature in the matter of amendments, and requires that they shall be submitted to a vote of the people. "And if the people," the Constitution proceeds to say, "shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the Legislature voting thereon, such amendment or amendments shall become a part of the Constitution." Art. 16, § 1.

The contention is that the voters registered under the Act of January 19, 1889, were not qualified to vote upon the proposed amendments, because they were not, at the day of the special election, registered so as to have entitled them to have voted for a member of the Legislature, if one were then to have been chosen. The error of the position lies in the assumption that registration is an electoral qualification. The qualifications of an elector are prescribed by the Constitution (§ 1, art. 2), and cannot be altered or impaired by the Legislature. *State v. Findley*, 20 Nev. 198.

The Registration Laws of the State do not attempt to add to these qualifications. These laws simply provide means for ascertaining and determining, in a uniform mode, whether the voter possesses the necessary qualifications, and are also intended to secure, in an orderly and convenient manner, the right of voting. Upon this subject, *Chief Justice Dillon*, speaking for the Supreme Court of Iowa in *Edmonds v. Banbury*, said: "But the Legislature, while it must leave the constitutional qualifications intact, and cannot add new ones, may nevertheless prescribe regulations to determine whether a given person who proposes to vote possesses the required qualifications." 28 Iowa, 272.

"No Registry Law can be sustained," said the Supreme Court of Wisconsin, "which prescribes qualifications of an elector additional to those named in the Constitution, and a Registry Law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election." *Dells v. Kennedy*, 49 Wis. 558.

"It is now generally admitted that these laws do not add to the constitutional qualifications of voters." *McCrory, Elections*, § 7.

Another objection made to the law involves a different construction of the same constitutional clause. It is claimed that the words "voting thereon," contained in the quoted

clause, refer to the words "members of the Legislature" as their antecedent; and this view leads to the result that only those were competent to vote at the special election who were qualified to vote for the members of the Legislature who voted upon the proposed amendments. The construction contended for would lead to results which could not have been contemplated. For instance, the right of an elector to vote would depend, not alone upon his qualification to vote for members of the Legislature of the session at which the proposed amendment was considered, but also, upon the fact whether such member or members did actually vote upon the proposed amendment. For if, from any cause, the members did not vote, it would seem that the elector would be disqualified. Other results quite as surprising and unreasonable, but not necessary to suggest or discuss, would proceed from the adoption of the construction. Without pursuing the matter further, we consider that all the electors of the State are entitled to vote upon the submission of the proposed amendment. We are led to this conclusion by a consideration of the provision under discussion in connection with the other provisions of the Constitution bearing upon the same subject and the theory of our political system. The power of the great body of the people, as an organized body politic, to amend or revise the Constitution of their State is a fundamental principle of the governments of the States of the Union. The power is expressly declared in the Constitution of this State in these words: "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it." Art. 1, § 2.

And, in defining the qualifications of electors, the Constitution further declares that every elector "shall be entitled to vote for all officers that now are or may be elected by the people, and upon all questions submitted to the electors at such election." Sec. 1, art. 2.

The clause under consideration must be construed with reference to these provisions. The conclusion reached is in harmony with them, and is supported by the language of the clause itself.

Objection is also made to the provisions of the law adopting the registry lists of the general election of 1888. The Constitution has committed the subject of the registration of electors to the Legislature. The object of these laws, as before stated, is to determine the qualifications of the voters. Laws of this description must be reasonable, uniform and impartial, and must be calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote. *Monroe v. Collins*, 17 Ohio St. 885.

The provisions of the Statute meet these requirements. The special election was to be held about three months after the general election of 1888, and electors registered for the general election, and continuing qualified voters, were not required to make further registration. The adoption of the registry lists of the then recent election, and dispensing with the burdensome requirement of a second regis-

tration, commend themselves as reasonable regulations calculated to facilitate, rather than impede, the exercise of the right to vote.

Relator having failed to establish the inva-

lidity of the Special Election Law or the proceedings thereunder, it is ordered that the writ of mandamus be denied.

ALABAMA SUPREME COURT.

Joseph H. COMPTON, *Appt.*,

v.

Joseph M. HAWKINS.

(.....Ala.....)

1. The owner of a landing on a navigable river may prohibit its use for unusual and unaccustomed purposes which may interfere with its use for the purposes for which it was intended.

2. A landing on a navigable river will, in the absence of evidence to the contrary, be presumed to have been intended for the loading and unloading of the craft navigating the river, and as a place for depositing such freight as they usually transport.

(June 17, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marengo County sustaining a demurrer to the complaint in an action brought to recover damages for the refusal of defendant to permit plaintiff to store timber on a wharf owned by defendant on a navigable river preparatory to rafting them by the river to market. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. George W. Taylor, for appellant:

The duties of a warehouseman are similar to those of a carrier and of an innkeeper.

1 Jones, Liens, §§ 967, 968, 977.

The lien given to bailees for lien originated as in the way of an equitable consideration for the duty imposed upon them to receive goods from the public generally; *i. e.*, the lien is the price paid by the law for the duty required under the law.

Steinman v. Wilkins, 7 Watts & S. 466, 42 Am. Dec. 254, and *notes*, 257,—showing the tendency of the law at that time to hold the carrier liable for refusing to carry.

Since that time by an unbroken line of decisions the carrier is held to this responsibility, to carry for the public generally, and without discrimination, goods offered in the regular course of business.

Hutchinson, Carriers, §§ 296-302; *Beale v. Posey*, 72 Ala. 823; *Jones v. Sims*, 9 Port. 236.

So of innkeepers to receive all guests.

Beale v. Posey, *supra*.

The keeping of a dock or landing is like the keeping of an inn, and though belonging as private property to individuals, when once legally thrown open to the use of the public, they become affected with a public interest, and all persons have an implied license to enter.

Gould, Waters, § 119; 1 Dillon, Mun. Corp. §§ 104, 105; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Munn v. Illinois*, 94 U. S. 113-151, 24 L. ed. 77-93.

The laws change to suit the times, and will be modified by them.

9 L. R. A.

Lexington & O. R. Co. v. Applegate, 8 Dana, 289, 33 Am. Dec. 497, 513.

And so the duty is cast upon a warehouseman and wharfinger to receive all goods offered in the usual course of business.

1 Jones, Liens, § 968, and *note*; *Rivara v. Ghio*, 3 E. D. Smith, 284.

Mr. Burke Johnston for appellee.

Clopton, J., delivered the opinion of the court:

The action is brought by appellant to recover damages alleged to have been sustained by the refusal of defendant, who the complainant avers is the keeper and owner of a public warehouse and landing on the Tombigbee River, a navigable stream, to receive at the landing, for shipment, pine timber tendered by plaintiff, or to permit him to deposit the same at the landing, preparatory to being rafted by the river to market. The complaint avers that defendant had the means of receiving the timber, and that plaintiff was ready and offered to pay a proper reward therefor. It is obvious that the gravamen of the action is the refusal of defendant to permit the use of the landing for the safe keeping and storage of the timber until it could be rafted, not the violation of any right incident or appurtenant to the right of navigation. The demurrer to the complaint, which was sustained by the court, involves the inquiries, What are the rights of the public in respect to the use of the landing? and What the duty of defendant in regard to the storage of timber? While the authorities are not in entire harmony in reference to the respective rights of navigators of public streams above the ebb and flow of the tide, and of riparian owners, the better opinion seems to be that the right to the use of the stream as a highway, and to land for purposes of receiving and discharging freight and passengers, are distinct, and those navigating the river have no right, as incident to the right of navigation, to land upon and use the bank for the purpose of loading or unloading vessels, without the consent of the owner, unless in cases of necessity.

In Washburn on Easements (p. 554) the author observes: "In regard to the right to land upon other points of the banks of a navigable stream than those which have in some way become public landings, the law would seem to confine it to cases of necessity, where, in the proper exercise of the right of passage upon the stream of water, it becomes unavoidable that one should make use of the bank for landing upon, or fastening his craft in the prosecution of his passage."

In *Bainbridge v. Sherlock*, 29 Ind. 364, it is said: "The river being public, and its banks being private, it is not difficult to discover the true foundation of those riparian rights, known

as 'wharf rights.' It is essential to the successful prosecution of his business that the navigator shall make frequent landings to lade and unlade, to receive and discharge passengers and to receive supplies. But, except in case of some peril or emergency of navigation, he cannot thus land without the consent of the riparian owner, and, in return for the privilege of landing, a reasonable compensation may be demanded. This is the origin of wharfage."

Riparian owners have claimed and exercised the right to construct wharves and landing places on navigable streams, from the earliest settlement of this country, subject to the limitation that the public easement or servitude is not impaired. The owner has the same dominion and power to control such landing places as any other private property, and to possess and use the same to the exclusion of the public. The right to raft timber does not imply or carry with it the right to deposit it upon private property preparatory to being rafted. Campbell, J., says: "The right to raft logs down the stream does not involve the right of booming them upon private property for safe-keeping or storage, any more than the right to travel a highway justifies the leaving of wagons indefinitely in front of private dwellings or stores." *Lorman v. Benson*, 8 Mich. 18.

The plaintiff has no common-law right to store or deposit logs or timber at a private landing for the purpose of rafting. The plaintiff, however, bases his right to recover on the alleged ground that the landing is public. Wharves or landings may be either private or public in their nature. If public, the owner is under obligations to concede to others the privilege of landing their goods. If private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper. Whether a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied and the nature and character of the structure. If the land on which it is constructed is vested in the public, or if built by public authority on land condemned, or if it be at the terminus of a public highway and practically forms a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing. The right to erect a landing on a navigable stream, having its foundation in the ownership of the land, when erected by an individual at his own expense, is private property. *The Wharf Case*, 8 Bland, Ch. 861.

It is well settled that the public may acquire an easement,—a right to the use of such landing,—by dedication on the part of the owner of the soil. But use by individuals, with the permission of the owner, does not give the public the right to do the same without his consent. Use by the public with his permission, and for his own emolument, for no number of years will amount to dedication.

In *Post v. Pearsall*, 22 Wend. 425, after an elaborate consideration of the question, it was held that the public have not the right, against the will of the owner, to use and occupy the land adjoining navigable waters as a public landing and place of deposit of property in its transit to and from vessels navigating such

waters, although such user has been continued upwards of twenty years with the knowledge of the owner.

In *O'Neill v. Annett*, 27 N. J. L. 200, the action was brought to recover damages for the defendant's refusal to permit vessels to discharge a cargo of coal upon his wharf. The declaration alleged that it was a public wharf, and the jury so found. The wharf was built by defendant at his own expense more than twenty years previously. A public turnpike passed or terminated near the wharf, but it does not appear that it extended to the landing, or that there was any connection between them, except that the public passed and re-passed from one to the other without interruption. During the whole period of its existence, vessels had been in the habit of loading and unloading at the wharf, and it had been used by persons in the vicinity as a place of deposit for lumber, wood, brick and other materials, the owner being paid for such use. It was ruled that the wharf was private property, and that the consent of the owner must be obtained before the public had a right to use it. It is said: "It is difficult to conceive of evidence that could more clearly negative the idea of dedication to public use, or more satisfactorily establish the fact that the proprietor was using the property for his own private emolument." The objects for which a private landing may be held and used may be public without affecting its private character. In such case, there is an implied license to vessels navigating the stream to use it for receiving and discharging freight and passengers, and also to all persons to occupy it for lawful and accustomed purposes; but the owner may, at any time, revoke the license as to the entire public, or withhold permission from particular vessels or persons. *Swords v. Edgar*, 59 N. Y. 28; *Steels v. Sullivan*, 70 Ala. 589.

The fair inference is that a landing on a navigable river is intended for the loading or unloading of the craft navigating the river, and as the place of deposit of such freight as they usually transport. The owner is authorized to prohibit the use of a landing intended and applied to such purposes, for unusual and unaccustomed purposes, such as the storage and keeping of timber to be rafted, which may obstruct free access to and from the vessels. The complaint does not aver sufficient facts to show plaintiff's right to deposit his timber at the landing, or the duty of defendant to allow it to be stored.

Affirmed.

ALABAMA GREAT SOUTHERN R. CO.,

Appt.,
v.

Lizzie A. CARMICHAEL

(...Ala....)

A passenger who contracts with a railroad conductor to be left at a station at which such conductor's train is not scheduled to stop after having been notified by being refused a ticket for passage to such station by that train that it was against the company's rules for the conductor to stop there, cannot recover damages from the company if the conductor breaks the

contract and carries him past the station, at least where other trains are provided by which such station could be reached.

(June 19, 1890.)

APPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for an alleged breach of contract by defendant's agent to carry plaintiff to, and leave her at, a certain station along defendant's road. *Reversed.*

At the trial of the case the following instructions were given by the court to the jury:

(1) "If you find that the plaintiff was a passenger upon this train by reason of her having gone upon the train and taken passage by permission of the conductor and paid her fare, then it would follow that she was entitled to be treated as a passenger, and have her rights respected as such, and have the obligation of the railroad performed in respect to carrying her to the place of her destination, and allowing her an opportunity to get off safely." (8) "If you find that she was a passenger, and entitled to be put off at Jonesboro by virtue of an agreement with the conductor upon the payment of her fare to that place, and that she was negligently carried beyond that point, and put off at another place, that would show a violation of her legal rights which she has by virtue of being a passenger, and having paid her fare, and having an alleged agreement, if there was any, and would entitle her to recovery." (4) "When a person gets upon a train, and, by agreement with the conductor, pays her fare and takes passage to a particular point on the line of the road, she becomes a passenger, although she may not have a ticket."

The court also gave the following charge in writing, requested by plaintiff: (1) "Plaintiff asks the court to charge the jury that where the plaintiff is entitled to recover in actions of this character, vindictive damages may be recovered when negligence complained of is so gross as to evince an entire want of care, and is sufficient to raise a presumption that the defendant, being cognizant of the probable consequences of his acts, is indifferent to the danger to which the persons of others may be exposed thereby,—a conscious indifference to consequences."

The defendant requested the following charges in writing to be given by the court: (1) "If the jury believe the evidence in this case, they must find their verdict for the defendant." (2) "If the jury believe all the witnesses to be equally unimpeachable and credible, the plaintiff is not entitled to a verdict." (3) "The jury are charged that, under the facts and circumstances of this case, the plaintiff is not entitled to recover any exemplary or vindictive damages." (4) "The jury are charged that, if they believe the evidence in this case, the plaintiff is not entitled to recover any damages except nominal damages." (6) "The jury are charged that in order to recover vindictive or punitive damages, it is necessary for the plaintiff to show that she has suffered some actual damages; and, if the plaintiff has not shown that she has suffered some actual damages, she is not entitled to any damages in this case except actual damages." (7) "The 9 L. R. A.

jury are charged that, in order for the plaintiff to recover in this case, she must prove each and every material allegation of her complaint to the satisfaction of the jury, by a preponderance of the testimony; and, if she has not done this, she is not entitled to a verdict in this case." (9) "The jury are charged that in this case, the plaintiff has proved no actual damages, and is not entitled to any damages except nominal damages, if she be, in the present case, entitled to nominal damages in the judgment of the jury." (10) "If the jury believe from the evidence in this case that the plaintiff was duly informed that it was against the rules of the Company for her to purchase a ticket from Meridian to Jonesboro or Bessemer, and that being so informed she got upon said defendant's train without permission, and if they further believe from the evidence that both she and the conductor of said train, knowing said rule, agreed to violate the same, and if they further believe from the evidence that she suffered any damage from the failure of said conductor to put her off, then this defendant is not liable in damages to said plaintiff."

The court refused to give each of these charges as asked.

The further facts appear in the opinion.

Messrs. Wood & Wood for appellant.

Messrs. Smith & Lowe for appellee.

Stone, Ch. J., delivered the opinion of the court:

The plaintiff, a female, took the east-bound train of the defendant Railroad Company at Meridian, Miss., on the evening (about dusk) of April 23, 1887. The train of that hour was what is known as the limited or fast train, which makes but few stops, and is not intended for local travel. The railroad furnishes another train which makes daily trips each way, and is designed to meet that want, and stops at every station on the road. On two points there is a palpable conflict in the testimony. *Mrs. Carmichael* testified that she desired to go to Jonesboro, Ala., and that she applied to the ticket agent at Meridian for a ticket to Jonesboro, and that he refused to give it to her. She testified further that the baggage-master refused to give her a check for her baggage, because she had no ticket. According to her testimony, the train did not stop at Jonesboro, but carried her about two miles further east, to a stopping place for day trains, near Bessemer, and there put her off. Her husband testified that he was at Jonesboro when the train passed waiting to receive her, and that the train did not stop; merely slowed up, coming nearly to a stop, and then moved on. She had testified that when the ticket agent refused her a ticket to go on that train, she saw the conductor, and he told her to get on the train, and he would receive her fare, and put her off at Jonesboro. This is the version given in the plaintiff's testimony.

The testimony for the railroad, if believed, proves that plaintiff made no mention of Jonesboro as her destination, but that in all she said she mentioned Bessemer as the place at which she wished to be put off. Defendant's witnesses testified that the train stopped to take on water very near Jonesboro station, with the coach in which plaintiff was riding almost op-

posite the depot, and that it remained stationary to take on water about three minutes. This was sufficient time for her to leave the train, if it be believed. It was also testified by defendant's witnesses that, at this time, water being scarce in Birmingham, trains were ordered to take water at Jonesboro, and that the fast or limited trains were included in this order. The testimony was full and undisputed, however, that the established orders and regulations of the Railroad Company were that passengers should not be received on or allowed to depart from the trains known as "fast" or "limited," except at the more important stations where they regularly made stops, and that neither Jonesboro nor Bessemer was one of the stopping places for that class of trains.

We think the inference from plaintiff's testimony alone is irresistible that when she made application at Meridian for a ticket on the fast train it was denied her, because the train did not stop at the place she was going to; and this whether she applied for a ticket to Jonesboro or to Bessemer. She therefore traveled on a train and to a destination in violation of the orders of the Railroad Company, with knowledge that she had been refused a ticket on that account.

It is contended for appellee that "there was no evidence to support the charges asked in relation to the violation of the rules of the Company by appellee and the conductor." The brief then refers to the testimony of four of the railroad's employes, to the effect that, water being scarce in Birmingham at that time, trains were ordered to take water at Jonesboro; and, to the testimony of the three that were on the train, that a stop of three minutes was made that night at Jonesboro, and water taken on. The brief then continues: "For this reason alone, if for no other, the charges in relation to the violation of the rules of the Company by the plaintiff and the conductor were properly refused." The meaning of this argument is that there was no testimony to support the hypothesis of the charges, and that, being abstract, they were properly refused. 3 Brick. Dig. p. 118, § 106, *et seq.*

We have stated the two points on which the testimony of the opposing parties to this suit is antagonized. To adopt the argument noted above, we must take as true the testimony of Mrs. Carmichael, that when she applied for a ticket, and when she negotiated with the conductor for passage without a ticket, she represented Jonesboro as her place of destination, against the testimony of four witnesses that she named Bessemer as the place at which she desired to get off; and that we take as true the testimony of three of those four witnesses that the train did stop at Jonesboro for three minutes, against the testimony of herself and husband that it did not stop. As we have said, we think the conclusion irresistible, from the testimony of Mrs. Carmichael herself, that she was refused a ticket, because the train was not allowed to stop at the place of her destination. This was sufficient notice to her that any agreement the conductor might make to put her off at the place she named would be a violation of the rules of the Company. Conceding all the plaintiff contends for,—namely,

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that the conductor agreed to put her off at Jonesboro, and failed to do it, and that the flagman was rude or rough in getting her off the train at a very unsuitable place,—is the corporation liable for the injury or indignity? Counsel have produced no authority which sustains such position. "A railway conductor cannot be required by a passenger to deviate from his train orders, on the latter's statement of an alleged agreement with the company conflicting therewith." 2 Wood, *Railway Law*, § 355.

"But a passenger must take notice of the published rules of a railway company. He is not entitled to damages if he takes a train which, by such rules, does not stop at the station to which he desires to go." *Id.* § 356.

"Everyone is bound to know that a railway conductor has no general power to run his train except in conformity to the schedule." *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277; *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 663, 12 Am. & Eng. R. R. Cas. 141.

"A passenger who voluntarily rides in a baggage-car by permission of the conductor, but against the rules of the railroad conspicuously posted in that car, and is injured in consequence of riding there, cannot recover from the railroad company on account of its negligence." *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21.

"A duty of a railroad company to the public requires that she should run her trains according to her rules and regulations, without infringing upon them to accommodate a single passenger. It is the duty of a person about to take passage to inquire when, where and how he can go or stop, according to regulations, and if he makes a mistake which is not induced by the agents of the railroad company, he has no remedy." *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 Ind. 141.

"It is not competent, we think, for the conductor to agree with an individual passenger to carry him to a given place, and stop at that place to allow him to leave the train, and thus bind the railroad company, unless the place at which he is to stop is a regular station on the train which he is conducting." *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12.

The case of *Wells v. Alabama G. S. R. Co.*, 67 Miss. 24, was a suit by a passenger against a railroad company for not putting her off at the station she desired to go to. Among other things the court said: "Before embarking, she applied to the ticket agent to purchase a ticket for Russell's, and was refused. Not content with one refusal, application was made the second time, and was again refused. Surely these facts afford no support to the theory of a special contract. On the contrary, they afford convincing proof that there was no such contract, and, further, that appellant, as a reasonable being, was thereby warned that the taking of the train for Russell's would be at her own peril."

Railroads have the undoubted power to prescribe rules for the running of their trains. They not only have the power, but their highest duty demands that they exercise it. On this depend the safety of passengers, the safety of trains and the preservation of vast property

interests. The immense power and capacity of railroads for evil as well as for good render it of supreme importance that regulations be observed, and that trains run strictly on schedule time, and according to schedule requirements. The horrible railroad collisions and disasters which fill the news columns are a tremendous warning against violation or disregard of orders by employes having charge of trains. Conductors of railroad trains are but agents, authorized, and only authorized, to run their trains according to prescribed rules; and, if it were necessary to the decision of this case, there are many decisions which hold that persons dealing with them are bound to take notice, or inquire and inform themselves of the extent of their powers. Such is the general rule when one deals with an agent not of the class called "general agents." *Cummins v. Beaumont*, 68 Ala. 204; *Herring v. Skaggs*, 63 Ala. 180.

But we need not go that far in this case. We feel bound to hold that Mrs. Carmichael had notice that it was against the regulations of the Railroad Company for that train to stop, either at Jonesboro or Bessemer, whichever place she named as her destination, either to take on or put off a passenger. So she was not only not deceived in the premises, but it was at her instance that the conductor agreed to violate orders, and to stop and put her off at a place at

which the regulations did not allow him to stop for such purpose.

It needs scarcely be said that when one dealing with an agent knowingly induces such agent to transcend his authority he can maintain no action against the principal for a breach of an agreement thus entered into by the agent in excess of his authority. The principle goes further. When one deals with an agent in known excess of the latter's authority, he takes the risk of ratification by the principal, and cannot even maintain an action against the agent for a breach of the contract so made in the name of the principal. The reason is that he is not in such case deceived by any assumed authority of the agent. *Aspinwall v. Torrence*, 1 Lans. 381, 386; Story, Ag. § 265; 1 Wait, Act. and Def. 258.

Applying the principles settled above to the rulings in this case, we hold that the city court erred in the first, third and fourth paragraphs of the general charge, as shown in the bill of exceptions.

The charge asked by plaintiff was improper under the testimony in this case. Of the charges asked by defendant, the court should have given the first, third, sixth and tenth. Charges 2 and 7 were properly refused, and charges 4 and 9 have no field of operation under the rules we have declared.

Reversed and remanded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Minnie S. SACKETT

v.

Bruno F. RUDER.

(....Mass.....)

1. A statutory right to challenge peremptorily in a civil case two of the jurors from the panel, called to try the cause, extends to by-standers put upon the panel as well as to jurors regularly summoned; and such jurors may be challenged after they have been sworn but before anything else is done, where such practice prevails in the cases of the regularly summoned jurors.

2. If the notice not to sell intoxicating liquors to a person who has a habit of drinking to excess, provided for by Pub. Stat., chap. 100, § 23, does not expressly state that the person signing it holds such relationship to the one referred to therein as is required by the Statute, to render a liquor seller who after having received the notice furnished liquor to such person liable for the prescribed penalties, it must be shown that he understood, that is, knew or believed, that such relationship existed.

3. To assist the jury in determining the amount to be assessed as damages for furnishing liquor to one who has a habit of drinking to excess contrary to the provisions of Pub. Stat., chap. 100, § 23, evidence may be admitted of the circumstances attending each violation of the Statute complained of, and of the consequences which in whole or in part resulted from such violation so far as they affected the relations between the person complaining and the one receiving the liquor.

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4. In an action to recover damages for furnishing liquor to one who has a habit of drinking to excess to warrant a recovery under counts covering a period of time plaintiff must show a sale within the period named, but under counts where particular days are set out a recovery may be had for injuries suffered by reason of a sale on any day not used as a basis for recovery under another count.

5. In such action there can be only one allowance of damages for one sale, and only one sale allowed for under any count; and damages can only be allowed for permitting loitering about the premises where liquors are sold for the particular occasions proved other than those when sales are alleged to have been made.

(October 25, 1890.)

EXCEPTIONS by defendant to a judgment of the Superior Court for Hampshire County in favor of plaintiff in an action brought to recover the statutory penalties for furnishing liquors to one who had the habit of drinking to excess. *Sustained.*

When the case was called for trial two of the jurors who had been sworn to try the case were absent and the court directed two talesmen to be returned to take their places. This was done and one of the persons returned was Everett C. Stone. Defendant desired to challenge Stone and so stated to his counsel, and the latter went to the clerk's desk for that purpose. Before he reached it the clerk had commenced to swear the talesmen. Counsel did not interrupt him, but as soon as the oath was administered and before anything else was

done stated that defendant challenged Stone. The court refused to allow the challenge on the ground that it came too late.

Plaintiff was a daughter of Rufus W. Sackett of Northampton, who died December 5, 1889. On February 26, 1889, she served on defendant a notice of which the following is a copy:

To whom it may concern:

Notice is hereby given not to sell any intoxicating liquors to R. W. Sackett of this city after this date, Feb. 26th, 1889.

Miss Sackett.

Plaintiff offered evidence for herself and from various neighbors on the question of damages.

That after the notice was given her father was kind and sociable when sober; but when intoxicated, as he frequently was, he was different in language, was cross and abusive to her, and told her on one occasion to go to hell; on another he told her he would shoot her, and on other occasions came into the room when the plaintiff had company and she could not keep him out, though he was intoxicated; that on other occasions she was obliged to take care of the horse when her father came home so intoxicated that he could not do it; that once he broke the door down on coming home and finding it locked, though she had left the key where he could find it, herself being away from home, and other evidence of a similar character. She testified that his conduct made her very nervous, and impaired her health. All this evidence was introduced to increase the damages under the counts in her declaration.

The jury returned a general verdict for plaintiff in the sum of \$1,533.75.

The case further appears in the opinion.

Messrs. William G. Bassett and John T. Keating, for defendant:

Defendant's right of peremptory challenge of the talesman Stone was seasonably exercised and should have been allowed.

Pub. Stat. chap. 170, §§ 33, 36.

The right of peremptory challenge is in addition to earlier statutory and common-law rights, and all necessary latitude to a fair and reasonably deliberate exercise of it should be allowed.

Rev. Stat. chap. 95, § 27; Gen. Stat. chap. 182, § 31; Laws 1862, chap. 85; Pub. Stat. chap. 170, § 36; *Stone v. Segur*, 11 Allen, 568; 1 Thompson, Trials, § 91.

Such right may now be exercised after something has been done relative to the case, *i. e.*, after it has been determined by examination that a person called stands indifferent.

Pub. Stat. chap. 170, §§ 35, 37; Laws 1887, chap. 149; 1869, chap. 151; 1873, chap. 817; 1875, chap. 167; Pub. Stat. chap. 214, § 6; *Com. v. McElhaney*, 111 Mass. 439; *Woodward v. Dean*, 118 Mass. 297; *Smith v. Earle*, 118 Mass. 531.

The test is, whether there was a waiver of the right to challenge. In this case the challenge was claimed as soon as politeness and orderly conduct would permit.

Hallock v. Franklin County, 2 Met. 558; *Jeffries v. Rindall*, 14 Mass. 205; *Davis v. Allen*, 11 Pick. 466; *Orrick v. Commonwealth Ins. Co.* 21 Pick. 456, 471; *Kent v. Charlestown*, 2 Gray,

281; *Brown v. Reed*, 81 Me. 153; *Tilton v. Kimball*, 52 Me. 500.

The notice was not good. It did not convey to defendant in clear and unmistakable terms the substance of the requirements of the Statute.

Kennedy v. Saunders, 2 New Eng. Rep. 512, 142 Mass. 9; *Tate v. Donovan*, 8 New Eng. Rep. 685, 143 Mass. 590; *Taylor v. Carroll*, 5 New Eng. Rep. 123, 145 Mass. 95.

The evidence to enhance damages beyond the minimum limit of the Statute was wrongfully admitted under the pleadings, which set out no special damages.

Baldwin v. Western R. Co. 4 Gray, 333; *Warner v. Bacon*, 8 Gray, 397; *Gorman v. Wheeler*, 10 Gray, 363; *Parker v. Lovell*, 11 Gray, 354; *Ordway v. Colcord*, 14 Allen, 59; *Pierce v. Charter Oak L. Ins. Co.* 138 Mass. 151, 164.

The jury ought not to have been allowed to find damages for specific instances of harm to plaintiff growing out of an appetite for drink assumed to have been produced and fostered in her father by his loitering in particular instances on defendant's premises, when the drink immediately causing the same was procured at places other than defendant's.

Marble v. Worcester, 4 Gray, 395; *Derry v. Plinter*, 118 Mass. 133; *Pratt v. Weymouth*, 6 New Eng. Rep. 671, 147 Mass. 245; *Shugart v. Egan*, 83 Ill. 56; *Schmidt v. Mitchell*, 84 Ill. 195; *Calloway v. Laydon*, 47 Iowa, 456; *Chase v. Kenniston*, 76 Me. 209; *McGee v. McCann*, 69 Me. 79; 2 Greenl. Ev. §§ 256, 268; 1 Sutherland, Dam. p. 21.

Messrs. Bond & Mason and Charles N. Clark, for plaintiff:

At common law the right of challenge must be exercised before the juror is sworn.

1 Thompson, Trials, p. 86, § 91.

The right to challenge peremptorily in criminal cases must be exercised before the jurors are examined as to their interest, bias and opinions.

Com. v. McElhaney, 111 Mass. 439.

The challenge of the talesman should be governed by the same rule which prevails in criminal cases.

Com. v. Gee, 6 Cush. 174.

The notice served upon the defendant was sufficient.

Kennedy v. Saunders, 2 New Eng. Rep. 512, 142 Mass. 9; *Tate v. Donovan*, 8 New Eng. Rep. 685, 143 Mass. 590.

There is nothing in the Statute which expressly requires the relationship of the party giving the notice to be stated in it.

Taylor v. Carroll, 5 New Eng. Rep. 123, 145 Mass. 95.

The notice was properly signed. Such a signature would be sufficient under the Statute of Frauds or under the Statute of Wills.

Sandborn v. Flagler, 9 Allen, 474; *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. 14 How. 446, 14 L. ed. 493; 2 Greenl. Ev. § 674.

The evidence with reference to the damages was properly admitted.

See *Chesley v. Tompson*, 187 Mass. 136; *Meagher v. Driscoll*, 99 Mass. 281; *Fillebrown v. Hoar*, 124 Mass. 580.

If a tort is said to have been committed on a particular day, the plaintiff is not confined

in his proof to the day laid, but may support the allegation by proving that the wrong was done on another day.

Gould, Pl. § 65; Heard, Civil Pl. 216; *Little v. Blunt*, 16 Pick. 359; *Perry v. Botsford*, 5 Pick. 189; *Com. v. Dillane*, 11 Gray, 67; *Com. v. Burke*, 14 Gray, 51; *Com. v. Maloney*, 16 Gray, 20.

Field, Ch. J., delivered the opinion of the court:

At common law no peremptory challenge to jurors was allowed in civil actions, and in criminal cases, where such challenges were allowed, the right of challenge must be exercised before the juror was sworn. *Creed v. Fisher*, 9 Exch. 472; *Stone v. Segur*, 11 Allen, 568; *Reg. v. Frost*, 9 Car. & P. 129, 187; *Reg. v. Key*, 8 Car. & K. 871, 2 Den. C. C. 846.

The Statutes in force here on this subject when the present case was tried were Pub. Stat., chap. 170, §§ 83, 89, and chap. 214, §§ 5, 6. The first clause of chap. 170, § 86, is as follows: "In all cases, civil or criminal, either party shall, before the trial commences, be entitled to challenge peremptorily two of the jurors from the panel called to try the cause," etc. Similar language is used in chap. 214, § 6, with reference to the challenging of jurors, "when the indictment is for an offense punishable with death or imprisonment for life." The provisions of statute relating to returning jurors from the by-standers "to complete the panel," are found in Pub. Stat., chap. 170, §§ 83, 84. In civil causes, except in the County of Suffolk, the first twelve jurors on the list of jurors who have been summoned to attend are, unless excused, sworn and impaneled as the first jury, and the next twelve are sworn and impaneled as the second jury, and the jurors are not sworn in each case, but once for all causes that may be committed to them. In criminal cases the jurors are called, sworn and impaneled anew for the trial of each case, "according to the established practice." Pub. Stat. chap. 170, §§ 26-32.

In criminal cases, according to the established practice, when the prisoner is set to the bar to be tried, the clerk publicly announces to him that he has the right to challenge a certain number of jurors without cause, and that he must exercise this right after they are called and before they are sworn. There is no similar announcement in the trial of civil causes. Civil causes are often tried in the absence of the parties, and from this and the practice of swearing the jurors at the beginning of the session to give a true verdict in all causes that may be committed to them it necessarily resulted that in any particular civil action the right of peremptory challenge might be exercised after the jurors had been sworn, and by the attorneys of the parties for them. When the right of peremptory challenge was first given in civil causes by Stat. 1862, § 84, the supreme judicial court was authorized to prescribe by general rules the manner in which it should be exercised (see Pub. Stat., chap. 170, § 87); but no rules having been prescribed, the practice in civil causes became established of permitting peremptory challenges up to the time when the trial commenced by the reading of the writ, or by taking some action which in

the ordinary sense of the words may be said to be the beginning of the trial. In criminal cases the practice continued of requiring the prisoner to exercise the right of peremptory challenge before the jurors were sworn. It was considered that a criminal trial commenced when the prisoner was set to the bar to be tried, and when, having pleaded not guilty, the jurors were called, and, after giving him an opportunity to challenge them, were sworn. The right of a court to reject a juror for cause, even after he has been sworn, if the attention of the court is then for the first time called to the objection, is not now under consideration. The practice as we have stated it is, we think, well established in both civil and criminal cases with reference to the challenge of jurors who have been regularly summoned. With reference to the peremptory challenge of jurors who are returned from the by-standers, we are not aware that the occasions have been so frequent that the practice can be said to be well established. Such a juror when returned, even in a civil cause, is sworn only for the particular cause, and he does not become one of the panel to try the cause until he has been accepted as a juror by the court. Neither party to the present case has argued that there is no right whatever to challenge peremptorily a talesman, and as the Statute gives the right "to challenge peremptorily two of the jurors from the panel called to try the cause," we think that the right of peremptory challenge extends to by-standers put upon the panel as well as to the jurors regularly summoned. The parties have nothing to do with the original selection of jurors, whether they have been regularly summoned, or have been returned from the by-standers, and the same reasons for allowing peremptory challenges to a party exist in one case as in the other. The question which has been argued is whether a party in a civil cause can challenge peremptorily a talesman after he has been sworn but "before anything else was done." This question, we think, must be decided by analogy, and we are of opinion that the right to challenge peremptorily such jurors as are returned from the by-standers and accepted by the court must be the same as the right to challenge other jurors upon the same panel, and that it can be exercised within the same limits. According to the practice the defendant had the right to challenge peremptorily any one of the regular jurors upon the panel at the time he attempted to challenge Stone, who was returned as a talesman; and as we are unable to make any distinction between the jurors with reference to the right of challenge, we think that the presiding justice erred in refusing to allow the challenge of Stone.

The form of the notice given in this case does not differ greatly from that given in *Taylor v. Carroll*, 145 Mass. 95, 5 New Eng. Rep. 122. It is a nice question whether the signature in that case indicated that the person signing it was a son of the person named in the body of the notice more distinctly than the signature in the present case indicated that the person signing it was a daughter of the person named in the body of the notice. The notice must in fact be given by a person who holds such a relationship to the person who has the habit of drinking to excess, as is required by

Pub. Stat., chap. 100, § 25, and if the notice does not expressly state that the person signing the notice holds any such relationship, we think that it must be shown that the defendant understood, that is knew or believed, that such a relationship existed.

In *Tate v. Donovan*, 143 Mass. 590, 3 New Eng. Rep. 685, it was held that the notice need not state that the person concerning whom the notice is given has the habit of drinking spirituous or intoxicating liquors to excess, but that the person to whom a proper notice has been given is put upon inquiry to ascertain this fact. But it is going too far to hold that a person is put on his inquiry by any notice that may be given. It is only when a person is notified in accordance with the Statute that it can reasonably be held that he is put upon inquiry. The Statute fairly implies that the person notified must have notice or knowledge that one of the persons named in the Statute has given him notice in pursuance of the Statute. A reasonable cause to believe is not the same thing as actual belief, and we think that it must be shown that the person notified understood in some manner that one of the persons named in the Statute had given him the notice if the notice itself does not state this. In the present case the jury found that the defendant knew that the person signing the notice was the daughter of Rufus W. Sackett, and this would render the exceptions taken on this part of the case immaterial.

In determining the questions of law relating to what are called damages, it is necessary to consider the nature of the action. In previous decisions it has been intimated that this is a penal action. *Taylor v. Carroll* and *Tate v. Donovan*, *supra*.

Except in the case of an employer, the Statute does not require that the person giving the notice, in order to maintain an action, should have been injured in his person or property. In this respect section 25 differs from section 21 of the same chapter, and resembles section 24. See *O'Connell v. O'Leary*, 145 Mass. 811, 5 New Eng. Rep. 296. The husband, wife, parent or child who may maintain the action need not be dependent for support upon the person having the habit of drinking to excess, or have suffered anything which by the common law is considered as damages. *Taylor v. Carroll*, *supra*.

The sum to be recovered for each violation of the Statute cannot be less than \$100 whether there is any damage or not. The Statute, indeed, says that the sum to be assessed, within the limits prescribed, is to be assessed as damages. This must be taken as a direction to the jury in determining the amount, but the word "damages" is not used in a strictly legal sense. In somewhat similar statutes the sum to be recovered is to be assessed "with refer-

ence to the degree of culpability." Pub. Stat. chap. 52, § 17; chap. 78, § 6; chap. 112, §§ 212, 213; Stat. 1883, chap. 243; Stat. 1887, chap. 270, § 3.

Penalties and forfeitures prescribed by statute are sometimes not for definite amounts, but only for amounts within certain limits, and when they are recoverable by an action of tort the amount within these limits must be determined by the jury; and often the statutes lay down no rules for the guidance of the jury. See, for an example, Pub. Stat., chap. 80, §§ 68, 81; chap. 217, § 2.

We think it clear that this is essentially a penal action, and that the common-law rules concerning damages cannot be in all respects applied to it, and that it was competent for the court, if it saw fit, in order to assist the jury in determining the amount to be assessed within the limits prescribed, to admit evidence of the circumstances attending each violation of the Statute complained of, and of the consequences which in whole or in part resulted from such violation, so far as they affected the relations between the plaintiff and her father. Certainly we are unable to see that the presiding justice in the present case violated any rule of law in any of his rulings upon what is called the assessment of damages.

It does not appear that any objection was taken to the form of the different counts in the declaration. The instruction "that in order to entitle the plaintiff to recover it was not necessary that the plaintiff should prove that the sales were made on the particular days set out in the declaration; that in order to recover under the counts covering a period of time the plaintiff must show a sale within the period named; but that under the counts where particular days were set out, the plaintiff might recover for injuries which she suffered by reason of a sale made on any day not used as a basis for recovery under any other count,"—is in accordance with the rule adopted in the trial of criminal cases. No question is made that all the acts of the defendant of which any evidence was introduced were done within twelve months after the notice was given. The instruction that "there must be only one allowance of damages for one sale, and only one sale allowed for under any count," is correct. The instruction that "you must notice that under the counts for loitering, as under the counts for sales, you are only to allow damages for a particular occasion—some particular occasion proved—other than the occasion when sales are made," is in accordance with the decision in *Kennedy v. Saunders*, 142 Mass. 9, 3 New Eng. Rep. 512.

For the reason that the presiding justice erred in not allowing the challenge to Stone, the exceptions are sustained.

WASHINGTON SUPREME COURT.

TERRITORY OF WASHINGTON, *Recept.*,
v.AH LIM, *Appt.*

(....Wash.....)

1. The law-making power of the Legislature cannot be restrained by the courts upon considerations of policy or supposed natural equity.
2. A Territorial Legislature has power to prohibit indulgence in a habit which it considers detrimental to either the moral, mental or physical well-being of one of the citizens of the Territory, to such an extent that he is liable to become a burden on society, where the Organic Act extends its power to all rightful subjects of legislation.
3. No limit can be placed by the courts on the discretion of the Legislature as to the passage of laws upon subjects which are proper for legislative enactment and control.
4. The title of a penal statute need not declare the purpose for which the statute was enacted.
5. A claim that a statute forbidding the use of opium is in violation of the inalienable rights to life, liberty and pursuit of happiness is not a sufficient ground for holding the statute void.

(Scott and Stiles, JJ., dissent.)

(February 28, 1890.)

APPEAL by defendant from a judgment of the District Court for King County convicting him of a violation of the provisions of a statute declaring the smoking or inhaling of opium to be a misdemeanor. *Affirmed.*

The facts are fully stated in the opinions.

Messrs. Humes & Andrews, for appellant:

A crime is a trespass upon some right, public or private. A vice consists in an inordinate, and hence immoral, gratification of one's passions and desires. The primary damage is to one's self. When we contemplate the nature of a vice we are not conscious of a trespass upon the rights of others.

Tiedeman, Pol. Powers, § 68.

It cannot be made a legal wrong for one to become intoxicated in the privacy of his room.

Ibid.

The right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our law.

Cooley, Const. Lim. § 885; Tiedeman, Pol. Powers, § 68.

The inalienable right to "liberty and pursuit of happiness" is violated when a man is prohibited from doing what does not involve a trespass on others.

Tiedeman, Pol. Powers, p. 152.

The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for a violation of a right by the action of another must exist or be threatened in order to justify interference by law.

Id. pp. 150, 151.

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Public sobriety is a relative duty, and therefore enjoined by our laws.

Private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction.

1 Bl. Com. pp. 128, 124.

If a man chooses to degrade himself by intoxication in the privacy of his own home or apartments, he commits no offense against the public, and is consequently not subject to police regulation.

Tiedeman, Pol. Powers, p. 302.

Messrs. Stratton & Fenton for respondent.

Dunbar, J., delivered the opinion of the court:

The defendant was indicted at the August Term of the District Court for King County for the crime of smoking opium, as follows, to wit (omitting the formal parts of the indictment): "The said Ah Lim, on the 27th day of September, A. D. 1889, in the County of King, in the district aforesaid, then and there being, did then and there, willfully and unlawfully, smoke opium, by then and there burning said opium and inhaling the fumes thereof through an instrument commonly known as an 'opium pipe,' contrary to the form of the Statute," etc. To this indictment the defendant interposed a demurrer specifying several grounds, but the one relied upon by defendant, and the one to be considered here, is that the Statute upon which the indictment is based is unconstitutional, as being in violation of the inalienable rights to life, liberty and pursuit of happiness, and that it involves a deprivation of liberty and property, through a limitation upon the means and ways of enjoyment, without due process of law.

The duty of passing upon the constitutionality of a law should be approached by the court with the utmost caution, and demands the most solemn, thoughtful and painstaking consideration; and in view of the consequences to society from the annulling of laws made by the representatives of the people, and presumed to have been enacted in response to the express desire of the people, it becomes the gravest question with which courts have to deal; and we believe it has been the uniform conviction of the courts that they ought not to, and cannot, in justice to a co ordinate department of the state government, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity. The following quotation from an opinion rendered by *Chief Justice Marshall* in the case of *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 [3 L. ed. 162], commends itself to our approbation as resting upon sound principles of propriety and right. Said the judge: "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by a duty to render such a judgment, would be unworthy of its station could it be unmindful

of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its Acts to be considered as void."

The Organic Act extends the power of the Territorial Legislature to all rightful subjects of legislation; and, when once we concede the rightfulness of the subject, the extent and character of the legislation on that subject cannot be called in question by the court. It has a right to take a comprehensive view in determining the necessity of the law, and the character of the purpose to be accomplished by it. This is the especial function of the Legislature, and, in the investigation of legislative power, courts have nothing to do with questions of policy or expediency; for, as a learned author says: "The Constitution has created the legislative and the judicial departments,—the one to make the law, the other to construe and administer it. It may be mischievous in its effects, burdensome upon the people, conflict with our conceptions of natural right, abstract justice or pure morality, and of doubtful propriety, in numerous respects, and yet we would not be justified to hold that it was not within the scope of legislative authority for such reason; and, as has been well said by Mr. Cooley in his work on Constitutional Limitations, it must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility. Page 192.

"The legislative and judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions, and cannot, directly or indirectly, while acting within the limit of its authority, be subjected to the control or supervision of the other without an unwarrantable assumption by that other power which by the Constitution is not conferred upon it." Of course, we do not pretend to argue that it is a responsibility which can at all times be obviated or avoided; but we insist that it must always be done with great caution and circumspection. Indeed, so weighty have the courts felt this responsibility that many courts have adopted a rule that they will not decide a legislative Act to be unconstitutional by a majority of a bare quorum of the judges only. Many courts have held that, before it can be pronounced unconstitutional, some particular prohibition must be pointed out.

In the case of *Bertholf v. O'Reilly*, 74 N. Y. 511, Justice Andrews, in rendering the opinion of the court, says: "The question whether the Act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional . . . prohibitions. The legislative power has no other limitation. If an Act can stand when brought to the test of the Constitution, the question of its validity is at an end; and neither the executive nor judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although

they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. . . . No law can be pronounced invalid for the reason, simply, that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare." The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives according to the methods provided by the Constitution. Again, in *People v. West*, 106 N. Y. 298, 8 Cent. Rep. 758, the court says: "The power of the Legislature to define and declare public offenses is unlimited, except in so far as it is restrained by constitutional provisions and guaranties. A legislative Act is presumptively valid; and whoever questions its validity must be able to point to some limitation or restriction, or to some guaranty in the Constitution of the State, or the United States, which it violates, before its operation can be stayed or the court be called upon to pronounce it void. . . . The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action; but, nevertheless, the justice and wisdom of penal legislation, and its extent, within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere."

Whether or not the main current of decisions flows in the exact direction taken by the court in the New York cases, we are satisfied that the doctrine is well established that the power of the Legislature cannot be restrained by the courts upon considerations of policy or supposed natural equity. Were this power, however, given to the courts, the law, instead of being administered and decided upon uniform principles, would be decided according to the particular bent or inclination of mind of the ruling judge. What would appeal to one judge as natural equity would not be so received by another; and the different views of what constitutes a natural equity would only be equalled in number by the number of judges on the bench, each judge following his own ideas of abstract right, not limited to any well-defined path of investigation, but controlled and impelled only by his personal ideas of what ought or ought not to be allowed in a particular case,—pointed in no definite direction, but drifting aimlessly, like mariners at sea under a clouded sky, with neither compass nor log. "Of late years, it has been much the fashion," says Judge Bell in *Com. v. M'Williams*, 11 Pa. 61, 70, "to impeach the action of the legislative bodies as unconstitutional when it happens not to accord with a party's notion of propriety and abstract right." But, says the court in *Davis v. State*, 3 Lea, 378, "whether a statute is 'contrary to the genius of a free people,' is a question for the Legislature, and not the judge. It cannot be annulled upon supposed natural equity, the inherent rights of freemen or any general and vague interpreta-

tion of a provision of the Constitution beyond its plain and obvious import."

The judiciary could not set aside a law, free from conflict with the Constitution, because it seemed unjust. It could only interfere by overstepping the limits of its sphere, by appropriating to itself a power beyond its province, and by setting an example which other organs of the government might not be slow to follow. It is its peculiar duty to keep the first lines of the Constitution clear, and not to stretch its power in order to correct legislative or executive abuses. Every branch of the government, the judicial included, does injustice for which there is no remedy, because everything human is imperfect. The legislative power "may be unwisely exercised or abused, yet it is a power intrusted by the Constitution to the Legislature, which, while exercised within the scope of the grant, is subject alone to their discretion; with which the judicial tribunals have no right to interfere because, in their judgment, the action of the Legislature is contrary to the principles of natural justice." *Williams v. Cammack*, 27 Miss. 209.

In the case at bar, no special constitutional limitation or inhibition is pointed out with which the law in question is in conflict, but it is contended by the defense that the right of liberty and pursuit of happiness is violated by the prohibition of any act which does not involve direct and immediate injury to another. Counsel for appellant says in his brief that the parent may be compelled to send the child to school so many months in the year; the State may prescribe his studies, and may tax the people to the verge of bankruptcy to mould the infant's mind to their liking; but this right, he urges, is on the ground that the child is the ward of the State, and that such jurisdiction ceases when it becomes of age. It is difficult to see how the question of inalienable rights can be affected by age, when the law prescribes the age at which the ward arrives at his majority, and the time at which the inalienable rights attach. Doubtless the true theory on which compulsory education is sustained is that the State has an interest in the intellectual condition of each of its citizens, recognizing the fact that society is but an aggregation of individuals, and that the moral or intellectual plane of society is elevated or degraded in proportion to the plane occupied by its individual members, and that the education is not compelled for the benefit of the child during its minority, or for its exclusive benefit after its majority. The State has an undisputed right to, and does, provide gymnasium attachments to its schools, and prescribes calisthenic exercises for the muscular development of school children. The object to be attained is not for the exclusive benefit of the child. The State has an interest in the health of its citizens, and has a right to see to it that its citizens are self-supporting. It is burdened with taxation to build and maintain jails and penitentiaries for the safe-keeping of its criminals, and to protect its law-abiding subjects from their ravages. It is taxed to maintain insane asylums for the safe-keeping and care of those who become insane through vicious habits or otherwise. It is compelled to maintain hospitals for its sick, and poor-houses for the

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indigent and helpless; and surely it ought to have no small interest in, and no small control over, the moral, mental and physical condition of its citizens. If the State concludes that a given habit is detrimental to either the moral, mental or physical well-being of one of its citizens, to such an extent that it is liable to become a burden upon society, it has an undoubted right to restrain the citizen from the commission of that act; and fair and equitable consideration of the rights of other citizens makes it not only its right, but its duty, to restrain him. If a man willfully cuts off his hand, or maims himself in such a way that he is liable to become a public charge, no one will doubt the right of the State to punish him; and if he smokes opium, thereby destroying his intellect, and shattering his nerves, it is difficult to see why a limitation of power should be imposed upon the State in such a case. But it is urged by the defense that a moderate use of opium, or that the moderate use of an opium pipe, is not deleterious, and consequently cannot be prohibited. We answer that this is a question of fact, which can only be inquired into by the Legislature. Smoking opium is a recognized evil in this country. It is a matter of general information that it is an insidious and dangerous vice, a loathsome, disgusting and degrading habit, that is becoming dangerously common with the youth of the country, and that its usual concomitants are imbecility, pauperism and crime. It has been regarded as a proper subject of legislation in every western State; and it is admitted by counsel in defense, in the argument of this case, that the Statute in relation to the suppression of joints kept for the purpose of smoking opium was constitutional and right.

Granted that this is a proper subject for legislative enactment and control, no limit can be placed on the legislative discretion. It is for the Legislature to place on foot the inquiry as to just in what degree the use is injurious, to collate all the information, and to make all the needful and necessary calculations. These are questions of fact, with which the court cannot deal. The constitutionality of laws is not thus to be determined.

Some criticism has been made on the fact that the Statute did not declare in its title the purpose for which it was enacted. This is not necessary for the validity of a penal statute, and does not affect the constitutionality of its provisions. *People v. West*, 106 N. Y. 293, 8 Cent. Rep. 758.

It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of well-defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society. Natural rights and liberties of a subject are relative expressions, and have relative or changeable meanings. What would be a right of liberty in one state of society would be an undue license in another. The natural rights of the subject, or his rightful exercise of liberty in the pursuit of happiness, depends largely upon the amount of protection which he receives from the government. Governments, in their earlier existence, afforded but little protection to their subjects. Consequently the subject

had a right to pursue his happiness without much regard to the rights of the government. The reciprocal relations were not large. He yielded up but little, and received but little. If he was strong enough to buffet successfully with the world, all well and good. If not, he must live on the charity of individuals, or die, neglected, on the highway. But now all civilized governments make provisions for their unfortunates, and progress in this direction has been wonderful even since noted sages like Blackstone lectured upon the inalienable rights of man. Not only is the protection of individual property becoming more secure, but the vicious are restrained and controlled, and the indigent and unfortunate are maintained, at the expense of the government, in comfort and decency; and the natural liberties and rights of the subject must yield up something to each one of these burdens which advancing civilization is imposing upon the State. It is not an encroachment upon the time-honored rights of the individual, but it is simply an adjustment of the relative rights and responsibilities incident to the changing condition of society.

Our conclusion is that the law in question involves no inalienable rights. It may be radical, injudicious and wrong; but as we have before indicated, these are questions solely for legislative investigation and discretion, and, as has been said by *Judge Story*: "Judges should regard it as their duty to interpret laws, and not to wander off into speculations upon their policy."

The judgment of the court below is affirmed.
Anders, Ch. J., and Hoyt, J., concur.

Scott, J., dissenting:

I cannot agree with the decision rendered in this case. That part of the Act upon which the indictment is founded is, in my opinion, void. It is as follows: "Any person or persons who shall smoke or inhale opium . . . shall be deemed guilty of a misdemeanor," etc. Sess. Laws 1893, p. 80.

It is amendatory of section 2073 of chapter 149 of the Code of 1881. The chapter is entitled, "Smoking and Inhaling Opium," and apparently was mainly intended to prohibit the keeping of resorts for the smoking of opium, and to this extent was a legitimate exercise of police powers. The purpose for which the amendment was adopted is not declared either in the entitling, or in the body of the Act, and cannot easily be arrived at. The acts prohibited therein have no reference to the keeping of a resort. The only other legislation we have found upon this subject is contained in the Act approved November 6, 1877, which amends section 13 of an Act approved November 12, 1875, entitled "An Act Defining Nuisances and Securing Remedies." The chapter in the Code does not refer in any way to this Act. All these laws were passed by our various Legislatures while we were under a territorial form of government.

The offense charged in this case cannot be held to be a nuisance, for it relates purely to the private action or conduct of the individual, and must not be confounded with those acts which directly affect the public. It is thought that the Act in question is *sui generis*; that there is none other of a similar nature in force

in this country, or one that has ever been sustained by the courts since we became an independent nation, although there may be an occasional instance somewhat closely allied to it. Legislation, however, has ordinarily been confined to those cases where the act of the person directly and clearly affected the public in some manner. But here a single inhalation of opium, even by a person in the seclusion of his own house, away from the sight, and without the knowledge, of any other person, constitutes a criminal offense under this Statute; and this regardless of the actual effect of the particular act upon the individual, whether beneficial or injurious. It is urged that there could be no conviction in such a case, for the want of proof. But the difficulty or impossibility of conviction could not affect the criminality of the act; also, the evidence might sometimes be furnished by the admission or confession of the guilty party, if in no other way. It is admitted that this law can only be sustained upon some one or more of the following grounds, viz.: that smoking or inhaling opium injures the health of the individual, and in this way weakens the State; that it tends to the increase of pauperism; that it destroys the moral sentiment, and leads to the commission of crime. In other words, that it has an injurious effect upon the individual, and consequently results indirectly in an injury to the community. And it is claimed that we must presume that the Legislature had some one or more of these objects in view in enacting the law, although there is nothing upon the face of the Act to indicate the legislative intention. This is going to a very great and dangerous extent to sustain legislation in this most important branch of our social structure.

In the case of *People v. West*, 106 N. Y. 203, 8 Cent. Rep. 758, in rendering its opinion, the court said: "It is not necessary to the validity of a penal statute that the Legislature should declare on the face of the Statute the policy or purpose for which it was enacted." The statement was apparently not necessary in the decision of that case; and it is a noticeable fact, in this connection, that in all the cases cited the purpose of the Acts were declared either in the entitling or in the body thereof, and were placed upon some one of the grounds mentioned, as affecting the health or safety of the public. The Act in question, in *People v. West*, was entitled "An Act to Prevent Deception in the Sale of Dairy Products, and to Preserve the Public Health."

In the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, which involved the validity of an Act making the owner of real estate, whereon he permitted intoxicating liquors to be sold, liable to damages for injuries resulting to individuals drinking it, the Act declared its purposes to be "the suppression of intemperance, pauperism and crime." In *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21 L. ed. 394], involving an Act granting to a corporation the exclusive right to maintain slaughter-houses within the limits of a certain prescribed district, and prohibiting all other persons from building, keeping or having such houses therein, the Act was entitled "An Act to Protect the Public Health." There may be no good reason for requiring the purpose of the law to be stated

upon its face in those cases wherein the injurious effect of the Act prohibited thereby is demonstrated by the Act itself, like the cutting off of the hand; but there is a substantial difference between such a case and those cases wherein the result of the Act, as to its being harmful, is doubtful or not apparent, and perhaps, occasionally, having an opposite effect in the same or different individuals. In such cases, at least, the object or purpose should be expressed. In all the cases above cited, the prohibited act directly affected and concerned the public, not simply through any primary effect upon the particular person, and they therefore do not apply with much force to the present case. Section 1924 of the Organic Act would seem to require that the object of the law should have been more fully expressed in the title, although it may be doubtful as to whether it is within the reason there given. The object must have been to serve some public purpose in one of the ways mentioned if it is valid, not merely to prevent the smoking of opium. That was the only means by which the final end or object was to be attained. See *Harland v. Territory of Washington*, 8 Wash. Terr. 145.

There is no good reason why the Legislature should not fairly declare the object or purpose of all such laws limiting the personal conduct of the citizen, at least where the direct or primary effect is upon himself only; and there are many good reasons why it should be required. Unless the Legislature has, as it is claimed it does have, the absolute, uncontrolled right to determine that the effect of any personal act it chooses to prohibit is injurious to the particular citizen,—and this is untenable,—then the authority cited, stating that it is not necessary to declare the purpose of the Act upon its face (*People v. West*), is not applicable here, as an entirely different case is presented. Limiting the scope of the Act to cases where injury results would not merely be declaring its purpose, but would be so framing the Act as to keep within the legislative province; for, clearly, where there is no resulting injury, there is no right to restrain, if laws restraining the personal conduct can be sustained at all where the act forbidden does not affect the public except through injury to the particular individual, and thereby, possibly, injuring the community in some one of the ways specified. Certainly, any idea of carrying such laws to a great extent would be calculated for an advanced public sentiment. However, if the Act in question declared that no man should willfully injure himself by smoking or inhaling opium, thereby limiting its scope to such cases where injury resulted, there would be strong, and I think valid, reasons for sustaining it, upon some one or more of the grounds mentioned. Every act of the individual which has a direct tendency to render him unfit to perform the duties he owes to society is a rightful subject of legislation. The principle is a just and legal one. A man has no right to do that which will render himself an imbecile or a pauper. Society has an interest in the promotion and preservation of the bodily, mental and moral health of each individual citizen, and laws tending to such results should be upheld in all reasonable ways. But because it is true that personal acts are rightful subjects of leg-

islation to the extent where they clearly interfere with the reciprocal rights of others, and their control is generally recognized as being within the police powers of the State, or because they may be a rightful subject of legislation to that further extent, where they merely result in injury to the individual, and thus less directly to the State, which, however, has not as yet been very generally, if at all, recognized heretofore in this nation, it cannot be that every self-regarding act of the person which the Legislature may choose to prohibit upon the ground that it is injurious to the individual, and thereby to the State, must be allowed to stand unquestioned through the courts, or that the courts have no duty to perform in the premises, as to determining whether the Legislature has exceeded the limit of its legitimate powers under the Constitution, unless a particular, specific constitutional provision can be shown which has been violated.

It is the one great principle of our form of government, expressed throughout that soul-inspiring document, our National Constitution, that the individual right of self-control is not to be limited, only to that extent which is necessary to promote the general welfare; and these are not questions of abstract right but of constitutional right. It is none the less a constitutional guaranty because general in its nature, or implied in the Bill of Rights, or because each particular act wherein the will of the citizen should not be interfered with is not pointedly and specifically guaranteed. Such particularity would be impossible. When one becomes a member of society, he necessarily parts with some rights or privileges which as an individual, not affected by his relations to others, he might retain. A body politic is a social compact by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. This does not confer power upon the whole people to control rights which are purely and exclusively private; but it does authorize the establishing of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government. See *Munn v. Illinois*, 94 U. S. 114 [24 L. ed. 77].

It is contended here that the Legislature, being the sole and absolute judge of the effect upon the individual of the act forbidden, has decided every act of smoking or inhaling opium to be injurious to the person so doing, no matter how long or how short the duration, or how great or how small the quantity, or under what conditions or circumstances the same might have been used, and that there is no right of appeal to the courts in this particular. Such a construction of the law makes the Legislature the sole judge of the constitutionality of its own Acts of this character. There must be a right of review or control, to some extent, in the courts. Each citizen is entitled to the protection of all the branches of the government. A declaration by the Legislature as to what the law shall be is not necessarily a conclusion reached by the State. The Legislature is not the State, although a very important or essential part of it. The power to protect the rights of the citizen from the wrongful effect

of such legislation is peculiarly adapted to, and within the province of, the judicial branch of the government, and can be exercised in one of two ways. Either the scope of such legislation should be limited to those instances where injury results as a matter of fact, and resorting to a trial in court to prove that fact in each individual instance; or if this would render an enforcement of the law impracticable, and a few must suffer for the public good by being prevented from regulating their own personal conduct in some matters beneficial or not harmful to them, in order that another class may be prevented from like actions, which to such persons would be harmful, then by recognizing a discretionary power in the Legislature to prohibit such acts entirely, and at the same time recognizing the duty of the courts to correct abuses thereof when the act prohibited should have no real relation or tendency to produce any of the results sought to be avoided. To declare any private act or omission of the citizen to be crime, which does not result in any injury to the person, and could not possibly affect society under any other possible view except the last one, would be an unwarranted infringement of individual rights, and therefore unconstitutional. Individual desires are too sacred to be ruthlessly violated when the acts purely appertain to the person, and do not clearly result in an injury to society, unless, possibly, thus rendered necessary in order to prevent others from like actions, which to them are injurious.

A great principle is involved in this character of legislation. Suppose the Legislature had forbidden the use of opium in any manner. If the unqualified right to prohibit its use in one way exists, this carries with it the right to prohibit its use entirely. Substitute any other substance, whether commonly used as medicine, food or drink, and still such a statute must be upheld, if the courts have no right of review. It is no answer to say that the Legislature would do nothing unreasonable. No man knows as to this. The question is, Has it the arbitrary power and right? Neither is it a sufficient answer to say that a man may appeal to a subsequent Legislature for redress; that where such laws are passed contrary to the popular will the remedy must be sought in this way; and that until another Legislature is convened, representing the desire of the people, the citizen must tamely submit to, and obey, the restrictive limitations and commands of every conceivable law relating to his personal conduct that, through some possible legislative caprice or inadvertence, might find its way upon the statute books, before the question could be again submitted to another Legislature, and its constitutionality again be tried by it, as that is virtually what the question would be. If it tended to promote the public welfare in any of the ways specified, it would be constitutional; and, if it did not do so, it would then be unconstitutional and void. And under such a view the Legislature must decide this.

Because the right to a trial in the courts as to the fact of injury resulting from the act in the particular case would complicate matters, and render it difficult to convict, affords no reason for taking away or denying the right, unless its effect would be to practically nullify

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the law; and not even in that case unless there is some other safeguard that must be held sufficient under the circumstances, such as limiting the action of the Legislature to those matters wherein the injurious effects of the prohibited act would be clearly apparent in the great majority of cases. It is better that there should be difficulties in the way of conviction, rather than that the citizen should be arbitrarily and needlessly deprived of his right to regulate his own personal conduct in matters that purely pertain to himself, or that his constitutional guaranty of life, liberty and the pursuit of happiness should be violated. Laws that are enacted in response to a general public sentiment are easily capable of enforcement; and otherwise, in a representative form of government, where the will of the majority is supposed to control, laws which do not receive the popular support ought not to have been enacted, and under such circumstances no great harm results if they should practically fail in their execution, and become dead letters upon the statute books.

Under whichever view taken of the power of the courts in the premises—whether to deal with individual cases or with classes—the Act in question should be held void. It is altogether too sweeping in its terms. I make no question but that the habit of smoking opium may be repulsive and degrading; that its effect would be to shatter the nerves, and destroy the intellect; and that it may tend to the increase of pauperism and crime. But there is a vast difference between the commission of a single act and a confirmed habit. There is a distinction to be recognized between the use and abuse of any article or substance. It is also a well-known fact that opium, in its different forms, is frequently administered as a medicine, and with beneficial results; and, while it may not be customary to administer it by way of inhalation, yet the Legislature should not arbitrarily prevent its use in such a manner. If this Act must be held valid, it is hard to conceive of any legislative action affecting the personal conduct or privileges of the individual citizen that must not be upheld. We have been cited to no law, which has been sustained, that goes to the extent that this one does. It has no reference to the manufacture or sale of the substance. It is not based upon any pernicious example that the commission of the act might be to others. The prohibited act cannot affect the public in any way except through the primary personal injury to the individual, if it occasions him any injury. It looks like a new and extreme step, under our government, in the field of legislation, if it really was passed for any of the purposes upon which that character of legislation can be sustained, if at all. An Act somewhat similar to it was held void in *Re Ah Jow*, 29 Fed. Rep. 181.

In former times, laws were sometimes passed limiting individual conduct in ways that are now considered ridiculous, such as regarding the number of courses permissible at dinner, the length of pikes that might be worn on the shoes, etc. But these were founded on the pique or whims of an exacting and tyrannical aristocracy rather than on reason, or, as in the case of the Connecticut Blue Laws, upon views of propriety or religion that do not now obtain

with anything like the former degree of strictness. Judge Cooley, in his admirable work on Constitutional Limitations, at page 385, says: "In former times, sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded, utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the State of Kentucky, at an early day, an Act was passed to compel the owners of wild lands to make certain improvements upon them within a specified time; and it declared them forfeited to the State in case the Statute was not complied with. It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property if he failed to improve it according to a standard which the Legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion; and, if defensible on principle, then a law which should authorize the officer to enter a man's dwelling, and seize and confiscate his furniture if it fell below, or his food if it exceeded, an established legal standard, would be equally so. But, in a free country, such laws, when mentioned, are condemned instinctively." This Statute, referred to, was subsequently declared unconstitutional in *Gaines v. Buford*, 1 Dana, 484, as appears in the note in said work.

In *Mugler v. Kansas*, 123 U. S. 623 [31 L. ed. 205], which was a case arising under the Prohibitory Liquor Laws of that State, the court in its opinion discussed the question, somewhat, as to whether the State could prohibit a man from manufacturing liquor for his own personal use, and concluded it could do so if it affected the rights and interests of the community. As to where the power rested to decide as to this, the court said: "But by whom, or

by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the 'police powers of the State,' and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, . . . the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed." Here a discretionary power in the Legislature is distinctly recognized, and also a final revisory or restraining power in the courts to correct what may appear to be abuses. The court further said, quoting partly from *Marbury v. Madison*, 5 U. S. 1 Cranch, 137 [3 L. ed. 60]: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

From the best investigation I have been able to give this subject, I am forced to the conclusion that the judgment of the court below should have been reversed, and the defendant discharged.

Stiles, J., concurs with Scott, J.

GEORGIA SUPREME COURT.

E. W. SPEER *et al.*, *Plfs. in Err.*,

v.

MAYOR, etc., OF ATHENS.

(.....Ga.....)

*1. Whether proper notice has been given before the introduction of a local or special bill is for decision by the Legislature, and where an Act is attacked as unconstitutional for want of such notice, evidence in regard thereto outside of the journals of that body will not be received by the courts.

2. The Act approved October 16, 1889, conferring upon the Mayor and Council of the City of Athens power "to construct, pave and otherwise improve sidewalks in said City, and to assess and collect the cost thereof out of the real estate abutting on the sidewalk so constructed, paved or otherwise improved," is not in violation of the constitutional requirement that taxation shall be *ad valorem* and uniform, such assessments not being "taxation," within the meaning of the Constitution.

3. Nor is the owner of such real estate thereby deprived of his property without due process of law, the Act providing that when execution is issued for the amount of the assessment, he may file an affidavit denying the whole or any part thereof, which affidavit is made returnable to the superior court, the issue thereon to be tried and determined as in cases of illegality. At such hearing he may show fraud or mistake, error or excess in the amount of the execution, want of statutory authority to support the assessment, or failure to comply with the provisions of the Statute and the ordinances in pursuance thereof.

4. Benefit to the owner of the real estate assessed, so far as necessary to be passed upon, as well as the necessity or reasonableness of the improvement, being for the determination of the Legislature, is concluded by the Act authorizing the assessment, and will not be inquired into by the courts, unless in extraordinary cases presenting a manifest abuse of legislative authority. Such assessments, not being an exercise of the right of eminent domain, do not fall within the constitutional provision that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

(July 12, 1890.)

ERROR to the Superior Court for Clarke County to review a judgment in favor of defendants in a suit brought to enjoin the laying of a sidewalk in front of certain property in the City of Athens, and to enjoin the collection of assessments for the laying of walks in front of certain other property. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. A. M. Speer for plaintiffs in error.

Mr. Andrew J. Cobb, for defendants in error:

The original Act, duly approved by the governor, having reached the place of final custody, the office of the secretary of state, the presumption is that it was regularly passed. This presumption can be overcome by proof. The

only proofs that will be admitted are the journals of the two Houses. Where the journal is silent, unless the Constitution requires the journal to speak, the presumption is that everything that is required to be done has been done. This presumption is conclusive.

Code, 85, subsec. 1; *Cooley*, Const. Lim. 4th ed. p. 165; *People v. Devlin*, 83 N. Y. 269; *Gormley v. Taylor*, 44 Ga. 76; *Ayers v. Trego County Comrs.* 87 Kan. 240; *Hall v. Steele*, 83 Ala. 562; *State v. Smith*, 4 West. Rep. 101, 44 Ohio St. 848; *Atty-Gen. v. Rice*, 7 West. Rep. 642, 64 Mich. 885; *Davis v. Gaines*, 48 Ark. 870; *Hunt v. State*, 22 Tex. App. 896; *People v. Clayton*, 5 Utah, 598.

Assessments for local improvements are not taxes within the meaning of the Constitution, and are not required to be laid uniformly. Neither are such assessments the exercise of the right of eminent domain. They are not burdens but equivalents. Whether the expense of making such improvement shall be paid out of the general treasury or be assessed upon the abutting property, or other property specially benefited, and if in the latter mode whether the assessment shall be upon all property benefited, or alone upon the abutters, or according to area of lots or frontage, is a question of legislative expediency.

Dillon, Mun. Corp. 8d ed. §§ 752-761; *Hayden v. Atlanta*, 70 Ga. 817; *First M. E. Church v. Atlanta*, 76 Ga. 186; *R. & A. R. Co. v. Lynchburg*, 81 Va. 478; *Wiles v. Hess*, 14 West. Rep. 290, 114 Ind. 871; *Smith v. Kingston*, 18 Cent. Rep. 534, 120 Pa. 857; *Findley v. Pittsburgh* (Pa.) Nov. 11, 1887; *Winter v. Montgomery*, 88 Ala. 589; *Detroit v. Chaffee*, 18 West. Rep. 158, 68 Mich. 635; *Adams v. Fisher*, 75 Tex. 657; *Wilbur v. Springfield*, 19 West. Rep. 598, 123 Ill. 395; *Davis v. Lynchburg*, 84 Va. 861; *Desty*, Taxn. 1237-1239, 1246, 1247, 1263; *State v. Fuller*, 84 N. J. L. 227; *State v. Newark*, 37 N. J. L. 415; *Allen v. Drew*, 44 Vt. 186; *Daily v. Swope*, 47 Miss. 867; *Sinton v. Ashbury*, 41 Cal. 525.

It is not possible to hold that a party has without due process of law been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in the court of justice, according to the modes of proceedings applicable to such case.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544; *Spencer v. Merchant*, 125 U. S. 845, 31 L. ed. 763; *Stanley v. Albany County Suprs.* 121 U. S. 535, 550, 80 L. ed. 1000, 1004; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 288; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *United States v. Memphis*, 97 U. S. 284, 24 L. ed. 937; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 807, 23 L. ed. 552; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 529, 24 L. ed. 784, 787; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616, 620.

Simmons, J., delivered the opinion of the court:

In the year 1889 the Legislature passed an Act which was approved October 16, '89 to au-

*Head notes by *SIMMONS, J.*
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thorize the Mayor and Council of the City of Athens to construct, pave and otherwise improve sidewalks in said City, and to assess and collect the cost thereof out of the real estate abutting on the sidewalk so constructed, paved or otherwise improved; to provide for the collection of such assessments, and for other purposes." This Act gives the power to the Mayor and Council, "in their discretion, to construct sidewalks in said City, and pave the same; to pave sidewalks already constructed; to put down curbing, and to otherwise improve the sidewalks now constructed, or hereafter to be constructed." It gives them the power "to assess the cost of constructing, paving and improving sidewalks . . . on the real estate abutting on the sidewalk constructed, paved or otherwise improved." It also gives them power to assess the cost of keeping in repair the sidewalks of the City, and gives them power "to enforce the collection of the amount of any assessment under this Act, by execution, to be issued by the clerk of council against the real estate so assessed, and against the owner thereof at the date of the ordinance making the assessment, . . . which executions may be levied by the chief of police . . . on such real estate, and, after advertising and other proceedings, as in cases of sale for taxes due the said City, the same may be sold at public outcry to the highest bidder." It also gives the defendant in execution the right "to file an affidavit denying the whole or any part of the amount for which the execution issued is due, and stating what amount he admits to be due, which amount so admitted to be due shall be paid or collected before the affidavit is received, and affidavits received for the balance; and all such affidavits so received shall be returned to the Superior Court of Clarke County, and shall there be tried and the issue determined as in cases of illegality." Subsequent to the passage of this Act the Mayor and Council of Athens adopted a general ordinance to carry it into effect, prescribing the mode and manner in which the sidewalks of Athens should be paved, and the material to be used in the pavement thereof. One section of this ordinance provides that the property owners on the sidewalks required to be paved are authorized to make the pavement themselves, under the supervision of the street commissioner, within thirty days after receiving notice that the sidewalk in front of their property is one of the streets ordered by council to be paved. In the event of the failure of the property owner to pave the same within the time prescribed, the City undertook to pave it. A bill of expense or cost was to be served upon the property owner, and if not paid by him execution was to be issued as required by the Act. Another ordinance was adopted by the Mayor and Council wherein they required the sidewalks on certain named streets to be paved. On these streets the plaintiffs in error owned property. They failed and refused to pave the sidewalks in front of their property in accordance with the ordinance of the City, whereupon some of the sidewalks were paved by the city authorities. The bill of expenses was made out in each case by the person having charge of the pavement for the City, and was reported to Council, as required by the ordi-

nance, and a copy of the bill sent to each one of the plaintiffs in error whose sidewalks had been paved. Upon their refusal to pay the same, executions were about to be issued, whereupon the plaintiffs in error filed their petition to the superior court, two of them seeking to enjoin the collection of the bills, and one of them to enjoin the laying of a sidewalk in front of his property, on the ground that the Act of the Legislature under which the City Council was proceeding is unconstitutional and void in the following particulars: (1) because it was introduced and passed without the previous notice required by the Constitution of the State; (2) because it conflicts with that provision of the State Constitution which requires uniformity in taxation; (3) because it is in conflict with that provision of the Constitution of the State which requires taxation to be *ad valorem*; (4) because it is in conflict with that provision of the 14th Amendment to the Constitution of the United States which forbids any State from depriving any person of life, liberty or property without due process of law; (5) because, were it even, as respondents claim it to be, a local assessment for a local object, no provision is made therein for determining the benefit received or the damage inflicted by its operation. Upon the hearing of the petition and the answer thereto the trial judge refused the injunction, to which the plaintiffs excepted.

1. As to the first exception, the Constitution, in article 8, par. 16 (Code, § 5075), declares: "No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be given at least thirty days prior to the introduction of such bill into the General Assembly, and in the manner to be prescribed by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such Act shall be passed." In accordance with this paragraph of the Constitution, the Legislature of 1878 passed an Act prescribing how the notice should be published. This Act prescribes that "the title of the bill shall be published once in the newspaper in which the sheriff's sales are advertised, and shall be posted at the door of the court-house in the county or counties of the residence of the person or persons . . . to be affected thereby, or in which the locality or municipality is situated, thirty days before the introduction of such bill in the House of Representatives; . . . and the production of the newspaper, dated thirty days prior to the introduction of such bill into the General Assembly, containing the notice required by this section, and the certificate of the ordinary that the notice has been posted, shall be sufficient evidence that such notice has been given in accordance with the requirements of the Constitution." Code, § 193a.

It appears from the paragraph of the Constitution and the Act of the Legislature just cited that the Legislature itself is made the judge of the evidence as to whether the proper notice has been given or not before the introduction of the bill. It is proposed in this case to show by extrinsic evidence that the proper notice had not been given for a sufficient

length of time before the bill was introduced into the Legislature. We do not think that courts are authorized to received such evidence, and upon it to decide whether or not the Legislature, a co-ordinate branch of the government, has made an erroneous decision, and allowed a bill to be introduced without the notice required by the Constitution and the law. The Constitution requires the Legislature to keep journals of its proceedings, and these journals are the only evidence which courts can receive in an attack of this kind upon the constitutionality of an Act.

Judge Cooley, in his work on Constitutional Limitations, 5th ed. 183, *185, says: "Each House keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any Act did not receive the requisite majority, or that in respect to it the Legislature did not follow any requirement of the Constitution, or that in any other respect the Act is not constitutionally adopted, the courts may act upon this evidence, and adjudge the Statute void. But whenever it is acting in the apparent performance of legal functions every reasonable presumption is to be made in favor of the action of a legislative body. It will not be presumed in any case, from the mere silence of the journals, that either House has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative Acts, unless where the Constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered."

2. The second and third exceptions may be considered together, and we think they are fully disposed of by the decision of this court in the case of *Hayden v. Atlanta*, 70 Ga. 817. That case fully discusses the points made in these exceptions, and overrules them. It is unnecessary for us to further elaborate the argument upon these questions.

3. By the fourth and fifth exceptions the point is made that the Act is in conflict with the constitutional requirement that no State shall deprive any person of his property without due process of law, because "due process of law" implies notice and an opportunity to be heard, and proper provision for this is not made by the Act. The Act does provide for notice and hearing, but the objection made is that it is insufficient in that no hearing is provided for upon the question of whether the owner of the property assessed is benefited by the improvement in a greater degree than the public, and thus benefited to the extent of the burden imposed by the assessment; it being contended that this special benefit to the property owner is essential to the validity of such assessments, and that "due process of law" requires that he be afforded his day in court upon the question.

In the *Hayden Case*, 70 Ga. 817, special benefit to the property owner, it seems, was not regarded as essential; but, whatever may be the view entertained as to this, it is clear that the whole question of benefit, whether general or special, is left to the legislative discretion, and, except in extraordinary cases, as hereafter explained, is not a matter of inquiry for the

courts. In that case, *Blandford, J.*, in delivering the opinion of the court, says: "It is a part of the police power of the State conferred on this city. . . . The blessings conferred by these improvements are shared by the owners of the property assessed in a greater degree than the general public; but, whether this was so or not, the power resides in the State, and the Legislature may, by law, confer upon municipal corporations the right to make these improvements, and to assess the property fronting on the streets thus improved for the cost of the same. . . . The power to have worked, opened, repaired and improved the public highways, streets and roads may be exercised by the Legislature in such manner and way, and under such circumstances, as it may be deemed best. There is no limitation imposed by the Constitution upon this power. It rests upon the sound discretion of the Legislature." "Due process of law," in this case, is such as is appropriate to the exercise of the taxing power; for while, as we held in the *Hayden Case*, assessments for local improvements of this kind are not "taxes" within the meaning of our Constitution, yet "that these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed." *Cooley, Taxn. 623.*

And "the taxing power proceeds on its own methods, and the rules of the common law bend and conform to them." *Id.* See also pp. 48, 49.

It is due process of law when the sovereign taxing power, by the legislative Act itself, determines that such improvements are necessary or reasonable, or of general benefit to the public and special benefit to the property owner assessed. "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the Legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. . . . With the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion." *Cooley, Taxn. 622.* It is not left to juries, whenever a property owner resists an assessment as unreasonable and unnecessary, to say that the sovereign taxing power has abused its discretion. The constitutional guaranty of due process of law has been sometimes supposed to entitle every person to have any demand made upon him submitted to the determination of a jury. But, says *Judge Cooley*, "such a construction applied in tax cases would work a thorough and radical change in the principles on which taxation is now supposed to rest. It would cripple the legislative power, and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve to a review and possible reversal at the hands of a jury. . . . To make juries the assessors of the claims of the State upon individuals could only introduce anarchy, one jury reaching one conclusion regarding the public needs, . . . and another another" etc. *Cooley, Taxn. 47.*

It is only in those extraordinary cases where the assessment "so far transcends the limits of equality and reason that its execution would cease to be a common burden, and become extortion and confiscation," that the courts can be called on to interfere. To this effect is the intimation in *Atlanta v. Gate City St. R. Co.*, 80 Ga. 280. See also authorities cited *infra*.

The interference of the courts in such a case is not dependent on whether the Act authorizing the assessment does or does not provide for a hearing; and if the courts can exercise this power without permission of the Act, it cannot be contended that the Act is invalid because of its failure to accord it.

Of the cases cited for the plaintiffs in error to show that the property owner must be allowed a hearing upon the question of benefit, it will be found that most of them deal with the taking of property under the power of eminent domain, in which cases the requirements as to notice and hearing, and the questions open to hearing, are essentially different. The distinction between assessments for paving and the exercise of the right of eminent domain is recognized in the *Hayden Case*, and is well stated in *Lewis on Eminent Domain*, § 5. See also cases hereinafter cited. Where property is taken or damaged for public improvements under the right of eminent domain, just compensation must be made to the owner; and where it is claimed that a part of the whole of that compensation comes to him in the shape of benefit, it is proper that a hearing be allowed him on that subject. The strong expressions so often quoted from the decisions in such cases as to the necessity of a hearing on the question of benefit are thus explained. What has been said by the authorities as to the importance to persons assessed,—that they should have an opportunity to be heard before the charge is fully established against them,—it has been further explained, "has reference to general assessment laws, under which the property of the citizens of the State is assessed or valued for the purpose and as the basis of taxation generally." *Baltimore v. Johns Hopkins Hospital*, 56 Md. 29.

As to the conclusiveness of legislative action upon the question of benefit, the result of the adjudications is stated in *Sheley v. Detroit*, 45 Mich. 431, by Judge Cooley, whose work on Taxation, in the treatment of this subject, is the authority most frequently cited and commended by the Supreme Court of the United States and the courts of the country generally. He says: "We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us [frontage]. If anything can be regarded as settled in the municipal law in this country, the power of the Legislature to permit such assessments, and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law and on the law of taxation, have collected the cases and have recognized the principle as settled. . . . If the Legislature declares that the cost . . . shall be levied upon abutting lots or their owners according to values, or to assessed benefits, or

to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority. . . . There is ample ground, therefore, upon which the Legislature may act when they decide that in their opinion considerations of equity require the cost of paving to be imposed upon the owners of abutting lots. We do not hold that they decide right, for that is not our concern. We only decide that they have the power and the discretion to do what they have done." In some States, where a different view was, or appeared to have been, held concerning the conclusiveness of legislative action upon the question of benefit, later decisions have overruled or explained the earlier cases. Former decisions of the Supreme Court of Pennsylvania, among them the *Hammett Case*, 65 Pa. 146, which is dwelt upon at great length in the brief of the plaintiffs in error, are reviewed and explained in a recent decision of that court. *Michener v. Philadelphia*, 118 Pa. 535, 11 Cent. Rep. 898. This decision deals with what seemed to be a case of peculiar hardship to the property owner, but says: "Of the necessity of the present sewer we cannot, of course, speak. Nor are we required to do so. The councils are the sole judges of the necessities of sewers, and their judgment is conclusive. . . . The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxation is presumed to be for the benefit, directly or indirectly, of the taxpayer or his property. . . . When a man comes to pay his general taxes, he cannot be permitted to allege that he derives no benefit therefrom, and it would be intolerable if, in every instance of special taxation, the question of benefits could be thrown into the jury-box. It would introduce into municipal government a novel and dangerous feature. It would substitute for the responsibility, limited though it be, of councils, the wholly irresponsible and uncertain action of jurors. It is better 'to endure the ills we have than to fly to those we know not of.'"

The Court of Appeals of Maryland, in the *Johns Hopkins Hospital Case*, 56 Md. 1, overrules a former decision (*Baltimore v. Scharf*, 54 Md. 499), and deals at some length with this question. It holds that "whether an improvement authorized by the mayor and city council of Baltimore will benefit the property along the line of such improvement, is a question left exclusively to their judgment, and their determination in the premises is final and conclusive. The courts have no power to review such determination at the instance of the property owners specially taxed." "An ordinance imposing an assessment upon the owners of adjacent property for the repaving of a street already opened and condemned, is not rendered invalid by failure to make provision for notice of the proceedings under it to such property owners, and to give them an opportunity of being heard before the charges are fully established against them, the imposition of such assessment being an exercise of the taxing power, and not of the right of eminent domain. The power to determine when a special assessment shall be made, on what basis

it shall be apportioned, over what district it shall extend and whether the particular improvement will confer a benefit upon property in the immediate locality, beyond that which will accrue therefrom to property more remote or the public generally, is a power confided to the legislative department, to be exercised subject to such provisions, and under such restrictions only, as the law-makers may see fit in each case to prescribe." The determination that the property assessed is specially benefited is implied, unless the expressed purpose of the law or ordinance forbids the implication that special benefit was contemplated. The rule of apportionment by the front foot is approved. The opinion of the court says (page 81): "We hold it, then, to be clear, both upon reason and authority, that provisions for notice, or giving the right of hearing, or an appeal to the courts and a jury trial, however wise and proper they may be in point of policy, are not essential to a valid exercise of this branch of the taxing power."

In New York, the leading case of *Stuart v. Palmer*, 74 N. Y. 183, deals directly with the constitutional requirement of "due process of law" as applied to such assessments, and holds unconstitutional a law imposing an assessment without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property assessed; but that case differs from the present in that no notice and hearing of any kind was there provided for by the Act. And the recent case of *Spencer v. Merchant*, 100 N. Y. 587, 1 Cent. Rep. 741, makes it clear that the same court does not recognize the right of the property owner to be heard as extending to the question of whether his property is specially benefited by the improvement, and to what amount or proportion of the cost, when the Legislature has itself determined the question. The language of the opinion in that case is strong and unequivocal, and has met with the sanction and approval of the Supreme Court of the United States, being quoted at length, as a clear exposition of the law, by *Mr. Justice Gray*, in delivering the opinion of the latter court in the same case. 125 U. S. 845 [31 L. ed. 763]. Says *Mr. Justice Gray*: "The Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited."

In that case the Act intrusted the apportionment to commissioners. In the present case the Legislature fixed upon its own rule of apportionment, to wit: the extent of the frontage of the property upon the proposed improvement; so that in the present case the apportionment is also closed to the courts and the property owner, except where the legislative rule is incorrectly applied, as, for example, where the property owner is charged with a greater number of feet or quantity of material than he is chargeable with under the Act. See

also *Roach v. Nevin*, 128 U. S. 578 [83 L. ed. 544]; *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673; *Allen v. Drew*, 44 Vt. 174; *Hennepin County v. Bartleson*, 37 Minn. 844; *Lent v. Tullison*, 72 Cal. 404, 427-429; *Jennings v. Le Breton*, 80 Cal. 8, 14; *Emery v. San Francisco Gas Co.*, 28 Cal. 846 (full discussion of question of legislative discretion as to assessments and the frontage system, and review of authorities, by Sawyer, J.); *Preston v. Rudd*, 84 Ky. 150; *Daily v. Swope*, 47 Miss. 367; *St. Joseph v. Anthony*, 80 Mo. 541; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *McCormack v. Patchin*, 58 Mo. 83 (repairing); *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *State v. Fuller*, 84 N. J. L. 227, explaining *Tide-Water Co. Case*, 18 N. J. Eq. 518. But see *State v. Newark*, 87 N. J. L. 423, *infra*, limiting to sidewalks.

In Iowa, *Warren v. Henly*, 81 Iowa, 31, holds that the expense of the improvement of streets by grading, paving, etc., may be imposed upon abutting property without regard to benefit; and the later case of *Gatch v. Des Moines*, 68 Iowa, 725, which holds that the property owner must be afforded notice and a hearing, excludes the question of benefit. See also *Dillon, Mun. Corp.*, 4th ed., §§ 760b, 761; *Welty, Assessments*, §§ 808, 809, and other authorities cited *infra*.

Illustrations of the extraordinary cases which must be presented to warrant a departure from this rule of non-interference by the courts will be found in *Preston v. Rudd* and *Paulson v. Portland*, *supra*, in each of which cases the general rule itself is strongly upheld. In the former case the assessment was far in excess of the value of the property. In the latter case the exception recognized is where property assessed is so remotely situated from the improvement charged upon it that special benefit to the property is physically impossible. The present case is peculiarly free from difficulty, in that the improvement in question is sidewalks. Whatever trouble or conflict may have arisen in regard to other local improvements, such as streets, sewers, etc., none such is encountered here. The conclusiveness of legislative and municipal action in determining that sidewalks shall be laid down, and the expense thereof borne by the abutting owner, without any hearing from him on the question of necessity or benefit, is well settled, not only in States where a hearing is held requisite as to assessments for street improvements generally, but in States where such assessments have been held wholly inadmissible under the Constitutions of those States. The method pursued by the Act of the Legislature and the municipal ordinances in this case has met with the sanction of general custom and judicial approval in all parts of this country, from the earliest period to the present.

Says Cooley on Taxation, p. 588: "The cases of assessment for the construction of walks by the side of the streets in cities and other populous places are more distinctly referable to the power of police. These footwalks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer, by the municipal charters, full authority upon the municipalities to order the walks,

of a kind and quality by them prescribed, to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and, in case of their failure so to construct them, to provide that it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is the law the duty must be looked upon as being enjoined as a regulation of police, because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state and of afterwards keeping them in a condition suitable for use. Upon these grounds the authority to establish such regulations has been supported with little dissent. No doubt this requirement is sometimes in a measure oppressive, since the actual cost may exceed the pecuniary advantages to the lot owner; but this, in the case of police regulations, is never a conclusive objection." He says further (page 615) that "while sidewalks may be ordered constructed under the police power, . . . they may also be constructed by means of special levies . . . and the expense apportioned by frontage."

Commenting on this the Court of Appeals of Virginia says (*Sands v. Richmond*, 81 Gratt. 577): "Whether the learned author is correct in referring the improvement of the sidewalk by the owner to the police power, or whether it belongs to the taxing power, it is not material to discuss. It is a power exercised by the municipal authorities of perhaps three fourths of the cities of the United States under their respective charters. It is just and reasonable in itself, and, with a few exceptions, is approved by the whole current of decisions."

Chief Justice Beasley, whose strong expressions in the *Tide-Water Co. Case*, 18 N. J. Eq. 518, occupy several pages of the brief of the plaintiffs in error, and are especially relied upon to establish the unconstitutionality of this Act, expressly excepts from the rule there laid down assessments for sidewalks, which assessments he approves in the following language: "A sidewalk has always, in the laws and usages of this State, been regarded as an appendage to and a part of the premises to which it is attached, and is so essential to the beneficial use of such premises that its improvement may well be regarded as a burthen belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable." *State v. Newark*, 37 N. J. L. 423. See also *State v. Fuller*, 34 N. J. L. 227.

The Supreme Court of Tennessee, which has disallowed assessments for street improvements generally, as opposed to the Constitution of that State, expressly excepts sidewalks (*Mo-Bear v. Chandler*, 9 Heisk. 849, 879), and places the authority to order their construction or to construct them upon the ground of police power. *Franklin v. Maberry*, 6 Humph. 868; *Washington v. Nashville*, 1 Swan, 177.

So, likewise, in Colorado, where assessments

for street improvement generally are held unconstitutional. *Palmer v. Way*, 6 Colo. 106; *Pueblo City v. Robinson*, 12 Colo. 598; *Wilson v. Ohs'cott*, Id. 600. See also *Goddard's Case*, 16 Pick. 605; *Palmyra v. Morton*, 25 Mo. 596; *Woodbridge v. Detroit*, 8 Mich. 809, 810; *Macon v. Patty*, 57 Miss. 878; *Deblots v. Barker*, 4 R. I. 445; *Bonsall v. Lebanon*, 19 Ohio, 418; *State v. Charleston City Council*, 12 Rich. L. 783; *Greensburg v. Young*, 58 Pa. 280; *O'Leary v. Sloo*, 7 La. Ann. 25; *White v. People*, 94 Ill. 604 (reviewing and explaining *Chicago v. Larned*, 34 Ill. 203, and *Ottawa v. Spencer*, 40 Ill. 217); *Hennepin County v. Bartleson*, 87 Minn. 343; *Galveston v. Heard*, 54 Tex. 427; *Dillon, Mun. Corp.* § 761, par. 6, 4th ed. p. 935; also § 798; *Burroughs, Taxn.* 494; *Desty, Taxn.* 1364.

The limitations or restrictions which should attend the exercise of this power as to sidewalks need not be gone into, for none such bear upon the present case. This is not a case of improvements ordered in outlying, uninhabited districts, for the Act requires that "no assessment shall be made for constructing, grading, paving or otherwise improving sidewalks outside of the fire limits, except as an extension of similar work already done, or hereafter done, within such fire limits." As to the material to be used, it will not be contended that there was an abuse of discretion by the municipal authorities. So far from being an extremely costly character, it was brick,—probably the most usual and practicable material employed for this purpose. Indeed there is hardly anything cheaper, unless it be wooden planks, which from their inflammable nature might well be regarded as ill adapted to use within the fire limits, or for permanent improvements in adjacent districts likely to be brought within the fire limits. In no aspect does the case present the plain and manifest abuse of legislative or municipal power and discretion held necessary to justify the interference of the courts, and which would bring it within the intimation of this court in the *Gate City St. R. Case*, 80 Ga. 276. As to the notice and hearing "appropriate to the nature of the case," ample provision is made by this Act and the ordinances thereunder. In the first place the lot owner is notified by general ordinance, of which he, as a member of the corporation, it has been held, is bound to take notice. *Palmyra v. Morton, supra*; 2 Dillon, *Mun. Corp.* § 804.

Again, before a brick is laid special notice is given him. The ordinance under which the improvement is directed requires this notice served upon the lot owner that he may have the opportunity to construct the sidewalk himself, or have it constructed at his own prices for labor and material, and he is given thirty days in which to do this. If he does not choose to avail himself of this privilege, and the city constructs the sidewalk, the ordinance requires that he be notified by service of a bill of costs and expenses of the amount with which he is charged, and an opportunity is afforded him to question its correctness. Finally, the Act itself makes full provision for a hearing to the lot owner as to every matter upon which he is entitled to be heard by providing that if, upon his failure to pay, execu-

tion be issued against him, he may file an affidavit denying the whole or any part of the amount for which the execution issued, which affidavit is made returnable to the superior court to be tried and the issue determined as in cases of illegality. The property owner is thus informed of the amount of the assessment, and a time, place and tribunal are provided at and before which a hearing may be had before his property can be taken and sold. If the sidewalk is not made in conformity with the requirements of the ordinance, if he is charged an amount in excess of the proportion for which he is assessable, he may be heard in reference thereto. "He may show fraud, mistake, want of authority to support the assessment, or a failure to comply with the provisions of the Statute. His constitutional rights are therefore fully protected. Whether the plan and system of local improvements as authorized and administered are the wisest is a question to be addressed to the Legislature." *Hennepin County v. Bartleson, supra*.

The following is a list of cases cited for the plaintiffs in error to illustrate what is meant by "due process of law." *Ex parte Ziebold*, 23 Fed. Rep. 791 (imprisonment for contempt); *Rowan v. State*, 30 Wis. 129 (murder case); *Wynehamer v. People*, 13 N. Y. 393 (liquor case); *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 235 [4 L. ed. 559] (summary process in favor of bank against debtors on notes, etc); *Ex parte Virginia*, 100 U. S. 846 [25 L. ed. 679] (indictment against county judge for excluding negroes from jury lists); *Blackman v. Lehman*, 63 Ala. 547, (trover for conversion of city bonds); *Jones v. Reynolds*, 2 Tex. 251, (summary judgments on bonds); *Westervelt v. Gregg*, 12 N. Y. 209 (legislative interference with husband's vested rights); *Wilkinson v. Leland*, 27 U. S. 2 Pet. 658 [7 L. ed. 553] (legislative Act confirming private sale); *Osborn v. Nicholson*, 80 U. S. 13 Wall. 662 [20 L. ed. 696] (legislative interference with vested rights); *Baker v. Kelley*, 11 Minn. 480 (Limitation Act as to time of attacking tax-sales); *Dwight v. Williams*, 4 McLean, 536; *Pennoyer v. Neff*, 95 U. S. 714 [24 L. ed. 565]; *Pearson v. Reid*, 10 Ga. 580 (suits between private parties relating wholly to private rights); *Newcomb v. Smith*, 1 Chand. 71 (erection of mill-dams within power of Legislature, and parties injured have only such remedy as the Statute may prescribe); *Davidson v. New Orleans*, 96 U. S. 107 [24 L. ed. 621].

It will be seen that, with one exception (*Davidson v. New Orleans*, 96 U. S. 107 [24 L. ed. 621]), these cases do not relate to assessments or the exercise of the taxing power. So far as they show that a hearing is requisite they are unnecessary, for in the present case a hearing is provided for; and so far as concerns

the question to which that hearing should extend they illustrate nothing as to cases of this character. Nor does the *Davidson Case* aid the plaintiffs in error. In that case it was held that the Act did provide for due process of law, and the assessment was sustained. The court says: "This court has heretofore decided that 'due process of law' does not in all cases require a resort to a court of justice to assert the rights of the public against the individual, or to impose burdens upon his property for the public use." And *Mr. Justice Miller* lays down the following rule: "Whenever by the laws of a State or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law." As we have already shown, the Act under consideration in the present case comes fully up to this rule.

Much of the argument addressed to this court was devoted to the evils and hardships incident to the power of assessment, and the very elaborate brief for the plaintiffs in error concludes with the language of *Chief Justice* Church in *Guest v. Brooklyn*, 69 N. Y. 506, in which these evils are strongly condemned. But the reply, so far as the courts are concerned, is to be found in that decision itself, and we conclude by quoting from the same opinion: "The effective remedy is not within the judiciary. Whatever our individual views may be of the policy, we are obliged to maintain established rules of law, and to restrain our own power within prescribed limits, as well as to enforce restrictions upon other departments of government. We should regard a departure by the courts from rules of law, wisely established for the protection of all, to meet the equities of a particular case or class of cases, as a far greater evil than that sought to be remedied. Courts can confine the Legislature within constitutional authority, and, when the questions are legitimately up, can and do exact a strict compliance with all the requirements of law leading to a forcible taking of the property of the citizen; but beyond this they have no discretion, and are themselves bound to observe and enforce legislative provisions, whether they approve them or not. The only effective remedy is with the legislative department of the government."

Judgment affirmed.

MICHIGAN SUPREME COURT.

Magnus HALLGREN, *Appt.*,

William CAMPBELL.

(....Mich....)

1. The title to an office cannot be tried in an action of replevin for property belonging to the office.

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2. Municipal officers appointed for fixed periods are, in the absence of express authority to remove them without cause, entitled to hold their offices until the expiration of such periods unless removed therefrom for cause after a fair trial.

3. The acceptance and attempt to exercise the duties of an office by one who is

appointed to succeed an incumbent whose term had not expired and the attempted removal of whom was unsuccessful because illegal, will not constitute him an officer *de facto* so long as the former incumbent continues to claim the office.

(August 1, 1890.)

ERROR to the Circuit Court for Menominee County to review a judgment reversing a judgment of a justice of the peace in favor of plaintiff in an action brought to recover possession of certain property belonging to the office of street commissioner of Menominee City. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Phillips & Thompson, for appellant:

The title to an office cannot be tried in an action of replevin for property belonging to the office.

Wayne County v. Benoit, 20 Mich. 176, and cases there cited; *Hadley v. New York*, 38 N. Y. 608.

The street commissioner is the proper custodian of the city property pertaining to his office.

Menominee Charter (being Act No. 223, Local Laws 1883), chap. 5, § 18; chap. 7, §§ 20, 21.

He is therefore a bailee of the property, and may maintain replevin for its possession.

Wells, Replevin, § 100; How. Stat. §§ 6856-6860, 8342; *Desmond v. McCarthy*, 17 Iowa, 525; *Wayne County v. Benoit*, 20 Mich. 176; *Phenix v. Clark*, 2 Mich. 327.

A person who is performing the duties of a public office is entitled to the possession of the property pertaining to the office, whether rightfully entitled to the office or not, because he is such officer *de facto*.

Wayne Co. v. Benoit, *supra*.

At the time of commencing suit, plaintiff was *de facto* street commissioner.

The charter gives the city council full power to remove the street commissioner summarily, as was done in this case.

Menominee Charter, *supra*, chap. 8, § 17; *Stadler v. Detroit*, 13 Mich. 346.

Mr. B. J. Brown, for appellee:

A corporate officer cannot be removed without cause, though the charter says generally that he may be removed.

Grant, Corp. p. 33, *note f*, citing Com. Dig. *Franchises*.

Our state system favors appointments for fixed periods, and almost entirely rejects the policy of removals at will.

Mead v. Ingham County Treas. 36 Mich. 419.

To warrant the removal of an officer, specific charges should be brought against him and all witnesses in the matter should be sworn.

High, Extr. Legal Rem. § 68.

Where it is intended to remove an officer of a corporation it is in general absolutely necessary, not only that he should be summoned generally to attend, but he must have a particular summons to attend and answer the particular charges against him.

Bagg's Case, 11 Coke, 93; *Exeter v. Glide*, 4 Mod. 36; *Delacy v. Neuse River Nav. Co.* 1 Hawks, 274; *Com. v. Pennsylvania Benef. Inst.* 2 Serg. & R. 141; *Ang. & A. Corp.* §§ 420, 429, and cases cited.

To justify the removal of a corporate officer
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there must be misconduct specially in the execution of his office.

Reg. v. Newbury, 1 Gale & D. 388.

Unless an officer be elected and declared to hold during pleasure, the power of removal as well as of disfranchisement ought to be exercised in a just and reasonable manner and upon due notice and opportunity to be heard.

2 Kent, Com. p. 298.

Cahill, J., delivered the opinion of the court:

The plaintiff brought an action of replevin in his individual name against the defendant to recover possession of the following personal property, to wit: "Two iron road-scrappers, one wooden road-scraper, one wooden beam-plow, one wooden tool-box and its contents, consisting of a quantity of shovels and picks, also all notice-books containing blank notices used by the street commissioner of Menominee City," which he claims belongs to the office of street commissioner of the City of Menominee. The defendant defends upon the ground that he is himself street commissioner of the City of Menominee, and is therefore entitled to the possession of the property. The defendant claims that on May 6, 1889, he was duly appointed to the office of street commissioner for one year; that he qualified and entered upon the discharge of his duties as such officer, and so continued down to the commencement of this suit. The plaintiff claims: *first*, that the defendant was never legally appointed to the office; *second*, that if he was appointed he was removed by the common council on the 5th day of August, 1889.

The point made against the legality of the defendant's appointment to the office is that the charter of the City of Menominee provides: "The council shall prescribe the rules of its own proceedings, and keep a record or journal thereof. All votes shall be taken by yeas and nays, and be so entered upon the journal as to show the names of those voting in the affirmative, and those in the negative, and within one week after any meeting of the council all the proceedings and votes taken thereat shall be published in one of the newspapers of the city." Chapter 8, § 8.

The record of the defendant's appointment is as follows: "Alderman Spies nominated William Campbell street commissioner, seconded by Alderman Oehrling, and he was declared elected." It is claimed that this record does not comply with the requirements of the charter, and that the appointment is therefore void, and we are cited to *Steeckert v. East Saginaw*, 22 Mich. 104. If we were required in this case to pass upon the title of the defendant to the office which he claims to hold the case cited would be in point; but we agree with plaintiff's counsel that the title to this office cannot be tried in an action of replevin for property belonging to the office. It is sufficient for the defendant's claim that the common council, having authority to do so, undertook to elect him street commissioner; that he accepted their action, qualified for the office, and entered upon the discharge of his duties, and was recognized by the common council as *de facto* street commissioner. This position would entitle him to the custody of the property in controversy un-

less he had been legally removed from office by the common council, or had been in fact removed by the common council, and had acquiesced in such removal, and to the appointment of the plaintiff as his successor. "A person actually obtaining office with the legal indicia of title is a legal officer until ousted." *Wayne County v. Benoit*, 20 Mich. 180.

The first action of the common council for the removal of the defendant was taken at a special meeting called for July 23, 1889, at which the following resolutions were presented and read: "Whereas, Wm. Campbell, the street commissioner of the City of Menominee, has graded and graveled a road on the town line, and running from the state road west to the gravel-pit, without being ordered by the common council, or without their knowledge, thereby expending a large sum of money without authority, and thereby subjecting the city to needless and uncalled for expense; and whereas, the said Wm. Campbell as street commissioner, as aforesaid, has neglected and refused, and still does neglect and refuse, to obey the orders of the city council in this, to wit, refusing to gravel Ogden Avenue as directed by vote of this council passed at a regular meeting held July 15, 1889; now, be it resolved, that said Wm. Campbell be and hereby is removed from office of street commissioner of said city, and the office of street commissioner is hereby declared vacant."

Upon a motion being made to adopt this resolution the mayor stated that he did not think it could be acted upon at this meeting, under the call that had been made, and, the matter being referred to the city attorney, he decided that the mayor was right. No action was therefore taken on the resolution at that meeting. At the next regular meeting, held August 5, 1889, the resolutions above quoted were adopted by yeas, seven; nays, two. Immediately following this action a resolution was adopted appointing Magnus Hallgren, the plaintiff, street commissioner by a similar vote. No notice was given to the defendant of these charges against him, or of the proposed action to remove him from office. The following provisions of the charter bear upon the question of the right of the common council to remove the defendant from office:

Section 3, chap. 5. "The following officers shall be appointed by the council, viz., a city attorney, city surveyor, city marshal, city clerk, street commissioner, and engineer of the fire department. The council may also, from time to time, provide by ordinance for the appointment of, and appoint for such term as may be provided in the ordinance, such other officers, whose election or appointment is not herein specially provided for, as the council may [shall] deem necessary for the execution of the powers granted by this Act and may remove the same at pleasure."

Section 5. "The mayor, city marshal, city clerk, city treasurer, street commissioner, supervisors and constables shall hold their office for the term of one year from the first Monday in April of the year when elected, and until their successors are qualified and enter upon the duties of their offices."

Section 17, chap. 8. "Any person appointed to office by the council by authority of this

Act may be removed therefrom by a vote of the majority of the aldermen elect, and the council may expel any alderman, or remove from office any person elected thereto, by a concurring vote of two thirds of all the aldermen elect. In case of elective officers provision shall be made by ordinance for preferring charges, and trying the same, and no removal of an elective officer shall be made unless a charge in writing is preferred and an opportunity given to make a defense thereto." Local Acts 1883, pp. 161, 162, 176.

It is claimed by the plaintiff that under this last provision of the charter the common council had a right to remove the defendant from the office of street commissioner without notice to him.

In *Mead v. Ingham County Treas.*, 86 Mich. 416, this court said: "Our state system favors appointments for fixed periods, and almost entirely rejects the policy of removals at will."

We shall need to find in the charter of Menominee clear and unequivocal power vested in the council to remove this officer without notice before we can concede that any such power exists.

In 1 Dill, Mun. Corp., § 250, it is said: "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing."

In *Mechem, Pub. Off.* § 454, it is said: "In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing." In support of this position both of these learned writers cite the case of *Ex parte Hennen*, 38 U. S. 18 Pet. 230 [10 L. ed. 186], and upon this case most of the later cases have been based. That was the case of a clerk of the District Court of the United States for the Eastern District of Louisiana. He had been removed from office by the district judge without other cause than the desire of the judge to supplant him with a personal friend. The court held that as the law vested in the judge the appointment of a clerk, and as such appointment was not for any fixed term, the power of appointment necessarily carried with it the power of removal. The main ground of the decision was that it could not be admitted that it was the intention of the Constitution that such an office should be held during life. We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officer he is entitled to notice, and a chance to defend. *Field v. Com.* 32 Pa. 478; *State v. St. Louis*, 90 Mo. 19, 6 West. Rep. 464.

It is claimed on behalf of the plaintiff that because section 17 of chapter 8 of the Charter provides expressly that elective officers shall not be removed except for cause, it is to be presumed that the Legislature intends that appointed officers might be removed without cause. We are not disposed to allow any presumption to aid the exercise of such arbitrary power. In such a case the Legislature may by

express words confer upon the common council of a city the power to remove an officer without cause; but in the absence of such power given in express words the presumption must be that the Legislature intended that every officer appointed for a fixed period should be entitled to hold his office until the expiration of such period unless removed therefrom for cause after a fair trial. This presumption is strengthened when we compare section 17 of chapter 8 with section 8 of chapter 5, before quoted. In the latter section certain officers are declared to be removable at pleasure, and although the street commissioner is expressly named in that section he is not included among those who may be so summarily removed. But it is claimed by plaintiff that he has, since his appointment, been acting as

street commissioner, and is therefore *de facto* such officer. There could not be two incumbents to this office. The defendant, by his refusal to deliver up the property, books and papers of the office, has indicated that he claimed to hold the office. If he was once lawfully in office, a fact which we are not allowed to question on this record, and has never yielded, but has held on and continued to act, then the plaintiff has never gotten possession, and cannot be regarded as an officer *de facto*. *Mead v. Ingham County Treasurer, supra*, 419.

The judgment of the court below was in accordance with these views, and is affirmed, with costs.

Grant, J., did not sit; the other Justices concurred.

WISCONSIN SUPREME COURT.

Ralph S. BUSHNELL
v.
Elijah D. BUSHNELL *et al.*
(.....Wis.....)

1. The Statute of Limitations as to the right of action of a surety who makes partial payments on the debt, against his co-surety for contribution, commences to run as to such payments from the time he pays the creditor more than his proportion of the debt.
2. An action at law by a surety who has paid more than his proportion of the debt against his co-surety for contribution is governed by the Statute of Limitations applicable to legal actions, and is not brought within the Statute applicable to equitable actions by the fact that an equitable action may be maintained for contribution in a proper case.
3. A surety who has made partial payments aggregating more than his share of the debt, his right to contribution as to all of which except the last is barred by limitation, is entitled to judgment against his co-surety for the amount of such last payment,

where the payments barred amount to more than his proportion of the debt, and the last payment is less than the co-surety's proportion.

4. A surety who has paid more than his share of the debt is entitled, in an action for contribution against his co-surety, to interest on the amount recovered from the time of its payment at the legal rate only, although the debt secured bore a higher rate.

(September 23, 1890.)

CROSS APPEALS from a judgment of the Circuit Court for La Fayette County in an action brought by one surety upon a promissory note to recover from his co-surety the amount which he had paid in excess of his share, allowing a part only of plaintiff's claim and interest thereon at the rate provided in the note. *Affirmed on plaintiff's appeal. Reversed on defendant's appeal.*

Plaintiff and defendant Elijah D. were brothers and had signed as sureties a note executed by another brother, Levi N. Plaintiff was compelled to pay more than his proportion of that note and brought this action to compel

NOTE.—Contribution between co-sureties.

Sureties ought to be placed in the situation of the creditors they shall have paid or be bound to pay. *Scribner v. Hickok*, 4 Johns. Ch. 530, 1 N. Y. Ch. L. ed. 326; *Lidderdale v. Robinson*, 2 Brock. 167.

This principle of substitution applies in favor of one surety who has paid more than his proportion of the debt, to enforce contribution out of security given by a co-surety. *Felton v. Bissel*, 25 Minn. 20; *Cuyler v. Ensworth*, 6 Paige, 32, 8 N. Y. Ch. L. ed. 336; *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 1 N. Y. Ch. L. ed. 190; *Croft v. Moore*, 9 Watts, 451; *Hess's Estate*, 69 Pa. 272; *Burrows v. McWhann*, 1 Desaus. 409; *Lidderdale v. Robinson*, 2 Brock. 159; *Gordon v. Rixey*, 14 Va. L. J. 298; *Pegram v. Riley*, 38 Ala. 369.

Contribution is among sureties only, and presumes the payment and extinguishment of the debt by one for the benefit of all. It rests rather upon the equity of equality than upon contract, though at law, to save the right, a promise to contribute will be implied. *Dillenbeck v. Dygert*, 97 N. Y. 309, 49 Am. Rep. 527; *Campbell v. Mesler*, 4 Johns. Ch. 384, 1 N. Y. Ch. L. ed. 353; *Armitage v. Baldwin*, 39 L. R. A.

Beav. 278; Davis v. Ferrine, 4 Edw. Ch. 63, 6 N. Y. Ch. L. ed. 793.

Jurisdiction of courts of law in contribution between sureties is expressly placed upon the ground of an implied assumption, arising from the knowledge of the general principle that equality is equity. *Waters v. Riley*, 2 Har. & G. 305, 18 Am. Dec. 309.

The right of contribution does not spring from contract, but rests on general principles of natural justice, that, when one has discharged a debt or obligation which was a common charge for the benefit of all, he has a right to call on his debtors for contribution. *Durbin v. Kuney* (Or.) April 7, 1890.

As respects the right of contribution it is immaterial whether the parties are jointly or severally liable, or whether they are bound by separate or the same instruments, or knew of each other's engagement, or are liable in the same or different amounts, if their obligations be assumed in respect to one and the same transaction. *Id.*

The rule that a surety who has paid a part of the joint liability may recover from each of his co-sureties his proportional part of the sum so paid does not apply where more than one of the sureties have made payments. In the latter case all pay-

Elijah D. to pay his share. At the time the action was brought Elijah D. was insane and under the care of a guardian, who was also made a party to the action.

The case sufficiently appears in the opinion. *Messrs. Bushnell & Watkins*, for plaintiff:

A paying surety's right to subrogation and contribution against a co-surety is well settled.

Mason v. Pierron, 68 Wis. 239; *German Am. Sav. Bank v. Fritz*, 68 Wis. 890; *Lidderdale v. Robinson*, 2 Brock. 159.

The fact that the Statute of Limitations had run against the creditor in favor of the defendant Elijah D. does not relieve him from liability to contribute when his co-surety has been compelled to pay.

Camp v. Bostwick, 5 Am. Rep. 669, 20 Ohio St. 337; *Preslar v. Stallworth*, 37 Ala. 402; 7 Wait, Act. and Def. 241; *Aldrich v. Aldrich*, 56 Vt. 824, 48 Am. Rep. 791.

A suit by a paying surety against his co-surety for contribution was always of original equitable cognizance.

Snell, Eq. p. 421; 1 Story, Eq. §§ 492, 493, 495, 496; 3 Pomeroy, Eq. Jur. § 1418; *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 114.

The doctrine of subrogation is of purely equitable origin and nature.

3 Pomeroy, Eq. Jur. § 1419, note 1; *Bispham*, Eq. § 335.

The right of contribution does not arise until the surety has paid more than his share of the debt.

Davies v. Humphreys, 6 Mees. & W. 168; *Ex parte Gifford*, 6 Ves. Jr. 805; *Camp v. Bostwick*, *supra*; *Morgan v. Smith*, 70 N. Y. 537; *Aldrich v. Aldrich*, 56 Vt. 824, 48 Am. Rep. 791; 2 Sutherland, Damages, 597-600; *Brandt*, Sur. §§ 251, 259.

Messrs. Orton & Osborn and D. S. Rose, for defendants:

Each payment gave the plaintiff a cause of action against the defendants, and the Statute commenced to run from the time the payment was made.

Angell, Limitations, §§ 131, 132; *Davies v. Humphreys*, 6 Mees. & W. 153; *Knotts v. Butler*, 10 Rich. Eq. 143; *Brandt*, Sur. § 259.

The Statute of Limitations begins to run between co-sureties at the time the debt is paid, irrespective of the time the obligation was entered into or became due.

Bullock v. Campbell, 9 Gill, 132; *Wood*, Lim. § 145; *Peabody v. Chapman*, 20 N. H. 418; *Scott v. Nichols*, 61 Am. Dec. 507, note; *Hudson v. Bishop*, 32 Fed. Rep. 519, 35 Fed. Rep. 820; *Chipman v. Morrill*, 20 Cal. 180.

Cole, Ch. J., delivered the opinion of the court:

This is an action by a paying surety against a co-surety for contribution. Cross appeals from the judgment were taken, and the questions arising will be considered without special reference to the case to which they relate. The main question is presented on the finding of the court below that the plaintiff is the owner and holder of the note mentioned in the evidence, which was signed by the parties to the action as sureties for their brother, Levi N. The note drew interest at the rate of 10 per cent, and several payments were made upon it, from time to time, by the plaintiff. As to these payments the six-years' bar of the Statute of Limitations was interposed, which the court sustained as to all payments except the one for \$98, made January 29, 1880. As to that payment the circuit court held the plaintiff was entitled to recover the full amount thereof, with 10 per cent interest from the time it was paid, and that the action was barred as to the other payments. The first question which will be considered is, Was the six-years' Statute of Limitations applicable to the first six payments made upon the note by the plaintiff? It is said by defendants' counsel that this action for contribution between sureties is founded upon an implied contract to contribute, and that a right of action accrues against the co-surety on each separate payment when made, when it is more than the equal share of the debt which the paying surety is bound to pay; and he says the case comes strictly within the limitation of subdivision 3, § 4222, Rev. Stat., which bars an action upon an obligation or liability, express or implied, in six years, except those mentioned in the last two preceding sections. The decision of the questions presented is clear upon the authorities.

ments must be added together, and the aggregate divided equally among the sureties. *Gross v. Davis*, 37 Tenn. 223.

Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. *McDonald v. Magruder*, 28 U. S. 3 Pet. 470, 7 L. ed. 744.

A surety who pays half of the common liability under an agreement that the claim shall not be satisfied except to the extent of the payment, and that the creditor's claim and remedy against the other surety shall not be affected or impaired thereby, cannot set up satisfaction of the whole debt by the co-operation of the Statute of Nonclaim and the payment, as a basis on which to found an equity to contribution. *Pegram v. Riley*, 38 Ala. 399.

Upon a bill by a surety to compel contribution by a co-surety, equity may pursue and subject to liability his property fraudulently conveyed to a third party who is made a defendant, without first requiring the remedy at law to be exhausted. *Moore v. Baker* (Wis.) 34 Fed. Rep. 1.

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The right of contribution affects only the relation of the co-debtors or sureties between themselves, and is entirely distinct from the contract with the creditor, which contract is made for the benefit of the creditor and simply expresses the relation between the co-debtors and the creditors. *Durbin v. Kuney* (Or.) April 7, 1890.

In a suit in equity the rate of contribution among sureties is determined according to the number of them who are solvent, and not, as in an action at law, by the total number. *Gross v. Davis*, 37 Tenn. 223.

A surety who has paid counsel fees for services necessary for the common defense of all the sureties, rendered for their mutual benefit, is entitled to contribution from co-sureties who have accepted the services and agreed to pay their share. *Ibid*.

In the recovery of contribution against co-sureties for payments made on a decree, the costs cannot be distinguished from the debt, but contribution applies to both. *Ibid*.

Says *Mr. Justice Story*: "Originally it seems to have been questioned whether contribution between sureties, unless founded upon some positive contract between them incurring such liability, was a matter capable of being enforced at law. But there is now no doubt that it may be enforced at law as well as in equity, although no such contract exists. And it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt." 1 *Story*, Eq. Jur. § 495.

In *Davies v. Humphreys*, 6 Mees. & W. 153, *Baron Parke* says the action for contribution arises upon a principle of equity, though it is now established to be the foundation of an action at law, and this is generally the language of the cases upon the subject. The result of this view would seem to be, that the plaintiff's right of action upon the liability of the co-surety is limited to the six years from the time he pays the creditor more than his proportion of the debt. *Angell* thus states the rule, and such is the doctrine of the adjudications. *Ang. Lim.* § 131 et seq.; *Davies v. Humphreys*, *supra*; *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 508, and authorities referred to in the note.

Where a note payable by installments is paid by a surety, the Statute begins to run against him from the time he pays each installment. *Bullock v. Campbell*, 9 Gill, 182.

It seems to be clearly established that, where a surety has paid more than his share of the debt, every such payment gives a right of action for contribution, and, as a matter of course, the six-years' Statute begins to run upon it.

But it is said that the case comes within the ten-years' limitation provided for in subdivision 4, § 4221. That, in effect, makes actions cognizable in a court of chancery, where no other limitation is prescribed in the chapter, subject to that period of limitation. In answer to this suggestion, we observe that this is a plain action at law, in which a judgment for a specified sum is demanded. This is the only relief or matter asked for in the action. The Statute in respect to a legal action applies to it. These Statutes are clear and explicit, and bar an action founded upon an obligation or liability, express or implied, which is not brought within six years from the time the right of ac-

tion accrues. It is said that a court of equity would take jurisdiction to enforce contribution, therefore the limitation of subdivision 4, § 4221, applies. Whether this position is sound or not we shall not determine. It is sufficient now to say that this is not an equitable suit to enforce contribution, and no equitable relief is sought. It is a legal action to recover money paid to the use of the defendant, and stands upon the same footing as any other action founded upon an implied contract.

The plaintiff paid the greater portion of the note, indeed, much more than his share. The principal debtor paid the plaintiff some money, and transferred to him some property. The court applied these several payments and the value of the property to reimburse the plaintiff for the excess he had paid more than his share. We see no error nor injustice in such an application. The aggregate of these payments, increased by the value of the property, is much less than the amount the plaintiff has paid for his co-surety. It is therefore proper not to require the plaintiff to account for them under the circumstances.

It was also correct to give the plaintiff judgment for the amount of the last payment, for, as we have said, he had already paid largely in excess of his proportion, and if the defendants pay the entire amount of the last payment made on the note, they will still fall short of paying their share of the debt. But there is an error in giving interest on the last payment exceeding 7 per cent. Interest at 10 per cent was given, doubtless because the note drew interest at that rate. But the recovery is upon an implied contract for money paid to the defendants' use, and not upon the note nor upon the guardian's bond. The note and bond are paid and extinguished. The rate of interest on the amount of the recovery should be the legal rate, and no more. The counsel for defendants claims that there was not \$98 due on the note when the last payment was made. We have made no computation, and shall not. The plaintiff is entitled to recover only what was due when the note was discharged, with legal interest on the same. The circuit court will enter judgment for the proper amount, as indicated in this opinion.

The judgment on the plaintiff's appeal is affirmed, and it is reversed on the defendants' appeal, and the cause is remanded to the Circuit Court for the entry of proper judgment.

ALABAMA SUPREME COURT.

John R. GILLILAND *et al.*, *Appts.*,

v.

Thomas J. FENN *et al.*

(....Ala....)

1. A conveyance of land infected with actual fraud because made for the purpose of hindering creditors may be avoided by a sub-

sequent purchaser thereof in good faith and for value from the fraudulent grantor, although he had notice of the previous fraudulent conveyance, under Code, § 1736, which declares void all conveyances made with intent to hinder, delay or defraud creditors, purchasers or other persons who are or may be so hindered, delayed or defrauded.

2. The registration of a mere voluntary

NORM.—Voluntary conveyance; validity of.

A voluntary conveyance is good as between the parties thereto. *Bunn v. Winthrop*, 1 Johns. Ch. 322, 1 N. Y. Ch. L. ed. 159; *Jones v. Jones*, 6 Conn. 9 L. R. A.

111; *Fain v. Smith*, 14 Or. 82; *Otis v. Beckwith*, 49 Ill. 121; *Wood v. Ingraham*, 8 Strob. Eq. 106; *Sou- verby v. Arden*, 1 Johns. Ch. 240, 1 N. Y. Ch. L. ed. 127; *McDaniel v. Johns*, 45 Miss. 648; *Cecil v. Beaver*,

deed which is unaffected by actual fraud operates as notice so as to bind a subsequent purchaser from the grantor; but the registration of a deed affected by actual fraud does not, at least not to the extent of barring the assertion of his rights based on the fraud of the transaction.

3. The title acquired by one who has conveyed away his property to defraud a creditor, by a compromise of an ejectment suit brought by such creditor to get possession of the property so conveyed after he has recovered judgment against the donor and bought such property at an execution sale under such judgment, by which compromise the donor obtains a reconveyance of the property to himself, will not inure to the benefit of the donee notwithstanding his deed contained covenants of warranty, as against one who, after the fraudulent conveyance, purchased the property thereby conveyed from the donor in good faith and for value, although with notice of such conveyance.
4. Payment by a debtor who has fraudulently conveyed away his property for the purpose of hindering his creditor, of such creditor's claim, will not purge the conveyance of fraud so as to render it impregnable against the attack of one who subsequently purchases the property so conveyed bona fide and for value from the fraudulent grantor.

(May 28, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Etowah County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

On May 15, 1867, A. W. Shepherd and his

wife executed to his son, John H. Shepherd, a voluntary deed to the lands in controversy, in order to defraud his creditors Rhea & Whorton. This deed was duly recorded August 9, 1867. John H. Shepherd died August 8, 1872. The father continued in possession of the land until December 28, 1877. A. W. Shepherd being indebted to Rhea & Whorton by note, this indebtedness was reduced to a judgment October 10, 1867, and on April 5, 1869, the lands here in controversy were sold under an *alias* execution on said judgment, and were bought by Rhea, he receiving the sheriff's deed for the same. On August 28, 1869, Rhea brought an action of ejectment against A. W. and John H. Shepherd for the recovery of said lands, and on May 6, 1871, recovered them from John H. Shepherd. That sale was subsequently set aside because made after the return day of the execution, and on May 26, 1873, an *alias fi. fa.* was placed in the hands of the sheriff, which was levied on the lands in controversy, and said lands were sold to Rhea on July 7, 1873, and a deed executed to him on that day. Rhea then commenced suit against A. W. Shepherd and others for said lands; and while said suit was pending, to wit, April 22, 1877, A. W. Shepherd compromised it by paying Rhea a certain amount, and Rhea and wife making to A. W. Shepherd a quitclaim deed to the said lands.

On December 28, 1877, the said A. W. Shepherd, being in possession of said land, sold and conveyed by warranty deed for a valuable consideration a part of it to appellant Gilliland, and then about a year afterwards sold another

28 Iowa, 241; Bucklin v. Bucklin, 1 Keyes, 146; Shrader v. Bonker, 65 Barb. 615.

An absolute deed containing a warranty of title, and purporting to be made for a valuable consideration, is valid as between the parties, though made for the purpose of defrauding creditors. Parrott v. Baker, 82 Ga. 364.

Consideration.

The want of consideration would simply render the conveyance voluntary, inoperative against existing creditors, but as between the parties valid and operative to pass the legal estate, excluding the implication of a use or trust for the grantor. Patton v. Beecher, 62 Ala. 589; Wilkinson v. Wilkinson, 2 Dev. Eq. 376; Green v. Thomas, 11 Me. 518; Philbrook v. Delano, 29 Me. 410; Graves v. Graves, 29 N. H. 129; Titcomb v. Morrill, 10 Allen, 15; Squire v. Harder, 1 Paige, 494, 2 N. Y. Ch. L. ed. 723.

The only operation of a clause reciting a consideration is to prevent a resulting trust to grantor, and to estop him from denying the effect of the deed for the use declared. Houston v. Blackman, 66 Ala. 559.

A conveyance made without consideration is void as to existing creditors, regardless of intent; as to subsequent creditors, it is void only when made to hinder, delay or defraud them. Boatman's Savings Bank v. Overall, 8 West. Rep. 302, 90 Mo. 410; Lionberger v. Baker, 4 West. Rep. 72, 88 Mo. 447.

A voluntary conveyance without consideration may be set aside as fraudulent against creditors, although there was no fraud or knowledge of fraud on the part of the grantee. McAnich v. Dennis, 128 Ind. 21.

A conveyance without consideration will not be upheld against an existing creditor who afterwards finds it impossible to obtain satisfaction without
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resorting to the property so conveyed. Obernier v. Treseler, 2 West. Rep. 160, 19 Mo. App. 519.

Deed by an insolvent of all his property, showing want of consideration, is *prima facie* fraudulent. Royer Wheel Co. v. Fielding, 2 Cent. Rep. 511, 103 N. Y. 504.

A conveyance by a debtor, to cover up his property from certain creditors, is assailable by any creditor whose debt existed at the conveyance. Barrett v. Nealon, 11 Cent. Rep. 304, 119 Pa. 171.

Inadequacy of consideration.

Mere inadequacy of price is not ground for equitable relief, but may, with other facts, furnish evidence of fraud. Nelson v. Betts, 3 West. Rep. 403, 21 Mo. App. 219; Bank of Pike County v. Murray, 4 West. Rep. 66, 88 Mo. 191; Novelty Mfg. Co. v. Pratt, 4 West. Rep. 741, 21 Mo. App. 171; Fuller Electrical Co. v. Lewis, 2 Cent. Rep. 481, 101 N. Y. 675; Schatz v. Kirker (Pa.) 2 Cent. Rep. 67; Shay v. Wheeler, 13 West. Rep. 899, 60 Mich. 224.

The payment, by the purchaser, of a fair consideration, upon a sale of property, is strong, although not conclusive, evidence of the good faith of the transaction, and requires clear evidence of fraudulent intent to overcome it. Nugent v. Jacobs, 4 Cent. Rep. 136, 108 N. Y. 125.

An inadequate consideration, unless grossly so, is not a circumstance of fraud. Shay v. Wheeler, *supra*.

When the inadequacy of consideration is so gross that it furnishes satisfactory evidence of fraud, the contract of conveyance, whether executed or executory, will be set aside on that ground. Cleere v. Cleere, 83 Ala. 581.

The inadequacy of consideration is important evidence to show fraud in a conveyance by an insolvent debtor, varying with the circumstances of each case, which should amount to clear proof be-

portion, and then after that conveyed the remainder of the tract to him.

Appellees instituted this suit to recover the said land, basing their claim to the same on their being the heirs of the said John H. Shepherd.

Messrs. James Aiken and Dortch & Martin, for appellants:

The deed from A. W. Shepherd to John H. Shepherd is void.

Ala. Code 1886, § 1735; *Flinn v. Barber*, 64 Ala. 193.

A first fraudulent grantee can recover from a second.

Eddins v. Wilson, 1 Ala. 287.

But not in case of sale for value and bona fide.

Jefferson County Sav. Bank v. Eborn, 84 Ala. 529.

Fraudulent mortgagees cannot recover from purchaser for value, without notice from mortgagor.

Beall v. Williamson, 14 Ala. 55; *McGuire v. Miller*, 15 Ala. 394.

The deed from A. W. Shepherd to John H. is void as to a bona fide purchaser for value, even with notice.

Elliott v. Horn, 10 Ala. 348; *Wyman v. Brown*, 50 Me. 148; *Hudnal v. Wilder*, 4 McCord, L. 295, 17 Am. Dec. 744; *Craig v. Zimmerman*, 87 Mo. 475, 56 Am. Rep. 466; *Frestidge v. Cooper*, 54 Miss. 77.

The warranty in the deed from A. W. Shepherd to John H. Shepherd does not estop a purchaser for value from A. W. Shepherd.

Stokes v. Jones, 18 Ala. 734, 21 Ala. 731.

fore the party can be held liable for fraud. *Gutach v. McIlhargy*, 13 West. Rep. 771, 69 Mich. 877.

A voluntary deed by a debtor may be impeached by a creditor by showing that he was a creditor when the deed was made, and that it was made on an inadequate consideration. *Gardner v. Kleinke*, 46 N. J. Eq. 90.

Grantee for valuable consideration gets a good title.

The grantee in an absolute deed who pays a valuable consideration gets a good title, although the grantor may have executed the deed with intent to defraud his creditors, if the grantee had no knowledge of the fraudulent intent. *Woodruff v. Bowles*, 104 N. C. 197.

A sale by the vendor to defraud his creditors is not invalid as against the vendee who purchased in good faith and for a sufficient consideration. *Jones v. Simpson*, 116 U. S. 609, 29 L. ed. 742; *Astor v. Wells*, 17 U. S. 4 Wheat. 466, 4 L. ed. 618; *Wheaton v. Sexton*, 17 U. S. 4 Wheat. 503, 4 L. ed. 623.

Fraud in the sale or conveyance of a debtor's property will not affect his vendee, unless the latter participated therein. *Catchings v. Harcrow*, 49 Ark. 20.

A deed will not be set aside as fraudulent because it recites a false consideration, unless it is shown that the grantee participated in the fraud of the grantor. *Levi v. Welsh*, 45 N. J. Eq. 897.

A purchaser's mere suspicions of fraudulent intent on the part of his vendor are not sufficient to put him on inquiry or vitiate his purchase. *Tuteur v. Chase*, 4 L. R. A. 832, 66 Miss. 473.

But an absolute deed made with intent to delay or defraud creditors, although made also to secure a debt, is void as against creditors if the grantee takes it with notice of the fraudulent intent. *Palmer v. Johnson* (Ga.) Dec. 9, 1889.

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Notice of fraudulent conveyance does not affect purchasers in good faith.

Bates v. Bates (Ky.) June 9, 1887.

Mr. W. H. Denson for appellees

Somerville, J., delivered the opinion of the court:

The main point of contention in this case involves an inquiry into the relative priority of the conflicting claims of title in ejectment, that of the plaintiffs being derived by immediate inheritance from an alleged fraudulent donee, and that of the defendants under a conveyance for valuable consideration from the alleged fraudulent donor. The salient facts as to the conveyance are these: The grantor, A. W. Shepherd, being largely indebted, conveyed to his son, John H. Shepherd, substantially his entire property, consisting of a farm, except one tract of about forty acres, upon which his residence was situated. The recited consideration is \$3,000, but the evidence tends to show that no consideration whatever in fact passed between the parties, but that the transaction was purely a voluntary conveyance; and, further, that it was a mere sham, made expressly with the fraudulent intent to hinder or delay creditors. The father continued to occupy the premises with the son, there being no visible change of possession by either; and the evidence tends to prove that he (the donor) still collected and appropriated the rents derived from certain occupying tenants, that he even furnished the son money to pay the taxes on the land; and, as between the parties, the whole affair was regarded as a secret trust mutually

The equity of a purchaser for a valuable consideration is greater than that of a creditor. *Lyons v. Leahy*, 15 Or. 8.

In the case of fraudulent conveyances, which the statute declares to be "utterly void" it has been well settled "that a purchaser for a valuable consideration, without notice, has a good title, though he purchases from one who has obtained his title by fraud." *Valentine v. Lunt*, 115 N. Y. 508; *Jackson v. Henry*, 10 Johns. 185; *Eureka, I. & S. Works v. Bresnahan*, 10 West. Rep. 194, 66 Mich. 439.

A fraudulent conveyance will not, at the instance of creditors, be vacated to the prejudice of a bona fide purchaser from a fraudulent grantee. *Hall v. Ritenour*, 3 West. Rep. 499, 87 Mo. 54.

Where vendee has knowledge of facts showing vendor's fraudulent intent, which are sufficient to put a prudent person upon inquiry, the sale is fraudulent unless made to secure a debt due him from vendor. *Redhead v. Pratt*, 72 Iowa, 90.

To avoid a conveyance made upon a valuable consideration, the grantee must be shown to have had actual notice of the grantor's fraudulent intent. *Lyons v. Leahy*, *supra*; *Benson v. Maxwell* (Pa.) 12 Cent. Rep. 600.

Voluntary conveyance good as to subsequent creditors.

A voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud. *Moore v. Page*, 111 U. S. 117, 28 L. ed. 873; *Sexton v. Wheaton*, 21 U. S. 9 Wheat. 229, 5 L. ed. 603; *Hinde v. Longworth*, 24 U. S. 11 Wheat. 199, 6 L. ed. 454; *Mattingly v. Nye*, 73 U. S. 8 Wall. 370, 19 L. ed. 690; *Kehr v. Smith*, 87 U. S. 20 Wall. 31, 23 L. ed. 313; *Smith v. Vodges*, 92 U. S. 183, 28 L. ed. 431; *Jones v. Clifton*, 101 U. S. 225, 26 L. ed. 908; *Graham v. La Crosse & M. R. Co.* 102 U. S.

intended to cover a transparent fraud on creditors, and that the son asserted no real claim of title as against his father. This deed from the father to the son was recorded. Afterwards the father sold the land to the appellant Gilliland, as the evidence tends to prove, for a valuable and adequate consideration in cash. The son having died, his heirs bring this suit, claiming title under him.

The question under consideration is one in which there is no little conflict of authority, as observed on all hands, in the text-writers and the adjudged cases. The apparent difficulties seem to me to have arisen from a failure in some instances to properly distinguish the application of the principles involved in their bearing on two classes of conveyances: (1) those that are merely voluntary; and (2) those which, in addition to being voluntary, are infected with an actual fraudulent intent. Another source of conflict is the difference of opinion as to how far notice of the prior conveyance and its nature will affect the title of the subsequent purchaser from the fraudulent donor or grantor.

There are some important propositions which we may formulate as premises in this discussion, as to which little or no doubt can exist. They will serve as valuable aids in arriving at a correct solution of the question in hand. (1) All executed conveyances, whether voluntary or actually fraudulent, are unquestionably valid *inter partes*. Such a conveyance is binding on the grantor, his heirs and personal representatives, and is absolutely unassailable by them. *Coffey v. Norwood*, 81 Ala. 512; *Davis*

v. Swanson, 54 Ala. 277; *Anderson v. Roberts*, 18 Johns. 516; Code 1886, § 1735, and cases cited. (2) The Statute of Frauds (13 and 27 Eliz.), on this point is substantially embodied in section 1735 of our present Code, and has long prevailed as a statutory provision in this State, to say nothing of its being, as long ago asserted by both Lord Mansfield and Chief Justice Marshall, but affirmatory of the common law. It declares void all conveyances made with intent to hinder, delay or defraud creditors, purchasers or other persons who are or may be so hindered, delayed or defrauded. *Carter v. Castleberry*, 5 Ala. 277; *Dougherty v. Jack*, 5 Watts, 456, 30 Am. Dec. 335. (3) Subsequent creditors and subsequent purchasers are thus placed precisely on the same footing, equal protection being afforded to each. 27 Eliz. was made to embrace purchasers, while 13 Eliz. only included creditors. Our Statute includes both, as that of New York and other States also do. As to the New York Statute, Spencer, *Ch. J.*, said in *Anderson v. Roberts*, 18 Johns. 516, 9 Am. Dec. 235, *supra*: "I cannot perceive the least difference between a conveyance to defraud subsequent creditors and a conveyance to defraud subsequent purchasers." *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489. The past decisions of this court, I may add, bearing on this subject, as we shall see, appear fully to recognize this view. (4) Our decisions uniformly hold also that a mere voluntary conveyance, unaffected with actual fraud, is valid as to subsequent creditors. But if actual fraud—*mala fides*, or fraud in fact—is shown, whether directed against

143, 26 L. ed. 106; *Clark v. Killian*, 103 U. S. 766, 26 L. ed. 607; *Wallace v. Penfield*, 103 U. S. 290, 27 L. ed. 147; *Horbach v. Hill*, 112 U. S. 144, 28 L. ed. 670.

So subsequent creditors cannot question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in. *Graham v. La Crosse & M. R. Co.* *supra*.

A subsequent creditor, knowing that the grantor has voluntarily parted with his property, cannot attack the deed as fraudulent. *Lewis v. Simon*, 72 Tex. 470.

Where vendor had sufficient property remaining.

The mere fact of indebtedness alone will not render a voluntary conveyance void, if the grantor has property remaining, amply sufficient to pay his creditors. *Dixon v. Sanderson*, 72 Tex. 339.

A voluntary conveyance is not fraudulent as to a creditor where, at the time it was made and continuously thereafter, the grantor owned other property subject to execution, sufficient to pay such creditor. *Terry v. O'Neal*, 71 Tex. 522.

A conveyance by a debtor, though upon an inadequate consideration or upon no consideration, if no fraud be intended, is valid if the debtor retains sufficient property to pay his debts. *Wilbur v. Nichols*, 61 Vt. 432.

Voluntary conveyance will not be set aside at instance of grantor's creditors, if there is affirmative proof that sufficient property remains in his hands to satisfy their demands. *Christopher v. Christopher*, 3 Cent. Rep. 219, 64 Md. 582.

The fact that after the payment of the expenses of an administration there are not sufficient assets to pay the debts of the decedent will not avoid a conveyance made by him in good faith in his lifetime, which left sufficient property to pay his debts then owing. *Wilbur v. Nichols*, *supra*.

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To set aside a conveyance as fraudulent against creditors, it must be shown that, when made, the debtor had no other property subject to execution out of which his debts could be satisfied. *Albertoli v. Branham*, 80 Cal. 631.

A voluntary conveyance by a husband of all his property to his wife, while he is heavily in debt, reserving nothing to pay existing creditors, is fraudulent. *Marston v. Dresen* (Wis.) April 8, 1890.

Transactions, when fraudulent.

Transactions the main, if not the sole, purpose of which is to shift the title so as to place it beyond the reach of creditors who are pressing their claims, and yet to secure it, to the fullest measure, for the enjoyment of the debtor, are fraudulent. *White v. Megill* (N. J.) Sept. 23, 1890.

Conveyance made to defraud creditors is void. See note to *Loos v. Wilkinson* (N.Y.) 4 L. R. A. 332.

Fraudulent conveyances, who protected from.

The Revised Statutes of Missouri relating to fraudulent conveyances afford protection to two classes of persons: (1) creditors, who are protected against "every conveyance, assignment, etc., made or contrived with the intent to hinder, delay or defraud them; (2) purchasers, who are protected against every conveyance, etc., made or contrived with the intent to defraud or deceive those who shall purchase the lands," etc.; and in both cases such conveyances are declared void. This is, however, qualified by the section which declares that no such conveyance or charge shall be deemed void in favor of a subsequent purchaser, if the deed or conveyance shall have been duly acknowledged, etc., or the purchaser has actual notice thereof, unless the grantee was party or privy to the fraud intended. *Bonney v. Taylor*, 6 West. Rep. 652, 39 Mo. 61.

existing or subsequent creditors, either class can successfully impeach and defeat such conveyance, so far as it may affect the right to the satisfaction of their lawful debts or demands as creditors of the fraudulent grantor. *Seals v. Robinson*, 75 Ala. 364; *Stiles v. Lightfoot*, 26 Ala. 443; 3 Brick. Dig. 515, § 119. In other words, as clearly stated by Mr. Freeman: "Such fraudulent conduct renders the transfer void *in toto*, except as to the parties; and of this invalidity a subsequent creditor may take advantage, as well as one whom the debtor intended to defraud." *Jenkins v. Clement*, 14 Am. Dec. 706, 707, *note*.

Assuming these premises, we pass to other questions of greater difficulty. The present rule in England undoubtedly is that mere voluntary conveyances, although not infected with actual fraud, are absolutely and conclusively void under the Statute of 27 Elizabeth as against a subsequent purchaser for a valuable consideration, although he purchased with notice of the existence of such former voluntary conveyance. *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488. Or, as stated by Mr. Pomeroy (2 Eq. Jur. § 974), the English rule now recognized is that the Statute of Elizabeth "avoids all voluntary conveyances as against subsequent purchasers for a valuable consideration, even though such conveyances were made in good faith, without any actual fraudulent intent, and though the subsequent purchasers for value had notice thereof." This rule, as he observes, has been accepted by a portion of the American decisions, but not by the great current of American authority.

Mr. Sugden, in his treatise of the Law of

Vendors (pp. 474, 475), asserts that this has always been considered "a harsh interpretation" of the Statute of Elizabeth, and "ought never to have been established." And such, indeed, seems to be the general current of opinion among both the English and American jurists and judges. Mr. Pomeroy conceives the American rule, as supported by the current of authority, to limit the operation of the Statute to prior voluntary conveyances made with fraudulent intent, and its protection to subsequent purchasers for a valuable consideration and without notice. The American doctrine he thus formulates: "Conveyances are not void under the Statute merely because they are voluntary, but because they are fraudulent; and the fraudulent intent may be inferred in the same manner and under the same circumstances as against subsequent creditors. A voluntary gift of property is valid as against subsequent purchasers and all other persons unless it was fraudulent when executed; and a subsequent conveyance for value is evidence of fraud committed in the former voluntary conveyance, but not conclusive evidence. It results," he concludes, "that a voluntary gift made when the grantor is not indebted, in good faith, and without intent to defraud subsequent creditors, is valid as against a subsequent purchaser for a valuable consideration with notice." 2 Pom. Eq. Jur. § 974.

The English rule, holding, as we have said, a voluntary conveyance absolutely and conclusively void as against a subsequent purchaser even with notice, was repudiated by the Supreme Court of the United States as far back as the case of *Cathcart v. Robinson*, 30 U. S. 5

Conveyance to defraud may be avoided by creditors of vendor.

A conveyance to defraud creditors is good as between the parties and their privies, but may be avoided by creditors of the grantor. If they condone the fraud, the conveyance will stand against all comers. *Millington v. Hill*, 47 Ark. 801.

If a creditor of a fraudulent grantor, with knowledge of the fraud, accepts from the grantee the purchase price agreed to be paid for the land, he thereby affirms the sale and waives the right to complain of the fraud. *Ibid*.

A creditor whose debt is contracted subsequent to the execution of a voluntary deed must show actual fraud, in order to have the deed set aside. *Gardner v. Kleitke*, 46 N. J. Eq. 90.

Intent to hinder, delay or defraud.

The fact that a grantor was insolvent at the time of making a conveyance will not render it void as to creditors, unless it was made with intent to hinder, delay or defraud them. *Joiner v. Van Alstyne*, 28 Neb. 172.

In order to defeat for fraud a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights may and do shortly supervene. *Schreyer v. Scott*, 134 U. S. 406, 33 L. ed. 955.

A conveyance to a trustee for use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent and his conduct be bona fide. *Eigenbrun v. Smith*, 98 N. C. 207.

Although a purchaser may pay a full price for the property, yet if he purchases with the intent to aid his vendor to defeat the latter's creditors, his purchase will be void. *Ibid*.

A conveyance in consideration of an agreement
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to support the grantor during life is not fraudulent as to creditors, unless made with a fraudulent intent to cheat them, of which the grantee had notice. *Hays v. Montgomery*, 118 Ind. 91.

N. Y. Rev. Stat., 137 (vol. 3, 7th ed. 2329), making void every conveyance or assignment made with the intent to hinder or defraud creditors, is still in force, notwithstanding the various Acts relating to voluntary assignments for the benefit of creditors and to the powers of assignees. *Loos v. Wilkinson*, 12 Cent. Rep. 427, 1 L. R. A. 250, 110 N. Y. 195.

The fraudulent intent on the part of a debtor is not sufficient to invalidate a transfer of goods to one creditor, where the latter is not in collusion with him in the fraudulent intent. *Smith v. Jensen*, 18 Colo. 212.

Fraudulent intent a question of fact.

Under the Statute of Frauds and Perjuries, the question of fraudulent intent is always a question of fact, and no conveyance or charge will be adjudged fraudulent as against creditors solely on the ground that it is not founded on a valuable consideration. *Purple v. Farrington*, 4 L. R. A. 535, 119 Ind. 184.

A voluntary conveyance will be declared fraudulent as to subsequent creditors, if, from the circumstances and other evidence, the court is convinced the deed was made with intent to defraud such creditors; and, the conveyance being voluntary, it is immaterial whether the grantee had notice of such fraud. *Mayhew v. Clark*, 33 W. Va. 387.

Failure to file deed for record.

The want of record of a deed is not a circumstance tending to show fraud. *Blish v. Collins*, 13 West. Rep. 546, 68 Mich. 542.

Failure to file a deed for record may be a circum-

Pet. 265 [8 L. ed. 120], decided in 1881. The court, through *Chief Justice* Marshall, announced the rule in that case to be that one who purchases for value without notice from the grantor in a voluntary conveyance gets a good title as against the prior donee; that such prior conveyance or gift was only *prima facie*, and not conclusively, void as against a subsequent purchaser, the subsequent sale itself furnishing only "a strong presumption of a fraudulent intent," so as to cast the burden on the donee of proving the bona fides of such voluntary conveyance. In other words, the subsequent sale is carried back to the antecedent voluntary conveyance so as to characterize its intent, and presumptively shows an intent to defraud such subsequent purchaser. *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 848.

In the case above cited from 80 U. S. 5 Pet. 265 [8 L. ed. 120], there was no evidence of an existing debt by the donor at the time he made the gift to his wife, nor other evidence of actual fraud. There were present only the badges of subsequent insolvency, the donor's continuing to claim the ownership of the property conveyed, and the fact of the subsequent conveyance itself. The doctrine of that case is expressly approved in *Corpus v. Arthur*, 15 Ala. 525. The case under consideration is one of actual, and not of constructive, fraud, the evidence, as we have said, strongly tending to show an express agreement for a secret trust, with no elements of a valid conveyance except in naked form and semblance only.

The inquiry is twofold: (1) whether the word "purchaser," as used in section 1785 of the Code, includes a purchaser by direct conveyance from the fraudulent grantor; and (2) how far notice to such subsequent purchaser of the former conveyance affects the validity of his title. As to the first point, there is no difficulty, either as to the letter of the Statute,

or its generally accepted interpretation. *Chancellor* Kent says it was, even in his day, the settled American doctrine that a bona fide purchaser for a valuable consideration would be protected under the Statutes of 18 and 27 Eliz., as adopted in this country, whether he purchases from a fraudulent grantor or a fraudulent grantee, and that there was no difference in this respect between a deed to defraud subsequent creditors and one to defraud subsequent purchasers. 4 Kent, Com. 464.

This, as we shall show, is the Alabama rule, and there is a vast array of weighty authority to support it. *Hove v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126; *Anderson v. Roberts*, 18 Johns. 513, 9 Am. Dec. 235; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489; *Elliott v. Horn*, 10 Ala. 848, 44 Am. Dec. 488; *Stokes v. Jones*, 21 Ala. 781.

The chief conflict of authority arises where the purchaser from the fraudulent vendor is charged with notice of the prior fraudulent conveyance. Many authorities hold that when he has such notice he can claim no right which his immediate grantor would be estopped from asserting, and, therefore, that he will not be permitted to avoid the prior conveyance on the ground that it was intended to defraud subsequent purchasers or creditors. These decisions rest on the very reasonable ground, not only that the fraudulent grantor, having no title himself, can confer none, but that a contrary rule would lead to the injustice of enabling him, by collusion with a subsequent purchaser, to cheat the original grantee out of his estate. To this effect are *Foster v. Walton*, 5 Watts, 378; *Fowler v. Stoneum*, 11 Tex. 478, 63 Am. Dec. 490; *Moseley v. Moseley*, 15 N. Y. 334, and many other decisions.

So there are many authorities to the contrary, holding that the word "purchaser" means purchaser with as well as without notice,

stance in making up a conclusion as to fraud, but it is not in itself proof of fraud. *Klein v. Richardson*, 64 Miss. 41.

Where the proof shows the deed was withheld from record for an unusual time, the secrecy of the transaction adds weight to the presumption to be overcome by satisfactory evidence. *Zimmer v. Miller*, 1 Cent. Rep. 702, 64 Md. 293.

Grantees failing to record their deed, and permitting the grantor to remain in possession, are not innocent grantees as to those giving him credit upon the property. *Blackman v. Preston*, 12 West. Rep. 817, 123 Ill. 881.

A deed which is voluntary upon its face, and which, on delivery, was instantly handed back to the grantor and kept in his possession unrecorded, cannot be upheld as against creditors from whom he obtained credit on the faith of his ownership of the property, whether the grantee, who was his daughter, did or did not know his fraudulent intent. *Slater v. Moore*, 13 Va. L. J. 355.

Conveyances, although not fraudulent at first, may become so afterwards by not being recorded. *Steele v. Coon* (Neb.), Oct. 15, 1889.

A deed of land absolute on its face, which was in reality a security in part for a past indebtedness, but mostly for future advances, where the agreement to reconvey upon payment of the amount was withheld from record to prevent injury to the grantor's credit and prevent his property from being attached, is fraudulent as to his then existing creditors. *Ferguson v. Johnston*, 36 Fed. Rep. 184, 9 L. R. A.

Notice of fraudulent intent inferred from circumstances.

The existence of actual notice of the grantor's fraudulent intent is a question of fact, and may be established by direct evidence, or it may be inferred from circumstances and from proof of vendee's knowledge of suspicious facts. *Lyons v. Leahy*, 15 Or. 8.

Conveyance, when voidable.

Where a conveyance is not made in good faith and for a good consideration, it is voidable both as to subsequent and existing creditors. *Romans v. Maddux*, 77 Iowa, 208.

A fraudulent conveyance is void as to creditors, although the vendee paid full value, if he participated in the fraud. *Renninger v. Spatz*, 128 Pa. 524.

Knowledge on part of purchaser.

A grantee of real or personal estate, when it is shown that the purchase was made with intent to defraud or to hinder and delay creditors, has no equity as against such creditors to be protected for the amount which he actually paid on such purchase. *Goodhue v. Berrien*, 2 Sandf. Ch. 680, 7 N. Y. Ch. L. ed. 734; *Ferguson v. Hillman*, 55 Wis. 191; *Gardiner v. Otis*, 18 Wis. 400; *Stein v. Hermann*, 23 Wis. 132; *Avery v. Johann*, 27 Wis. 243; *Union Nat. Bank v. Warner*, 12 Hun, 306; *Briggs v. Merrill*, 50 Barb. 389; *Fullerton v. Viall*, 43 How. Pr. 394.

and, when there is actual fraud in the conveyance, it is made void by force of the Statute as against such purchasers for value. *Lewis v. Love*, 2 B. Mon. 845, 88 Am. Dec. 161; *Jenkins v. Clement*, 14 Am. Dec. 708, note; *Craig v. Zimmerman*, 87 Mo. 475, 56 Am. Rep. 466.

In this status of the law, it is proper that we should be governed by the rule to be deduced from the past decisions of this court as the principle involves a rule of property of vast importance in its effect on titles. These decisions seem to me, on the whole, to clearly favor the view that a conveyance infected with actual fraud may, under the Statute, be avoided by a subsequent bona fide purchaser holding by deed from the grantor, although he have notice of the previous fraudulent conveyance.

As to purchasers at a sale under execution against a grantor who has made a fraudulent conveyance, the rule is clear and well established. The title thus acquired under legal proceedings instituted by a creditor is unquestionably good, although the purchaser may have had notice of the fraud, for his knowledge of the fraud likewise imports a knowledge that it was the precise thing that rendered the conveyance void as to creditors and purchasers. This principle runs from the very recent case of *Teague v. Martin*, 87 Ala. 500, back to *Reed v. Smith*, 14 Ala. 880 (1848), and even still further, to *Carter v. Castleberry*, 5 Ala. 277 (1848).

It is recognized, even in those jurisdictions which repudiate the rule that a fraudulent vendor can confer no title by his deed of conveyance made to a subsequent bona fide purchaser with notice of the prior fraudulent deed. *Miller v. Koertge*, 70 Tex. 163.

In *Carter v. Castleberry*, *supra*, however, the following language was used by Chief Justice Collier: "It is true that a fraudulent conveyance is binding on the grantor, but authorities are ample to show that it may be avoided by a subsequent bona fide purchaser, although he may have notice of the previous conveyance;

[for] if he is informed of it, say the books, he knows that it is fraudulent, and of consequence void. And," he adds, "it is quite immaterial whether the subsequent purchaser acquire his title by a deed directly from the fraudulent grantor, or at a sale made under execution against him." That case involved a title to land acquired by purchase under execution, and the principle asserted was therefore not necessary to the decision of the case.

In *Eddins v. Wilson*, 1 Ala. 287, a father had made a fraudulent and voluntary deed to his son. He subsequently made a fraudulent conveyance based on a valuable consideration to another person. It was held that the first deed, though fraudulent, was good between the parties, and could not "be defeated by a subsequent vendee, whose purchase was conceived in fraud," for, it was added by Collier, *Ch. J.*, if this were so "it would only be necessary for him [the fraudulent grantor] to commit one act of fraud to defeat another." It was further said: "The law, however, is entirely different if the second purchaser can show that the transfer under which he claims was made for a valuable consideration, and in good faith." There is nothing here said about the effect of notice.

The case of *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488, decided in 1846, is one in point, when critically considered as a construction of our Statute of Frauds, now embodied in section 1735 of the Code. That case clearly holds that a subsequent purchaser for value from a fraudulent grantor obtains a title superior to that of the first grantee, although such subsequent purchaser had notice of the prior conveyance. There a father had made a voluntary conveyance to his son with intent to defraud creditors. The land, it is true, was entered by the father in the son's name, but this was considered immaterial (as was the same fact in *Hove v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126), the effect as to creditors, as

Actual notice to purchaser not necessary.

To avoid a sale for valuable consideration, actual notice to the purchaser of the fraudulent intent of the vendor is not necessary. No purchaser has a right to remain willfully ignorant of facts within his reach. *Dyer v. Taylor*, 50 Ark. 314.

A person who had knowledge of a conveyance two years before he entered into the contract which is the basis of his claim cannot say that he was defrauded thereby. *Schreyer v. Scott*, 134 U. S. 405, 88 L. ed. 955.

To avoid a sale upon the ground that it is fraudulent as to creditors, the purchaser must have knowledge of the fraudulent purpose of the seller, or have notice of such facts tending to show a fraudulent purpose as would put a man of ordinary prudence on inquiry. *Bollman v. Lucas*, 22 Neb. 793.

Voluntary conveyances, when void as to subsequent purchasers.

Voluntary conveyances, even though made in good faith, without any actual fraudulent intent, are void as to subsequent purchasers for a valuable consideration, even where such purchasers had notice thereof. *Sexton v. Wheaton*, 1 Am. Lead. Cas. 51.

But this broad doctrine has been limited by the current of authorities, to the effect that conveyances are not void merely because they are volun-

tary, but because they are fraudulent, the fraud to be inferred in the same manner and under like circumstances as against subsequent creditors. Such conveyances made when the grantor is not indebted, in good faith, and without intent to defraud, are valid as against subsequent purchasers for value with notice. *Wicks v. Clarke*, 8 Paige, 161, 4 N.Y. Ch. L. ed. 384; *Gardner v. Boothe*, 31 Ala. 186; *Corprew v. Arthur*, 15 Ala. 535; *Brown v. Burke*, 23 Ga. 574; *Chaffin v. Kimball*, 23 Ill. 36; *Aiken v. Bruen*, 21 Ind. 187; *Gardner v. Cole*, 21 Iowa, 205; *Pence v. Croan*, 51 Ind. 336; *Beal v. Warren*, 2 Gray, 447; *Enders v. Williams* (Ky.) 1 Met. 340; *Coppage v. Barnett*, 34 Miss. 621; *Prestidge v. Cooper*, 54 Miss. 74; *Sanger v. Eastwood*, 19 Wend. 514; *Baltimore v. Williams*, 6 Md. 236; *Foster v. Walton*, 5 Watts, 378; *Dougherty v. Jack*, 5 Watts, 456; *Lancaster v. Dolan*, 1 Rawle, 231; *Tate v. Liggit*, 2 Leigh, 84; *Footman v. Pendergrass*, 8 Rich. Eq. 33; *Anderson v. Green*, 7 J. J. Marsh. 448.

Where a voluntary conveyance was made it could not prevail against a subsequent purchaser with implied notice only of the prior deed. *Bonney v. Taylor*, 6 West. Rep. 655, 90 Mo. 72; *Sterry v. Arden*, 1 Johns. Ch. 261, 1 N. Y. Ch. L. ed. 133.

A purchaser with notice of fraud may purchase the title of a bona fide purchaser without notice, and the latter may sell the property and pass good title to the former. *Craig v. Zimmerman*, 4 West. Rep. 360, 87 Mo. 475.

was observed by Ormond, J., being precisely the same as if the land had been entered in the name of the donor instead of the son, who was a minor. The father afterwards sold the land to one who was not a creditor at the time the land was entered, inducing his infant son to convey. The son, seeking to disaffirm his conveyance, afterwards brought an action for the land. The court held that he could not maintain the action on the ground that the purchaser from the father, although he acquired title subsequent to the original fraudulent conveyance, and with notice of it, was entitled to protection under the Statute of Frauds, which was admitted to embrace the substance of 13 and 27 Eliz. The minor son in conveying (it was said) had done only what a court of equity would have compelled him to do. We can nowhere find any case in our Reports which repudiates the construction of the Statute announced in *Elliott v. Horn*, *supra*. On the contrary, the case of *Stokes v. Jones*, 18 Ala. 734, fully sustains it, and so does the same case as decided in the second appeal, and reported in 21 Ala. 731. A father there had made a fraudulent deed of gift to his children, and he afterwards conveyed the same property to a subsequent purchaser for value. The latter title was held to prevail in an action of ejectment, actual fraud in the conveyance being proved.

The case of *Corprew v. Arthur*, 15 Ala. 525, cited and relied on by appellee's counsel, so far from being repugnant to the foregoing cases, is corroborative of their authority. The same Statute is there construed by Judge Collier as applicable to one purchasing for value from the donor in a voluntary conveyance not infected with actual fraud. Adopting the view of the United States Supreme Court, as announced in *Cathcart v. Robinson*, 30 U. S. 5 Pet. 264 [8 L. ed. 120], it was held that one who purchases for a valuable consideration with notice that his vendor had made a previous voluntary conveyance will not be preferred. It was decided that a subsequent mortgagee was a purchaser within 27 Eliz., so as to avoid a prior voluntary conveyance under that Statute, but it was added: "As a subsequent purchaser he cannot claim the right to subject the land to the payment of his demand without showing that the conveyance was not only voluntary, but was intended to defraud creditors."

The same principle is announced in *Gardner v. Boothe*, 31 Ala. 186, where it was decided that a subsequent purchaser for value of certain slaves from a donor in a voluntary conveyance, although he bought without notice, acquired no title as against the donee. To invalidate the transfer as to a subsequent purchaser, it was held that proof of actual fraud was necessary.

The case of *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, was one involving personal property left in the hands of the grantor, and is governed by a principle somewhat different. But the subsequent purchaser was fully protected there as against a prior fraudulent grantee.

There is nothing in *Griffin v. Doe*, 12 Ala. 784, which is contradictory of these views, when the language of the court is construed

with reference to facts of the case. The plaintiff in ejectment there claimed title under a recorded deed from one Oliver, the alleged fraudulent grantor. The defendants claimed title under two sheriff's deeds, executed after the deed of the plaintiff, but based on judgments rendered on debts older than the fraudulent conveyance. It was held that the plaintiffs' title derived from the fraudulent grantor was subordinate to that derived under the execution sale. We need pursue this part of the discussion no further. Whatever superior force may be accorded to the weighty reasons by which the contrary doctrine is so ably supported, our decisions commit us to the rule that the purchaser for value from the grantor in a voluntary conveyance infected by actual fraud obtains a superior title as against a fraudulent donee, although he purchased with notice of the conveyance. The whole reason of the case is simply this: The Statute itself expressly declares fraudulent conveyances void as against subsequent purchasers and creditors alike. This implies bona fide purchasers for value, but it does not exclude purchasers with notice of the very fact which alone enables them to avoid the conveyance. Nor can a fraudulent grantee make any very just or conscionable complaint that he is deprived of the fruits of his iniquity, because it is done by the mandate of the law itself.

A distinction is made as to notice between the registration of a mere voluntary deed, unaffected by actual fraud, and a deed which is so infected. The former operates as notice, so as to bind a subsequent purchaser, but the latter does not, at least to the extent of barring the assertion of the purchaser's rights based on the fraud of the transaction. As stated in *Laird v. Scott*, 5 Heisk. 346: "After registration of a voluntary deed for land, a subsequent purchaser for value cannot claim to be an innocent purchaser without notice. But, if the voluntary conveyance was intended to defraud a subsequent purchaser, the notice by registration will not affect his right to attack the voluntary conveyance for actual fraud. It follows that a voluntary conveyance made with the intent to defraud a subsequent purchaser for value is void as against him without registration, and with or without notice." *Jenkins v. Clement*, 14 Am. Dec. 708, *note*, and cases cited; *Wyman v. Brown*, 50 Me. 143; *Lewis v. Love*, 2 B. Mon. 845, 33 Am. Dec. 162; *Mason v. Baker*, 1 A. K. Marsh. 308, 10 Am. Dec. 724; *Lancaster v. Dolan*, 1 Rawle, 231, 18 Am. Dec. 625.

The plain reason of this distinction is that the Statute itself makes conveyances infected with actual fraud void as to subsequent purchasers for value; but it does not, according to the better view, embrace mere voluntary conveyances not actually fraudulent. Other conveyances are governed as to notice by the Registration Statutes. Code 1886, § 1810 *et seq.*, and section 1735. It was long ago resolved (as far back as *Sperry's Case*, 5 Coke, 60b), that a purchaser, notwithstanding he had notice of a fraudulent conveyance, might avoid it: for the notice of the purchaser cannot make that good which an Act of Parliament has made void as to him. Newl. Cont. 396, 397.

And, moreover, as said in *Myers v. Peek*, 2

Ala. 659, mere notice on the part of the purchaser of a fraudulent transfer will not prevent his avoiding it, because, if he knew of the transaction, he knew it was void by law." There is no force in the contention that, after Rhea had compromised his suit of ejectment with A. W. Shepherd, the alleged fraudulent grantor, and had reconveyed to him the title to the land in controversy after its purchase at the sheriff's sale, this title inured to the benefit of the fraudulent grantee by virtue of the covenant of warranty contained in that deed. It may be admitted that Rhea acquired the title by the sheriff's sale under his execution against the fraudulent grantor, the judgment debt being older than the fraudulent conveyance, and that his deed to A. W. Shepherd conveyed back to him the legal title to the land. But this title inured to the benefit of the subsequent purchaser, not of the fraudulent donee. This is expressly settled in *Stokes v. Jones*, 21 Ala. 731, 18 Ala. 734, where it is said: "The voluntary fraudulent estoppel [argued to have been created by the covenant of warranty contained in the deed] is as impotent to defeat the just claims of creditors or bona fide purchasers for a valuable consideration as the deed would be had it contained no covenant out of which the estoppel is supposed to arise. A party cannot do by circuitry and indirection what the law forbids to be directly done. He cannot avoid the claims of creditors or bona

fide purchasers by conveying with warranty to defraud them, and afterwards acquiring the title." It is too clear for argument that the payment of Rhea's debt by A. W. Shepherd did not purge his conveyance of fraud as to subsequent purchasers or creditors. If it was void for actual fraud, being a mere secret trust and a sham sale, the transaction at once lay open to the attack of either of these classes. The existence of Rhea's debt was only a circumstance to prove fraud. Its payment was indemnity to him alone, and to no one else. It in no manner purged the fraud as a ground of attack on the title by others who were invested by law with this right. We are aware of no principle by which one who cheats two distinct persons can, by affording indemnity to the one, exempt himself from legal liability to the other. This precise point was made in *Stokes v. Jones*, 21 Ala. 731, but was passed by the court *sub silentio*, being obviously regarded as without merit. These views result necessarily in the reversal of the judgment, many of the rulings of the court being repugnant to the principles which we have here announced. The exceptions based on the rulings on the evidence, much of which is purely cumulative, may not arise on another trial, and we do not consider them. They have not, moreover, been deemed of sufficient importance to be discussed by counsel.

Reversed and remanded.

PENNSYLVANIA SUPREME COURT.

Re George L. OLIVER'S ESTATE.

APPEAL OF MERCHANTS' FUND ASSOCIATION of Philadelphia.

(...Pa....)

- 1. The interest of a member of a partnership,** organized on the joint-stock plan for the purpose of dealing in land, the articles of which provide that the affairs of the company are to be managed by trustees, and the interest of each member in the joint fund is to be measured by his shares of stock, is simply an interest in the profits made and a resulting interest in the business and assets of the company, and is personal estate, and he has no title to the land purchased by the company, as tenant in common or otherwise.
- 2. Where a member of a joint-stock association organized for dealing in land,** whose interest therein is purely personal estate consisting of a right to share in the profits and to an account of assets, devises his estate to trustees with directions to pay the income to one for life and after his death to pay the principal to another, dividends received by the trustees out of profits made by the association after testator's death are income and go to the life tenant and not to the remainderman.
- 3. Profits made by a joint-stock association formed for the purpose of dealing**

in land by a sale of land at a greatly increased price because of the discovery therein of mineral ore after the death of one of its members, whose interest consisted simply of a right to share in profits and to an account of assets, will be held to have accrued after such member's death, and will belong to the income and not to the principal of his estate notwithstanding the land was bought during his lifetime.

(October 6, 1890.)

APPPEAL by the Merchants' Fund Association from a decree of the Orphans' Court for the County of Philadelphia rendered upon the first account of the trustees of the estate of George L. Oliver, deceased, and awarding certain money to Mrs. Catharine M. Richardson as income from the trust fund which appellant claimed to be entitled to as principal. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. James Bayard Henry and George Junkin*, for appellant:

The fund in controversy was principal, and should go to the remainderman.

Eley's App. 103 Pa. 306; *Earp's App.* 28 Pa. 368; *Moss' App.* 83 Pa. 204; *Biddle's App.* 99 Pa. 278; *Vinton's App.* Id. 434.

The income or profits which the life tenants are given, are those produced by the use of the assets, and not by the increase of value in the assets themselves.

Cragg v. Riggs, 5 Redf. 82-91.

The expression "net rents, issues, profits and

NOTE.—Partnership in real estate speculation; nature of. See note to *Tyler v. Waddingham* (Com.) 8 L. R. A. 667.

9 L. R. A.

income of the remainder and residue of my estate," is a commingling of the terms used to create a life tenancy in realty and a life interest in personalty, but, as used by testator, mean nothing more nor less than the net earnings of the principal of said estate; and the same rule would apply if the testator had used the terms "proceeds," "income," "profits," "products," "earnings" or any other expression of a similar nature.

France's Estate, 75 Pa. 224; *Eley's App.* 103 Pa. 800; *Earp's App.* 28 Pa. 868; *Moss' App.* 88 Pa. 264; *Vinton's App.* 99 Pa. 484; *Matson's Ford Bridge Co. v. Com.* 10 Cent. Rep. 809, 117 Pa. 265.

The increase in the value of the assets or capital of any association belongs to the remainderman, especially in a case like this where said increase has not arisen from any efforts on the part of the management, but owing purely to the fortunate discovery, by strangers, of unknown assets or capital belonging to the association.

Cook, Stock and Stockholders, § 553; *Perry, Tr.* § 545, and *note*; *Hill, Trustees*, 4th Am. ed. 591.

When a life interest is given in perishable funds or property, which may be consumed in the using, the same should be converted and invested in such a way as to produce a permanent capital, the income or interest of which permanent capital alone is to go to the owner of the life estate.

Cairns v. Chaubert, 9 Paige, 160, 4 N. Y. Ch. L. ed. 649.

The life tenant is only entitled to the income or interest of the capital or assets, and not to any portion of the capital or assets or the proceeds thereof.

Kinmonth v. Brigham, 5 Allen, 276; *Lewin, Tr. Am. ed.* 804; *Wms. Exrs.* 2d Am. ed. 1393; *Hill, Trustees*, 4th Am. ed. 591.

If the proceeds of the sale of the 40 acres are "earnings," so will the proceeds of the remaining 560 acres (less the amount originally invested) be "earnings;" and if the proceeds of the sale of the remaining 560 acres are "earnings," then trustees of every estate must regard all appreciations in the value of investments, during the continuance of a life estate, as belonging to the life tenant, which is not the law of Pennsylvania yet, nor of any other State or country.

Vinton's App. supra; *New England Trust Co. v. Eaton*, 1 New Eng. Rep. 372, 140 Mass. 532; *Re Gerry*, 4 Cent. Rep. 796, 103 N. Y. 445.

When a dividend is declared and paid to trustees on funds in their hands derived from the sale of trust property by which the principal fund is impaired or diminished, or where moneys are received as the proceeds of what are termed wasting securities, such as leasehold estates which in process of time will expire or perish or become of greatly diminished value, if the funds are held on a trust by which the income is to be paid for life to certain persons, it will be the duty of the trustees to add such dividends or moneys to the principal fund, so as to preserve it unimpaired for those entitled in remainder.

Cairns v. Chaubert, 9 Paige, 160, 4 N. Y. Ch. L. ed. 649; *Paris v. Paris*, 10 Ves. Jr. 185; *Iowe v. Earl of Dartmouth*, 7 Ves. Jr. 151; *Hill*, 9 L. R. A.

Trustees, 4th Am. ed. p. 591; *Perry, Tr.* § 545, and *notes*; *Lewin, Tr. Am. ed.* *805; *Cook, Stock and Stockholders*, § 554, and *note*; *Wms. Exrs.* 2d Am. ed. 1398.

Messrs. Richard C. Dale and Henry C. Olmsted, for appellee:

The fund in this case was properly held to be income.

Matson's Ford Bridge Co. v. Com. 10 Cent. Rep. 809, 117 Pa. 265; *Barclay v. Wainwright*, 14 Ves. Jr. 66; *Browne v. Collins*, L. R. 12 Eq. Cas. 586; *Hyatt v. Allen*, 56 N. Y. 553; *Perry, Tr.* §§ 544, 545; *Reed v. Head*, 6 Allen, 174; *Harvard College v. Amory*, 9 Pick. 446; *Bulch v. Hallett*, 10 Gray, 402; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Preston v. Melville*, 16 Sim. 163; *Lord v. Brooks*, 52 N. H. 72.

Williams, J., delivered the opinion of the court:

The contest in this case is between the life tenant and the remainderman, and the question is whether the fund in the hands of the trustees is income or principal. It appears that George L. Oliver was one of the persons who organized The Metalline Land Company of Lake Superior, and that he remained a member of the company until his death in 1886. This company was organized on the joint-stock plan, with a capital divided into 20,000 shares having a nominal or face value of \$5 each. At the time of his death Oliver held 5,582 shares. By his will he made some specific gifts and placed the residue of his large estate in the hands of trustees with directions to pay the net income derived therefrom to his daughter during her life, and the principal after her decease to the Merchants' Fund Association for certain charitable uses. The Metalline Land Company owned about 600 acres of land when Oliver died, and two years later sold 40 acres of it for a half million of dollars. The larger part of this price has been divided by the company among its stockholders, and the dividend accruing to the Oliver stock is over \$100,000. The daughter claims it as income. The appellant claims it as principal. To which of them should it be awarded? Before determining this question it will be best to consider some preliminary ones that lead up naturally to it. These are, first, What is the legal status of the company? second, What is the relation of the stockholders to the company? third, What is the interest of a stockholder in the company property? The company is unincorporated and is a partnership organized on the joint-stock plan by the contract entered into by its members. This contract designates and describes the business to be done, the capital to be used and how it is to be paid in by the members, and limits the number of persons by whom the affairs of the company are to be conducted. It provides that the interest of each member in the joint fund is to be measured by his shares of stock, which he may sell and transfer without consultation with his associates and without impairing the power of the trustees or the existence of the company. The partnership thus formed, whatever the liability of its members to third persons may be, is an artificial judicial person capable of acquiring, holding and selling property. Ordinarily a partnership can convey its real estate only by the deed of all its members,

but this company gave to its trustees power to buy, incumber and sell land for it in their own names. It was a dealer in land as a commodity using the names of its trustees in all its transactions. The principle that an unincorporated company or firm may deal in land, and that when it does so it holds the title and may incumber or convey it, was settled in *Brady v. Colhoun*, 1 Penn. & W. 140.

The relation of the stockholders to the company is also settled largely by the articles of agreement. They contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. As between themselves, however it may be as to others, they are liable to losses in proportion to their stock. They have, however, no power to use the name of the company, to interfere with its business or to bind it in any manner. This power they have voluntarily surrendered, and committed it to the trustees selected by them as the agents and representatives of the company; so that the firm or company speaks not through its members as such but through its trustees. These are liable for their fidelity to the trust and for all profits made in the business, in substantially the same manner that a board of directors is liable to the stockholders in an incorporated company. In partnerships of the ordinary character each partner is the agent of his firm, has personal contact with and control over its affairs, and the right to possession in common with his copartners of the firm property; but under the agreement organizing the Metalline Land Company the relation of the individual member to the firm was changed and his rights reduced so that the stockholder had only a right to participate in the election of trustees and to receive his share of the money made.

The interest of the stockholder in the company proper is controlled by his relation to the company under his agreement, and by the nature of the business done.

The object in buying was not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of land; and the articles provided for the division of the profits made by such purchase and sale among the stockholders. The interest of each member was therefore an interest in the profits made. He had no title to the land bought by the trustees for the company, as a tenant in common or otherwise, and could neither convey nor incumber it. His interest in it was personal estate and the extent of that interest was shown by his certificates of stock. *Kramer v. Arthur*, 7 Pa. 165; *Brady v. Colhoun*, *supra*.

The company was the real owner of the land and the trustees acting for it could alone incumber or convey it. The stockholder had, as a partner has, a resulting interest in the business and assets of the company which can be legally ascertained only by an account. *Maily v. Wood*, 71 Pa. 488.

The purchase of real estate by a firm or company dealing in it, is, as between itself and its members, a conversion of it into personalty, and the levy and sale of the land upon a judgment against an individual member of the firm passes no interest or estate in it to the purchaser. The creditor of one partner can ac-

quire by levy and sale of his debtor's interest no greater right than his debtor held, viz., the right to an account and to a distributive share of what may remain after the payment of the firm debts on final settlement. *Ebbett's App.* 70 Pa. 79; *West Hickory Min. Assn. v. Reed*, 80 Pa. 88; *Maily v. Wood*, *supra*.

The interest of Oliver as a stockholder in the land company was therefore not that of a tenant in common of its lands, but that of one entitled to share in the profits of its business. The trustees under his will succeed him as holders of his shares, and their interest as such holders is neither greater nor less than his interest was while he was living. The company was not dissolved by Oliver's death and has not yet been dissolved. It has done but little business for several years, but it has paid the taxes on its lands and kept up its own organization, and still holds undisposed of nearly 600 acres in the names of its trustees. The relation between it and the holders of its stock is therefore the same since Oliver's death as before. He had no title to the lands of the company while he lived, and none could pass from him to the trustees under his will by reason of his death. His interest as a stockholder was personal estate in his hands, and it is personal estate now in the hands of his representatives. The dividend made by the company out of the proceeds of the 40 acres has the same character and is governed by the same rules as though it had been made in his lifetime. It represents part of the difference between the cost of the land sold, including taxes and expenses, and the price received for it. That difference is the profit made by means of the purchase and sale of the land, which it is the duty of the trustees to divide among the stockholders. It is clear, therefore, that this dividend is personal estate and represents gain or profit made in the proper business of the land company, that of buying land for purposes of sale, and selling it with a view to make gain for the stockholders. The will directs the payment of the net income from his estate, real and personal, to his daughter; and as this dividend represents income it goes to the daughter and not to the remainderman. The shares are part of the residuary estate and belong to appellant. The profit accruing from the sale of lands is income from the investment in the stock of the land company, and if made since the death of Oliver is not to be distinguished from income derived from any other source. This leads us to the only other question, which is, When was the profit out of which this dividend is declared earned?

It is urged that it has not been earned since Oliver's death, and that for that reason, admitting it to represent profits, it belongs to the remainderman under the rule in *Karp's App.* 28 Pa. 368. The argument is that the phenomenal advance in the price of this piece of land is not due to anything done by the land company by way of development or otherwise, but to the presence of a rich deposit of copper ore which was in place when Oliver died. For this reason it is said the real value of the land has not changed. Nothing, therefore, has been gained by reason of anything done by the company. The reply to this is that the object of forming the company was to buy lands in ad-

vance of any general knowledge of their mineral value, and by means of openings or borings develop their true value and then sell. Whether the work which demonstrated the existence of the deposit of copper on the 40 acres was the work done by it or by its neighbors is unimportant. The mineral value was made apparent in either case and a sale at a greatly increased price made possible. The increased price came, not from a change in the actual value, but from a correct knowledge of that value, which increased the market price. This knowledge was acquired, and the price advanced in consequence of it, after Oliver's death. When he died the stock was thought to be of little value, and the lands could not have been sold at a profit. There were therefore no accrued or undivided profits to pass to the remainderman, and the wonderful advance made since his death has been earned, within the meaning of the rule in *Earp's Appeal*, by means of developments made in the neighborhood since the title was vested in the trustees named in his will. *Earp's Appeal* is therefore in harmony with our holding in this case.

The same is true of *Willbank's App.*, 64 Pa. 256, and *Moss' App.* 83 Pa. 264. In the latter case the question was over the character of the option, to subscribe for new shares of stock, belonging to existing stockholders by virtue of their ownership; and this court held that the option did not represent profits earned, but the right of the holder to increase his investment with a view to enlarged operations and greater profits to be earned thereby in the future. It belonged, therefore, to the owner of the stock, and not to the owner of the income.

The circumstance that the entire block of shares in the land company was appraised at \$5 is without significance. It is now clear that the shares are worth all that has been invested in them, and that the remainderman is many thousands of dollars better off than was supposed when the inventory was taken, but the net income is not his. That goes to the daughter.

The decree of the court below is affirmed, and the costs of this appeal are to be paid by the appellant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Charles WINCHESTER

v.

George M. GLAZIER.

(....Mass....)

1. Where the question as to whether or not a partner is entitled to a salary, when no profits are made, is left open to doubt by the partnership articles, if he is credited with salary at such times for a series of years on the books of the concern, with the knowledge of the other partner, who makes no objection thereto, such interpretation by the parties themselves of the partnership agreement will be conclusive, and the claim for salary at such times must be allowed upon a winding up of the concern. In like manner failure by one partner to object to an increase in the salary paid the other will make such increase binding on him.
2. A partner is entitled to interest on advances made by him to the firm, and on unwithdrawn profits, where for years prior to the time when his right thereto is disputed the cus-

tom has been to credit each partner with such interest on the books of the concern with the knowledge and approval of both, notwithstanding the partnership articles provide that the capital of neither shall be taken to pay interest to the other and make no provision whatever as to advances and unwithdrawn profits.

3. The right of a partner to interest on advances, arising from a long-continued custom of the partnership to allow such interest, cannot be affected by the fact that, without his knowledge, the bookkeeper, in accordance with his interpretation of the partnership articles and with the assent of the other partner, charged back to the respective partners the amount of such interest standing to their credit.
4. Interest will not be allowed to a member of a partnership on advances and unwithdrawn profits left with the firm unless it is provided for in the partnership articles or is in accordance with the understanding of the parties.
5. Advances made by a partner to the concern with the understanding that he shall receive interest thereon will be treated as a loan,

NOTE.—Partners, compensation for services.

In the case of joint partners, the general rule is that one is not entitled to charge against another a compensation for his more valuable or unequal services bestowed on the common concern, without a special agreement. *Bradford v. Kimberly*, 8 Johns. Ch. 434, 1 N. Y. Ch. L. ed. 674; *Beatty v. Wray*, 19 Pa. 516; *Forrer v. Forrer*, 29 Gratt. 138; *Patton v. Calhoun*, 4 Gratt. 138; *Phillips v. Turner*, 2 Dev. & B. Eq. 123; *Franklin v. Robinson*, 1 Johns. Ch. 167, 1 N. Y. Ch. L. ed. 98; *Emerson v. Durand*, 64 Wis. 111; *Reybold v. Jefferson*, 1 Harr. (Del.) 415; *Lathrop v. Hyde*, 25 Wend. 452; *Caldwell v. Leibert*, 7 Paige, 483, 4 N. Y. Ch. L. ed. 240; *Drew v. Ferson*, 22 Wis. 651; *King v. Hamilton*, 16 Ill. 190; *Boardman v. Cloese*, 44 Iowa, 428; *Heath v. Waters*, 40 Mich. 437; *Zimmerman v. Huber*, 29 Ala. 379; *Bennett v. Russell*, 24 Mo. 624; *Coddington v. Idell*, 29 9 L. R. A.

N. J. Eq. 504; *Gilhooly v. Hart*, 8 Daly, 176; *Cameron v. Francisco*, 28 Ohio St. 190; *Coursen v. Hamilton*, 2 Duer, 513; *Dunlap v. Watson*, 124 Mass. 306; *Vanduzer v. McMillan*, 37 Ga. 299.

There is no compensation for inequality of services rendered before the dissolution; and these cases are decisive in a case for winding up, which is the consummation of the contract, and its business is as much an affair of the firm as an original operation. *Beatty v. Wray*, 19 Pa. 516; *Thornton v. Proctor*, 1 Anstr. 94; *Franklin v. Robinson*, 1 Johns. Ch. 165, 1 N. Y. Ch. L. ed. 100. See note to *Gray v. Hamill* (Ga.) 6 L. R. A. 72.

A partner must serve without any reward or compensation, unless there is an express stipulation for compensation. *Denver v. Roane*, 99 U. S. 353, 25 L. ed. 478.

The law never undertakes to settle between partners their various and unequal services bestowed in

and will draw interest until repaid, notwithstanding the prior dissolution of the partnership.

6. Where interest at 7 per cent has been credited by partners at their accountings upon advances made by the respective members to the concern each partner is entitled to receive the amount so found due him; but if the agreement between the partners for interest is not in writing, and remains executory, only 6 per cent can be allowed.

7. Where a member of a partnership becomes a member of another firm, from which he receives a salary, which is never entered on the books of the first concern, but which he retains for his own use with the knowledge of his copartner in such concern, who makes no claim to share in it until after their partnership is dissolved, such claim will be disallowed.

8. Accounts between partners, which are not partnership matters, may be adjusted by being charged in the partnership account, if the partners agree thereto.

(October 24, 1890.)

RESERVATION from the Supreme Judicial Court for Suffolk County (Holmes, J.), for the consideration of the full court of an action brought for the settlement of a partnership account, and to recover the amount alleged to be due from one partner to the other.

The case sufficiently appears in the opinion.

Mr. J. G. Abbott, for plaintiff:

When the capital to be advanced by each partner is fixed by the partnership contract, and one partner advances for the business of the firm funds in addition to his capital, as between the partners, upon a settlement of its affairs between them, he is to be allowed interest on such sums.

Ex parte Chippendale, 4 De G. M. & G. 86; *Hart v. Clarke*, 6 De G. M. & G. 254; *Re Norwich Yarn Co.* 22 Beav. 167; *Troup's Case*, 29 Beav. 353; *Re Beulah Park Estate*, L. R. 15 Eq. Cas. 43; *Berry v. Folkes*, 60 Miss. 608; *Morris v. Allen*, 14 N. J. Eq. 44; *Lloyd v. Carrier*, 2 Lans. 364; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Emerson v. Durand*, 64 Wis. 111-122; *Millar v. Craig*, 6 Beav. 433; *Coddington v. Idell*, 29 N. J. Eq. 504; *Hodges v. Parker*, 17 Vt. 244; *Reynolds v. Mardis*, 17 Ala. 82; *Leserman v. Bernheimer*, 118 N. Y. 89; *Baker v. Mayo*, 129 Mass. 517.

This rule has been adopted, even where the

advance by one partner for the use of the firm was unknown to the other partners.

Lindley, Partn. 649; *Collier*, Partn. § 885; *Ex parte Chippendale*, *supra*.

Only the affairs of the partnership, not private transactions between the partners, having no connection with its business, can be considered or settled in this suit.

Lindley, Partn. 728, 729, and authorities cited; *Parsons*, Partn. 270-277; *Wetherbee v. Potter*, 99 Mass. 354; *Rockwell v. Wilder*, 4 Met. 556; *Williams v. Henshaw*, 11 Pick. 79; *Gardner v. Cleveland*, 9 Pick. 334.

Messrs. Robert M. Morse, Jr., and Charles E. Hellier, for defendant:

A settlement between partners will not be opened or set aside in the absence of fraud, collusion or mistake.

Riggs v. Hawley, 116 Mass. 596; *Stuart v. Sears*, 119 Mass. 143; *Harris v. Carter*, 6 New Eng. Rep. 604, 147 Mass. 818; *Bradley v. Brigham*, 187 Mass. 545, 547; *Chappedelaine v. Dechenaux*, 8 U. S. 4 Cranch, 306, 2 L. ed. 629; *Finley v. Lynn*, 10 U. S. 6 Cranch, 238, 3 L. ed. 211; *Taylor v. Shaw*, 2 Sim. & Stu. 12; *Endo v. Caleham*, Young, 806; *Stetthamer v. Killip*, 75 N. Y. 232; 2 *Lindley*, Partn. p. 512.

The books of a firm are prima facie evidence against any partner who has access to them.

Topliff v. Jackson, 12 Gray, 565; *Winship v. Bank of U. S.* 30 U. S. 5 Pet. 529, 8 L. ed. 216; *Foster v. Fifield*, 29 Me. 136; 2 *Bates*, Partn. § 978, and note 2; 2 *Lindley*, Partn. p. 536, and note.

The current expenses of the firm should have been paid whether or not there were profits to pay them, and the salary of a partner is a debt of the firm to that partner in his individual capacity which is to be borne by all, including the recipient, and is part of the expense of the firm.

Fuller v. Miller, 105 Mass. 103; *Frunck v. Haskell*, 182 Mass. 580; *Aakew v. Springer*, 111 Ill. 682; *Cook v. Phillips*, 16 Ill. App. 446; *Couch v. Woodruff*, 63 Ala. 466; *Hills v. Bailey*, 27 Vt. 549; *O'Lone v. O'Lone*, 2 Grant, Ch. (U. C.) 125; 1 *Lindley*, Partn. p. 880; 2 *Bates*, Partn. § 778.

Salary found regularly credited upon the books of a firm constitutes as express an agreement therefor as if contracted for in the articles.

Pratt v. McHutton, 11 La. Ann. 260; *Geddes v. Wallace*, 2 Bligh, 295; *Jackson v. Sedgwick*,

the joint business. This must be left to contract. *Reynold v. Jefferson*, 1 Harr. (Del.) 401, 26 Am. Dec. 405.

The surviving partner is not entitled to compensation for winding up the partnership business. *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677.

He is entitled to a reward for his services if it can be clearly implied from the course of dealing or other circumstances. See note to *Gray v. Hamil*, *supra*.

Allowance of interest in partnership accounting.

The period of the dissolution of the partnership is the proper time to make a rest and adjust the accounts, and the partner against whom the balance is found is chargeable with interest. *Andrews v. Andrews*, 3 Bradf. 101; *Johnson v. Hartshorne*, 52 N. Y. 173.

As a general rule, interest is not allowed upon partnership accounts until after a balance is struck 9 L. R. A.

on a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns. *Gilman v. Vaughan*, 44 Wis. 649; *Dexter v. Arnold*, 3 Mason, 234; *Lee v. Lashbrooke*, 8 Dana, 214; *Day v. Lockwood*, 24 Conn. 185; *Desha v. Smith*, 20 Ala. 747; *Whitcomb v. Converse*, 119 Mass. 38; *Beacham v. Eckford*, 2 Sandf. Ch. 116, 7 N. Y. Ch. L. ed. 531.

In taking partnership accounts, the question whether interest shall be allowed or disallowed cannot be determined by the application of any established general rule, but such allowance or refusal must depend upon the circumstances of each particular case. *Buckingham v. Ludlum*, 20 N. J. Eq. 350.

The allowance or refusal of interest in the settlement of partnership accounts depends upon the circumstances of each particular case; any unbending rule would work injustice in some cases. *Gyger's App.* 62 Pa. 73.

1 Swanst. 460, 469; *Const v. Harris*, Turn. & R. 523; 2 Bates, Partn. § 775.

Undrawn profits cannot draw interest except by agreement of the partners.

Harris v. Carter, *supra*; *Dinham v. Bradford*, L. R. 5 Ch. App. 519; *Wood v. Scoles*, L. R. 1 Ch. App. Cas. 389; *Bradley v. Brigham*, *supra*; *Miller v. Lord*, 11 Pick. 11, 26; *Godfrey v. White*, 43 Mich. 171; 1 Lindley, Partn. 390; 2 Bates, Partn. § 786; *Ex parte Chippendale*, 4 DeG. M. & G. 19.

The defendant drew an increased salary after the expiration of the first term of the copartnership, and the plaintiff assented thereto. The increased salary was regularly charged to the defendant on the books of the firm and was reckoned in on each semi-annual settlement. These facts establish a valid agreement which the plaintiff cannot now repudiate.

Harris v. Carter, *Bradley v. Brigham* and *Pratt v. McHatton*, *supra*; *Gage v. Parmelee*, 87 Ill. 327; *Geddes v. Wallace*, *Jackson v. Sedgwick* and *Const v. Harris*, *supra*; *Southmayd's App.* (Pa.) Feb. 7, 1887; 2 Bates, Partn. § 775.

C. Allen, J., delivered the opinion of the court:

The first question is, whether the defendant was entitled to draw a salary in half years when there were no net profits. This question is open to doubt if the partnership articles alone are looked at, but its determination does not depend merely upon the construction which would be given to the partnership articles, taken by themselves alone. It is a general rule for the construction of written instruments, including statutes, deeds and contracts, that when the language is open to doubt, and parties whose interests are diverse have from the outset adopted and acted upon a particular construction such construction will be of great weight with the court, and will usually be adopted by it. *Stone v. Clark*, 1 Met. 378; *Stevenson v. Brakine*, 99 Mass. 867, 875; *Lovejoy v. Lovett*, 124 Mass. 270, 274; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50, 54 [19 L. ed. 594, 596].

This rule has full force in the construction of partnership articles, and a practical construction given for several years by the partners themselves to language which would otherwise be open to doubt will usually be accepted by the court as conclusive.

The defendant was credited with the full amount of his salary in every year during the continuance of the partnership. The master finds that the plaintiff had knowledge, at least as early as 1878, that credits of salary were made to the defendant in half years when there were no profits. At that time six such half-yearly credits had been entered, namely, in 1872, 1874, twice in 1875, 1876 and 1877. The master reports that there was no evidence that the plaintiff ever objected to this course prior to the bringing of this suit, and that the plaintiff testified as a witness before him. The partnership continued for six years after 1878, and under these circumstances it must now be considered that under the partnership articles, as understood and acted upon by the partners, the defendant was entitled to his salary, whether there were profits of the business or not.

By a similar course of reasoning, though

upon the facts the conclusion is less clear, the plaintiff must be held bound by the increase of the defendant's salary in 1874 from \$2,500 to \$3,500 a year. When the partnership began the defendant had said that after the expiration of three years, if the business continued, he should insist upon more salary; beginning with 1874 thenceforward his salary was credited to him upon the books at the rate of \$3,500 a year; the plaintiff had access to the books, and the master reports that his attention was distinctly called to this fact December 31, 1877, and that it was quite probable that he was aware of it earlier, if he did not agree to it in advance; and upon the further facts found by the master, it seems to be a fair conclusion that at that time he virtually waived all objections and assented to the increase.

The next question is whether the plaintiff is entitled to interest upon his advances to the firm and his unwithdrawn profits in excess of the \$15,000 which it was stipulated in the partnership articles that he should pay in as capital. It was provided in the articles that "the capital of neither shall be taken to pay interest to the other." So far as concerns the capital which the partnership articles call for, this may be taken as an express provision, which leaves no room for construction; and the plaintiff makes no claim for interest on his \$15,000 of capital when there were no profits. But he contends that the above provision relates merely to the capital stipulated for in the partnership articles, and that it does not apply to his advances or profits left in the firm above that sum; and this appears to have been the practical construction adopted by the parties prior to the year 1877. Until that year interest at the rate of 7 per cent per annum was uniformly credited on the books of the firm, both to the plaintiff and to the defendant in all balances found due to them respectively. These books were kept under the eye of the defendant. If in 1877 he had for the first time raised the objection that the plaintiff was not entitled to this allowance, his own course of conduct for eight years would justly have been held conclusive upon him of the understanding with which the firm had received and held these sums, and the provision in the partnership articles may well be considered to be limited to the interest on capital already therein referred to. There was no provision in the articles referring to advances or unwithdrawn profits, and the understanding of the parties in relation to them must be gathered from their acts. At the beginning of the year 1877, under the practical construction adopted by the parties, the plaintiff's advances and unwithdrawn profits amounted to \$25,000 over and above the \$15,000 of capital which he paid in under the provisions of the articles; while the defendant had recently drawn out so much upon his own account as to make him self indebted to the firm. Now, although interest might not be allowed to a partner for such advances and unwithdrawn profits in the absence of an agreement or understanding to that effect, yet slight circumstances may be sufficient to show such an understanding, and in the present case the circumstances are sufficient fairly to lead to that conclusion. In the first place, the plaintiff proceeded at once to pay in

considerable sums of money, and the balances taken from time to time show a rapid and nearly uniform increase of the amounts standing to his credit. There was an unbroken habit of crediting interest to each partner upon the books of the firm, upon all balances thus placed to his credit, which is almost conclusive evidence of such an understanding. *Harris v. Carter*, 147 Mass. 313, 6 New Eng. Rep. 604; *Bradley v. Brigham*, 137 Mass. 545; *Baker v. Mayo*, 129 Mass. 517; *Leserman v. Bernheimer*, 113 N. Y. 39; *Lloyd v. Carrier*, 2 Lans. 364; *Pratt v. McHilton*, 11 La. Ann. 260; *Ex parte Chippendale*, 4 DeG. M. & G. 19, 38; *Millar v. Craig*, 6 Beav. 438.

Moreover, during the whole continuance of the partnership, after 1877 as well as before, the firm was borrowing money for its business in considerable amounts, and was paying interest for this borrowed money at the rate of 7 per cent per annum. In addition to this, it appears that the plaintiff had added to the sum standing to his credit and allowed it to increase by paying in money as aforesaid and by the accumulation of interest and profits with the expectation that he would be credited with interest on it at the rate of 7 per cent per annum and with no expectation that the provision of the partnership articles would be construed to deprive him of interest on amounts standing to his credit in excess of his capital, in half-yearly periods of losses, if such occurred; nor did it appear that the understanding and expectation of the defendant had been any different.

If by reason of the acts of the parties such was the right of the plaintiff in 1877, we cannot see that anything has happened since then which impairs that right. It appears that in that year a new bookkeeper was employed, who looked over the partnership articles, and noticed the provision in regard to interest above mentioned, and consulted the lawyer who had drawn them up, but who of course had no power at that time to affect the rights of the parties by trying to explain what the articles meant; and under his advice, and with the knowledge and sanction of the defendant, but without the knowledge of the plaintiff, he undertook to correct what was deemed by him to have been an error in crediting interest to the partners in half-yearly periods of losses, and charged back to the partners the interest so credited, as well on the excess over the capital stipulated for as on the capital itself. At this time it was highly advantageous to the defendant, and disadvantageous to the plaintiff, to have this change made. The plaintiff had a large amount standing to his credit in the firm and the defendant almost nothing. It is not likely that the plaintiff would at once withdraw the excess above his part of the capital without serious injury to the firm, which at the time was borrowing money in considerable amounts at 7 per cent. It was not at this time in the power of the defendant, without the assent of the plaintiff, to change the construction of the articles which had thus been adopted and acted upon, and had thus become of the same force in respect to what was already paid as if written out therein. It becomes a question, therefore, whether the plaintiff gave any such assent to this change as to be binding upon him. It is certainly true that his protests

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against the change might have been more vigorously expressed than they were, but the facts reported by the master are insufficient to show an assent thereto on his part. We are therefore brought to the conclusion that the change by which the interest was charged back to the partners was unwarranted, so far as concerns the interest upon the sums standing to their credit in excess of the capital mentioned in the partnership articles.

In respect to advances made to the firm and unwithdrawn profits left with it after the accounting of January 31, 1878, the case stands differently. After that time the defendant did not intend to allow any interest except when there were profits, and the plaintiff knew that he did not. Upon any new advances, or new profits which were left in the firm, no interest should be reckoned, since such was not the understanding of the parties.

It must further be considered at what time interest should cease upon the sum which on June 30, 1877, stood to the plaintiff's credit in excess of his \$15,000 of capital. The interest on the \$15,000 of capital when profits were made would of course cease with the dissolution of the firm. The excess above the capital stipulated for stands more upon the footing of loan, and in such case would bear interest until repaid. If the firm had not had the benefit of the plaintiff's money, it would have been under the necessity of borrowing money elsewhere or of curtailing its business. It seems to be more in conformity with the understanding of the parties to treat the excess standing to the plaintiff's credit on June 30, 1877, as a loan, to be repaid with interest before any division of profits should be made, the interest to run until re-payment. *Morris v. Allen*, 14 N. J. Eq. 44, 47; *Ex parte Chippendale*, 4 DeG. M. & G. 19, 38; *Wood v. Scoles*, L. R. 1 Ch. App. Cas. 369.

Interest at the rate of 7 per cent having been credited at all prior accountings, the plaintiff was entitled to retain that amount. So far, however, as the understanding for interest remained executory, only 6 per cent can be allowed, the agreement not being in writing. Pub Stat. chap. 77, § 8; *Martin v. Mandell*, 125 Mass. 562, 564.

A further question arises upon the claim of the plaintiff to be allowed 20 per cent of the salary received by the defendant from the firm of Ira Parker & Co. The defendant became a member of that firm with the plaintiff's consent, and at the beginning his share of the profits was divided between the plaintiff and the defendant in the same proportions as the profits from their regular business. When a renewal of that partnership was made, it was agreed that the defendant's share of the profits thereof should be divided equally between the plaintiff and the defendant; but the defendant thenceforth received a special salary from that firm of \$2,000 a year, which he kept for his own use. Upon the facts stated by the master, the plaintiff is not entitled to share in this. He knew the facts, and no entry of this salary was made in the books, and no claim to share in it was made by the plaintiff, till after the dissolution of his partnership with the defendant.

The Palmer and Bates note appears to have been signed by the defendant for the plaintiff, and the defendant was entitled in some form

to recover the amount paid thereon by him, from the plaintiff. As a method of accomplishing this result, it was charged in the partnership account, and although it was not a partnership matter, yet this method of adjusting a matter between the partners might properly be adopted, if not objected to. No wrong

to the plaintiff appears in this transaction. The same considerations apply to the note for \$2,500 as to the Palmer and Bates note. Unless the parties agree, the account will be stated by the master in accordance with these views.

Ordered accordingly.

CONNECTICUT SUPREME COURT OF ERRORS.

Mary A. CONNELLY, *Appt.*,

v.

MASONIC MUTUAL BENEFIT ASSOCIATION.

(58 Conn. 552.)

1. Where a mutual benefit association, which prescribes membership in good standing in some masonic lodge as a condition to membership in it, adopts the usage of referring the question as to such membership on the part of applicants to the proper masonic officers, such usage, in the absence of any express agreement between it and an applicant as to how such question shall be determined, will constitute a part of the contract between them, and a decision of such officers upon the question of an applicant's membership at a given time, either before or after his acceptance by the association, will be conclusive on it.
2. A decision of a voluntary association in a proceeding for admitting, disciplining, suspending or expelling members is conclusive, like that of a judicial tribunal, if the proceeding was had fairly, in good faith and pursuant to the laws of the association, and there was nothing in it in violation of any law of the land.
3. A vote of a masonic lodge restoring to the rolls, as of the date of his suspension, the name of a suspended member, which was passed in consequence of a decision by the proper officers of the order, having jurisdiction of the

matter, that the suspension was irregularly effected, will, so far as the suspending vote is concerned, although passed after his death, render him a member in good standing at the time of his death within the meaning of a benefit certificate held by him making such membership a condition of liability on the part of the one issuing it for the amount which it represents.

4. The question whether or not the evidence upon which an officer of a voluntary society who had jurisdiction of the matter acted in declaring irregular a vote of the association which suspended a member, was sufficient to support his decision, is not open to review by a court of law.

(April 22, 1890.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Reversed.*

The facts are fully stated in the opinion.

Messrs. William K. Townsend and George D. Watrous, for appellant:

The decision of the highest masonic tribunals of the State of New York, declaring Henry M. Connelly to have been illegally suspended from Baltic Lodge, is absolutely binding upon the courts of law, in the absence of allegations, supported by proof, that these tribunals acted fraudulently and without jurisdiction.

Niblack, Mut. Ben. Ins. § 129.

NOTE.—*Mutual benefit association: suspension of member; decision of officers not reviewable by courts.*

The decisions of a voluntary association, fairly and honestly made in accordance with its rules and not contrary to public policy or in violation of the law of the land, are binding upon its members, and will not be interfered with by the courts. *Oscola Tribe v. Schmidt*, 57 Md. 98; *Connitt v. New Prospect Ref. Prot. Dutch Church*, 54 N. Y. 551; *White v. Brownell*, 3 Daly, 329, 3 Abb. Pr. N. S. 318, 4 Abb. Pr. N. S. 199; *Harrison v. Hoyle*, 24 Ohio St. 254; *Leech v. Harris*, 2 Brewst. 571.

Even if a member would otherwise be heard in the state tribunals, yet he must first exhaust all the appeals and remedies given within the order or association itself. *Hirschl, Fraternities and Societies*, 49; *Harrington v. Workmen's Benev. Asso.*, 70 Ga. 340, 27 Alb. L. J. 438; *Chamberlain v. Lincoln*, 129 Mass. 70.

An incorporated lodge may determine who are not members, and the courts will leave this to the rules and judicial officers of the lodge, regardless whether the charter does or does not, in express terms, give such powers to these officers. *State v. Odd Fellows Grand Lodge*, 8 Mo. App. 148.

The court will not prevent the judicial officers of the society from passing upon an accusation against a member with a view to his expulsion; such officers are, to that extent, a court, and a court of 9 L. R. A.

chancery is not the proper tribunal to correct the errors and irregularities of such a court. *Gregg v. Massachusetts Med. Society*, 111 Mass. 185.

In such cases courts will never interfere, where property rights are not involved, and the rights to which are not taken away from the person complaining. *Rigby v. Connell*, 23 Week. Rep. 630; *Re St. James Club*, 13 Eng. L. & Eq. 589, 2 DeG. M. & G. 387; *Hopkinson v. Marquis of Exeter*, 16 Week. Rep. 298, L. R. 5 Eq. 66.

If a member is expelled, courts will not review the merits of the case, but will consider the society the sole judge. Its sentence is conclusive like that of any other judicial tribunal. *Com. v. Pike Beneficial Society*, 8 Watts & S. 250; *Black & W. S. Society v. Vandyke*, 2 Whart. 309; *Burt v. Free Masons*, 44 Mich. 208; *Robinson v. Yates City Lodge*, 86 Ill. 598.

Courts will not review cases, even where the proceedings are not strictly according to the rules, if no substantial rights are affected, unless the decision arrived at was contrary to natural justice, or if the rules of the club had not been observed, or if its action was malicious, and not bona fide. *Dawkins v. Antrobus*, 44 L. T. N. S. 537, 24 Alb. L. J. 158; *Lambert v. Addison*, 46 L. T. N. S. 20, 25 Alb. L. J. 418; *Gardner v. Fremantle*, 24 L. T. N. S. 81, 19 Week. Rep. 256. See note to *Milner v. Bowman* (Ind.) 5 L. R. A. 95.

The whole law relating to voluntary associations, including such as the defendant, is part of the law of contract, and the rights and duties of members are such as are provided for by their constitution, by laws, etc.

Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665, note; *Grosvenor v. United Society of Beavers*, 118 Mass. 78.

No civil court has any control over the application by masonic courts of masonic law, except in three cases: (1) where the law is in conflict with that of the land (Niblack, Mut. Ben. Ins. §§ 25, 59); (2) where the masonic courts have acted without jurisdiction, and have not observed their rules; (3) where they have acted fraudulently. Otherwise the decision is conclusive.

Dawkins v. Antrobus, L. R. 17 Ch. Div. 615; *Anacosta Tribe v. Murbach*, 18 Md. 91, 71 Am. Dec. 625; *Karcher v. Supreme Lodge K. of H.* 187 Mass. 388; *Sperry's App.* 8 Cent. Rep. 215, 116 Pa. 391; *Otto v. Journeymen Tailors P. & B. Union*, 75 Cal. 308, 7 Am. St. Rep. 156, and a large number of cases cited in note, p. 164.

The rule of construction in all cases is most favorable to the continuance of membership.

Niblack, Mut. Ben. Ins. §§ 15, 62; *Darrow v. Family Fund Society*, 6 L. R. A. 495, 116 N. Y. 537.

This is precisely the case where A and B contract, leaving to third parties to fix the price or some other essential part of the agreement. The decision of such party honestly made within the scope of the authority given is binding.

1 Benjamin, Sales, Am. L. Ser. 99-102; Bennett's ed. pp. 84-86; *Brown v. Cole*, 45 Iowa, 601; *Norton v. Gale*, 95 Ill. 533; 2 Parsons, Cont. 706, note; *Mason v. Bridge*, 14 Me. 468, 81 Am. Dec. 66; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; Morse, Arbitration and Award, pp. 36-42.

That the restoration was not made until after Connelly's death can make no difference, provided there is proper authority for such a proceeding.

Marck v. Supreme Lodge K. of H. 29 Fed. Rep. 896.

Messrs. W. C. Case and W. H. Ely for appellee.

Andrews, Ch. J., delivered the opinion of the court:

The plaintiff is the widow of Henry M. Connelly, who died January 23, 1885, and as the beneficiary named by said Connelly in his application for membership in the defendant Association is entitled to recover of the defendant the sum of \$2,000, if Connelly, at the time of his death, was a member of the defendant Association.

Connelly became a member of the defendant Association in 1880. At that time he was a member in good standing of the Baltic Lodge, No. 284, Free and Accepted Masons, of the City of Brooklyn, New York. Membership in good standing in some masonic lodge was a condition to admission into, and to the continuance of membership in, the defendant Association. One of the by-laws of the defendant provides that "any member of this Association who shall forfeit the benefit of his lodge by nonpayment of dues shall forfeit all rights

to benefits in this Association; and any member suspended or expelled from his lodge, or who shall stand non-affiliated for one year, shall forfeit his membership in this Association."

By a vote of Baltic Lodge, at a meeting held on the 11th day of October, 1882, Connelly was regularly suspended or unaffiliated for nonpayment of dues. The defendant's pleadings show no other reason why he was not a member in its Association at the time of his death than his non-affiliation in Baltic Lodge as shown by its vote. By another vote of Baltic Lodge, passed on the first day of December, 1888, the name of Henry M. Connelly was restored to the rolls of the lodge as of the day of his alleged suspension. The contention of the plaintiff is, that the effect of the last vote is to render the former one void and as though it had never been passed. If the contention is right then she is entitled to recover the \$2,000, otherwise not.

By the laws of masonry, Baltic Lodge, while it had the government of its own members and the power to discipline them, is itself subject to the Grand Lodge of the district in which it exists, and to the constitution and statute laws of such Grand Lodge. Section 46, art. 24, of the constitution of the Grand Lodge of the district within the limits of which Baltic Lodge is located, provides as follows: "A lodge shall have power to enact a by-law which shall provide a penalty for the nonpayment of lodge dues, which penalty shall be unaffiliation; but such penalty shall not be inflicted except for the nonpayment of at least one year's dues, nor until the brother shall have been duly summoned thirty days previous to pay said one year's dues." Another statute of the Grand Lodge provides that "in order to unaffiliate a member for nonpayment of dues a lodge must act under a by-law passed in accordance with the section of the constitution and statutes of the Grand Lodge for that purpose made and provided." Another section prescribes the form and requisites of a summons to be used by a lodge in such cases, and how it must be addressed. Section 85 of the constitution of the Grand Lodge provides that "each district deputy grand master shall have power, and it shall be his duty (among other things), to determine and order in what cases a member (of an individual lodge) alleged to have been illegally stricken from the rolls, rendered unaffiliated, or suspended for nonpayment of dues only, shall be restored to the rolls or reinstated; and if he discover in his district any masonic error or evil to endeavor to immediately arrest the same by masonic means, and, if he judge expedient, to specially report the same to the Grand Lodge."

Eustace H. Wheeler, district deputy grand master of said district, having in the fall of 1888 investigated the circumstances under which Connelly was suspended as aforesaid, on or about November first of that year, declared his unaffiliation or suspension void upon the ground that the summons used by the Baltic Lodge did not conform to the requirements of the Grand Lodge, and ordered his name to be restored to the rolls of the Baltic Lodge as of the date of his alleged suspension; and the decision of the deputy grand master was

affirmed by the grand master of the State of New York. In accordance with said decision and order Baltic Lodge on the first day of December following voted "that the name of said Henry M. Connelly be restored to the rolls of said lodge as of the date of his alleged suspension."

The facts so set forth in the finding indicate that the masonic organization has a due and orderly system of laws and rules, enacted by itself and enforced by its own agencies, in accordance with which membership in any lodge is acquired, continued, suspended or lost; and that all questions of membership or non-membership, or of good standing in any lodge, or of affiliation or non-affiliation are by these laws and rules within the jurisdiction of their own officers, and that when any such question has been passed upon by their own tribunals, subordinate and appellate, the decision is conclusive and binding upon all masons; and that, according to these laws and rules, an apparent non-affiliation of any member having been declared to be void by the proper appellate authorities and having been revoked by the lodge of which he was a member, and his name restored to its rolls as of the date of his alleged suspension, he would be all the time a member in good standing of the lodge.

The defendant Association contracted with Connelly on the basis that he was a mason and that he should remain a mason. It would have been easy for the defendant and Connelly to have agreed upon some method by which the question of his being or remaining a mason should be decided as to be binding upon them both. In the absence of any agreement in what way his membership in some masonic lodge was to be proved, or how his continuing to be a mason in good standing was to be shown, we should naturally infer that these questions were to be decided by the masonic tribunals. There is no other authority by which these questions should be decided. And it appears that this is just what the defendant did. When Connelly applied to become a member of the defendant Association, they asked for and received a certificate signed by an officer of Baltic Lodge that he was a mason. They accepted that as conclusive and admitted him to membership in the Association. When Connelly died they asked for a certificate to be signed by the secretary of Baltic Lodge that he continued to be a mason. The forms, of which copies are set forth in the record, indicate that they are such as are used by the defendant in all cases. They did in the case of Connelly precisely what they do in the case of every one of their members. They referred the question of being or not being a mason to the masonic officers themselves. Such a usage shows that it is really a part of the contract made by the defendant with each of its members that masonic questions shall be decided by masonic tribunals. This is a usage by which we think the defendant must be concluded. In the light of this usage and of all the evidence we think the contract between the defendant and Connelly must be construed as though it provided in terms that the question of his being or continuing to be a mason in good standing should be decided by the masonic officers.

The decisions of any kind of a voluntary
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society or association, in admitting members, and in disciplining, suspending or expelling them, are of a quasi judicial character. In such cases the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society; whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land. If it is found that the proceeding was had fairly, in good faith and pursuant to its own laws, and that there was nothing in it in violation of any law of the land, then the sentence is conclusive like that of a judicial tribunal. *Whitney v. Brooklyn Eccl. Society*, 5 Conn. 406; *Gibbs v. Gilead Eccl. Society*, 38 Conn. 158; *Otto v. Journeymen Tailors P. & B. Union*, 75 Cal. 808; *Com. v. Pike Beneficial Society*, 8 Watts & S. 250; *Anacosta Tribe v. Murbach*, 13 Md. 91; *People v. Board of Trade*, 80 Ill. 134; *Robinson v. Yates City Lodge*, 86 Ill. 598; *White v. Brownell*, 8 Abb. Pr. N. S. 318.

Connelly's name was stricken from the rolls and he was rendered unaffiliated by a vote of Baltic Lodge for the "nonpayment of dues only." In such a case it was within the jurisdiction of the deputy grand master Wheeler, and it was his duty to determine, whether such striking from the rolls was illegal or not; and if he found it to be illegal according to masonic rules, it was his duty to order the name to be restored to the rolls. The deputy grand master having investigated the circumstances of Connelly's case did find the vote by which he was rendered unaffiliated to be void, and he ordered his name to be restored to the rolls, and it was restored as of the date of his apparent suspension. This judgment of the deputy grand master was affirmed by the grand master of the State. By the reversal of this vote of unaffiliation, and by the action of Baltic Lodge, Connelly was reinstated as of the date of that vote, and he stood as a member of that lodge at the time of his death as if no such vote had ever been passed.

It is objected to the decision of the deputy grand master that it was not made till after Connelly died. His death produced no change in the rights of the plaintiff to have the unaffiliation set aside if it were illegal. Possibly she had no right to ask for such reversal until his death. It would seem reasonable, therefore, that her right to procure such reversal ought not to abate by his death. *Marck v. Supreme Lodge of K. of H.* 29 Fed. Rep. 896; *Lakensky v. Supreme Lodge K. of H.* 81 Fed. Rep. 592.

A copy of the summons used by the Baltic Lodge in Connelly's case is shown in the finding. It is claimed that the decision of Deputy Grand Master Wheeler, that the summons did not conform to the requirements of the Grand Lodge, is not supported thereby. That objection is not open to us. It being found that the deputy grand master had jurisdiction to act in the matter, his decision, upon a question of fact involved in the case, is not open to review by a court of law. *Chase v. Oheney*, 58 Ill. 509. *Walker v. Wainwright*, 16 Barb. 486.

There is error in the judgment appealed from, the plaintiff on the facts found being entitled to recover the \$2,000.

In this opinion the other Judges concurred.

CALIFORNIA SUPREME COURT.

Joseph F. METZ, *Resp.*,
v.
CALIFORNIA SOUTHERN R. CO.,
App.

(....Cal.....)

Ladies' jewelry is not a proper article of baggage to be carried in the trunk of a man traveling alone, so as to render the carrier liable for its value in case of its loss, at least when it is placed in the trunk simply for the purpose of having it transported.

(August 4, 1890.)

APPEAL by defendant from a judgment of the Superior Court for San Bernardino County in favor of plaintiff in an action brought to recover the value of certain articles of baggage lost by defendant while they were in its possession for the purpose of transportation. *Modified.*

The facts sufficiently appear in the opinion.

Mr. A. Brunson, for appellant:

A muff or a silver napkin ring in a gentleman's trunk is not baggage.

Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510.

Silverware, knives, forks, spoons and the like are not in any sense proper baggage for the passenger, and, when included with it, no recovery can be had therefor in case of loss.

Giles v. Fountleroy, 13 Md. 126; *Pettigrew v. Barnum*, 11 Md. 434; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671; *Richards v. Westcott*, 2 Bosw. 589.

Where jewelry and other articles are not intended for use by the passenger, they do not constitute baggage.

Nevins v. Bay State Steamboat Co. 4 Bosw. 225. See also *Thompson, Carriers*, p. 512; *Hutchinson, Carriers*, § 688; *Blumenthal v. Maine Cent. R. Co.* 79 Me. 550.

Messrs. C. W. C. Rowell and Charles R. Redick, also for appellant.

Mr. A. W. Blair for respondent.

Sharpstein, J., delivered the opinion of the court:

This appeal is from a judgment rendered in favor of plaintiff and against defendant for the sum of \$357, and costs. The only question presented by the record is, Do the findings support the judgment? The court finds that, at Kansas City, Mo., in January, 1888, the plaintiff engaged passage on the defendant's railroad to Colton in this State, bought a ticket, paid his fare and checked his trunk, containing, among other things, one ladies' gold watch and chain of the value of \$150; one ladies' breastpin and ear-rings of the value of \$15; five ladies' gold rings of the value of \$25; one set ladies' small gold ear-rings of the value of \$5; two ladies' silver rings of the value of \$2; one ladies' gold bracelet of the value of \$25,—which the court found to be "proper articles of luggage and baggage for the plaintiff to carry as such." Defendant had no knowledge of said contents when it received and checked said trunk, and assumed no other obligation in rela-

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tion thereto than such as was imposed by law under the facts above stated; that is, there was no special contract between the parties relating to said trunk and contents. When the trunk was delivered to plaintiff by defendant at Colton the articles above named, together with other articles, the right to recover the value of which is conceded by appellant, were missing, and were not, and never have been, delivered to plaintiff. The court further finds that all the articles so lost were carried in said trunk, not for trade, gift or speculation, but for transportation. The value of these articles is included in the judgment recovered by plaintiff against defendant, and appellant insists that the judgment should be modified by deducting from it the value of said above-enumerated articles. And his contention is that said articles, or none of them, constituted what in law is defined to be "luggage," or "baggage."

Common carriers are required to receive and carry a reasonable amount of luggage for each passenger without charge. Civil Code, § 2180.

"Luggage may consist of any article intended for the use of a passenger while traveling or for his personal equipment." Id. § 2181.

Before the enactment of this Code courts acknowledged the difficulty of defining with accuracy what should be deemed luggage within the rule of the carrier's liability, and we think this provision of the Code has disincumbered the subject of little, if any, of the difficulty which previously surrounded it. If we define the word "equipment" as Webster defines it, viz., "the act of equipping or being equipped, as for a voyage or expedition," it adds nothing to what had long before been understood as comprehended in the term "luggage." In *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 272 [20 L. ed. 428], the court, speaking through *Mr. Justice Field*, said that the contract to carry "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the Queen's Bench in *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 621, where *Chief Justice Cockburn* announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey, must be considered as personal luggage."

It is not found that the plaintiff carried those articles for his personal wear or convenience with reference to his immediate necessities or to the ultimate purpose of his journey, but it is found that he was carrying them for transportation; and it is found that they were proper articles of luggage and baggage for the plaintiff to carry as such. We are not prepared to hold that a gentleman traveling without a wife or other female companion would ordinarily, no matter what his rank or station in life might be,

carry as baggage for his personal use or convenience a quantity of ladies' jewelry, or that if he did carry it, and it was lost, he could recover the value of it of a common carrier who had no knowledge of its being among the contents of a trunk which was being carried as luggage.

In one case, *McGill v. Rowand*, 3 Pa. 451, the Supreme Court of Pennsylvania held that where a man was traveling with his wife, whose jewelry was in a trunk which was being transported as baggage, and was lost, the husband was entitled to recover of the common carrier its value. In that case it might well have been held that the jewelry "was intended for the use of a passenger while traveling."

The Supreme Court of the United States, in *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24 [25 L. ed. 531], says: "Whether articles of wearing apparel in any particular case constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling." "The implied undertaking," says Mr. Angell, 9 L. R. A.

"of the proprietors of stage-coaches, railroads and steamboats, to carry in safety the baggage of passengers, is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Ang. Carr. § 115.

In *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, this court had occasion to consider the provisions of the Code above cited, but the question in that case was whether a passenger was entitled to carry a large sum of money as baggage. It was held that he was not. But that decision in no way aids us in the solution of the question involved in this case. We are satisfied, however, in this case, that the findings do not support the judgment for more than \$185, the value of the articles lost other than those which we have enumerated above.

It is therefore ordered that the judgment be modified by deducting therefrom all over \$185, and the plaintiff have judgment for that sum only, and that appellant recover the costs of its appeal.

We concur: *McFarland, J.; Works, J.; Paterson, J.*

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

James T. BLACK *et al.*
v.
HENRY G. ALLEN CO. No. 4718

James T. BLACK *et al.*
v.
SAME. No. 4750

Charles SCRIBNER *et al.*
v.
SAME. No. 4719

(43 Fed. Rep. 613.) *

1. The owner of a copyright may assign an undivided interest therein so that the copyright becomes the undivided property of joint owners; he may also assign or transfer, in equity, an exclusive right to use the copyrighted work in a particular manner or for particular purposes upon such terms and conditions as may be agreed upon.
2. Permitting the use of a copyrighted article in a foreign encyclopædia, the remainder of which is written by foreigners and *publi- catis juris* in this country, does not warrant its insertion in an unauthorized reprint of the encyclopædia here, by a third person.
3. Procuring an article, which is to be inserted in a foreign encyclopædia, to be written and copyrighted in this country for the express purpose of protecting the encyclopædia from be-

ing reprinted here in cheap form, which reprint would be of great value to our people and could be made were it not for such article, is not such a fraud on the Copyright Laws as will prevent a court from entertaining jurisdiction of a bill to restrain an infringement of the copyright.

4. A bill for an injunction need not be verified at the time it is signed.
5. A bill to restrain infringement of a copyright filed by the author and his publishers, which sets out the terms of an agreement between the parties and states that if the agreement did not transfer an interest in the copyright to the publishers it was an exclusive license to them, sufficiently states the publishers' title.
6. In a bill by the legal and equitable owners of a copyright to enjoin its infringement it is unnecessary to state the manner in which the equitable interests became vested. If the owner of the entire legal title is a complainant it is immaterial whether the equitable title became vested by an instrument in writing or by parol.
7. Positively averring the infringement of a copyright in a bill to restrain such infringement is sufficient although the infringement is not stated to be within the knowledge of the affiant.
8. An administrator appointed in one State cannot maintain a suit in a United States circuit court for another State to restrain an infringement of a copyright which belonged to his intestate, without taking out ancillary letters in

NOTE.—Assignment of copyright.

The copyright is retained by the author in the absence of any agreement with the publisher. *Pulte v. Derby*, 5 McLean, 328.

A contract to publish a work and give the author a certain price for each copy published, does not give the publisher the sole and exclusive right to publish the work. *Willis v. Tibbals*, 1 Jones & S. 220.

A publisher taking a copyright in his own name, under a contract to pay a royalty to the author, cannot assign the copyright or publish the work except upon the terms of the contract. *Ibid.* See also *Mackaye v. Mallory*, 12 Fed. Rep. 328; *Little v. Hall*, 50 U. S. 18 How. 165, 15 L. ed. 828; *Paige v. Banks*, 80 U. S. 13 Wall. 608, 20 L. ed. 709; *Blatchf. 152*; *Stephens v. Cady*, 55 U. S. 14 How. 528, 14 L. ed. 828; *Stevens v. Gladding*, 58 U. S. 17 How. 447, 15 L. ed. 155.

A mere assignment of a copyright will not pass

a right to a renewal subsequently granted. *Pierpont v. Fowle*, 2 Woodb. & M. 23.

While, after the obtaining of a copyright, a written assignment may be necessary to convey title to it, or a written license to give a right to reproduce copies of the copyrighted book, one may become the owner, by a parol transfer, of whatever right the author, prior to taking the copyright, had to convey. *Ibid.*

An assignee's right to maintain an action for the violation of a copyright is not defeated because the assignment is not recorded. *Webb v. Powers*, 2 Woodb. & M. 497.

A grant by the owner of a copyright, of the exclusive right to take orders for and sell a copyrighted book in defined territory, is merely of the exclusive right to sell as far as the grantor can control it, but not a guaranty that no other person shall obtain copies of the same work and sell them in competition with the grantee. *Webster v. Ellsworth*, 36 Fed. Rep. 337.

*DIRECTIONS FOR SECURING COPYRIGHTS UNDER THE REVISED ACTS OF CONGRESS.

1. A printed copy of the title (besides the two copies to be deposited after publication) of the book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or a description of the painting, drawing, chromo, statue, statuary or model or design for a work of the fine arts, for which copyright is desired, must be sent by mail or otherwise, prepaid, addressed,

Librarian of Congress,
Washington, D. C.

This must be done before publication of the book or other article.

The printed title required may be a copy of the title page of such publications as have title pages. In other cases, the title must be printed expressly for copyright entry, with name of claimant of copyright. The style of type is immaterial, and the print of a type-writer will be accepted. But a separate title is required for each entry, and each

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title must be printed on paper as large as commercial note. The title of a periodical must include the date and number.

2. The legal fee for recording each copyright claim is 50 cents, and for a copy of this record (or certificate of copyright) an additional fee of 50 cents is required, making \$1, in case certificate is wanted, which will be sent by early mail. Certificates covering more than one entry are not issued.

3. Within ten days after publication of each book or other article, two complete copies of the best edition issued must be sent, to perfect the copyright, with the address,

Librarian of Congress,
Washington, D. C.

The postage must be prepaid, or else the publications inclosed in parcels covered by printed penalty labels, furnished by the librarian, in which case they will come free by mail, without limit of weight, according to rulings of the Post Office De-

such other State; but he may take out such letters after demurrer to his bill and aver the fact by amendment before answer filed.

9. A statistical atlas is properly copyrighted as a whole; it is not necessary to copyright separately each map in the book.
10. An inchoate right to a copyright may, prior to the taking of the copyright, be transferred by parol.
11. To a bill to restrain the infringement of copyrights of maps, it is proper to attach copies of the infringed and infringing maps as parts thereof.

(June 23, 1890.)

BILLS to restrain an alleged infringement of certain copyrights, and for an account of profits. On demurrers to bills. *Overruled in first and last cases. Sustained in second case.*

The cases are fully stated in the opinion.

Mr. James A. Whitney for defendant, in support of the demurrers.

Mr. Rowland Cox for plaintiffs, *contra*.

Shipman, J., delivered the following opinion:

These are demurrers to the respective bills in equity for injunctions against alleged infringements of copyrights.

The important facts which are alleged in No. 4,718 are as follows: Four of the plaintiffs are members of the firm of Adam & Charles

Black, of Edinburgh, Scotland; are aliens and subjects of the Queen of Great Britain. The fifth and remaining plaintiff is Francis A. Walker, a citizen of the State of Massachusetts and of the United States. The said firm, whose members I shall hereafter call the Messrs. Black, for the sake of brevity, are the publishers of the well-known work entitled "The Encyclopædia Britannica, Ninth Edition," which is made up of articles or books, each of which is, in a large number of instances, an independent book or treatise. Three of the articles contained in the twenty-third volume of the encyclopædia, hereinafter referred to, have been copyrighted in the United States. One of these articles, entitled "United States. Part III. Political Geography and Statistics," was written by said Walker, who secured a copyright thereof, according to the provisions of the Statutes of the United States, for the term of twenty-eight years from February 13, 1888. In the several copies of every edition published, the following words were inserted on the title-page: "Copyright, 1888, by Francis A. Walker." On or about April 1, 1888, said Walker assigned and transferred to the Messrs. Black an interest in said copyright; "that is to say, the said Walker did assign and transfer to your orators, constituting the firm of Adam & Charles Black, the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending, during the whole term of the

partment. Without the deposit of copies above required the copyright is void, and a penalty of \$25 is incurred. No copy is required to be deposited elsewhere.

4. No copyright is valid unless notice is given by inserting in every copy published, on the title page or the page following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary or model or design intended to be perfected as a work of the fine arts, by inscribing upon some portion thereof, or on the substance on which the same is mounted, the following words, viz.: "Entered according to Act of Congress, in the year —, by —, in the office of the Librarian of Congress, at Washington," or, at the option of the person entering the copyright, the words: "Copyright, 18—, by —."

The law imposes a penalty of \$100 upon any person who has not obtained copyright who shall insert the notice "Entered according to Act of Congress," or "Copyright," etc., or words of the same import, in or upon any book or other article.

5. Any author may reserve the right to translate or dramatize his own work. In this case notice should be given by printing the words "Right of translation reserved," or "All rights reserved," below the notice of copyright entry, and notifying the Librarian of Congress of such reservation, to be entered upon the record.

Since the phrase "All rights reserved" refers exclusively to the author's right to dramatize or to translate, it has no bearing upon any publications except original works, and will not be entered upon the record in other cases.

6. The original term of copyright runs for twenty-eight years. Within six months before the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all. Applications for renewal must be accompanied by explicit statement of ownership, in the case of the author, or of relationship, in the case of his heirs, and must state definitely the date and place of entry of the original copyright. Advertisement of renewal is to be made within two months of date of renewal certificate, in some newspaper, for four weeks.

7. The time within which any work entered for copyright may be issued from the press is not limited by any law or regulation, but depends upon the discretion of the proprietor. A copyright may

be secured for a projected work as well as for a completed one. But the law provides for no caveat, or notice of interference—only for actual entry of title.

8. A copyright is assignable in law by any instrument of writing, but such assignment must be recorded in the office of the Librarian of Congress within sixty days from its date. The fee for this record and certificate is \$1, and for a certified copy of any record of assignment \$1.

9. A copy of the record (or duplicate certificate) of any copyright entry will be furnished, under seal, at the rate of 50 cents each.

10. In the case of books published in more than one volume, or of periodicals published in numbers, or of engravings, photographs or other articles published with variations, a copyright is to be entered for each volume or part of a book, or number of a periodical, or variety, as to style, title or inscription, of any other article. But a book published serially in a periodical, under the same general title, requires only one entry. To complete the copyright on such a work, two copies of each serial part, as well as of the complete work (if published separately), must be deposited.

11. To secure a copyright for a painting, statue or model or design intended to be perfected as a work of the fine arts, so as to prevent infringement by copying, engraving or vending such design, a definite description must accompany the application for copyright, and a photograph of the same, at least as large as "cabinet size," should be mailed to the Librarian of Congress within ten days from the completion of the work or design.

12. Copyrights cannot be granted upon trademarks, nor upon mere names of companies or articles, nor upon prints or labels intended to be used with any article of manufacture. If protection for such names or labels is desired, application must be made to the Patent Office, where they are registered at a fee of \$5 for labels and \$25 for trademarks.

13. Citizens or residents of the United States only are entitled to copyright.

14. Every applicant for a copyright should state distinctly the full name and residence of the claimant, and whether the right is claimed as author, designer or proprietor. No affidavit or formal application is required.

Office of the Librarian of Congress,
Washington, 1890.

said copyright, the said book, entitled 'United States. Part III. Political Geography and Statistics,' in connection with, and as a part of, their said twenty-third volume of their said encyclopædia, designated 'Encyclopædia Britannica, Ninth Edition,' and not otherwise; the said Walker retaining the right to print, publish, copy and vend the said copyrighted book in every form and manner other than as a part of said Encyclopædia Britannica." The bill alleges that if said Walker did not, by said agreement, assign to the Messrs. Black an interest in said copyright, the said agreement was an exclusive and irrevocable license to them to print and sell, during the term of the copyright, the said book or article in connection with, and as a part of, said twenty-third volume. The copyrighted book was printed and sold in connection with, and as a part of, said volume. The whole of the copyright, except the right to use the subject thereof in the encyclopædia, has always remained in said Walker. The defendant has printed and sold, without the consent of the plaintiffs, said copyrighted article, in and as a part of its reprint of said encyclopædia, except that it has omitted the copyright notice upon the title-page, and threatens to continue to print and sell the same as part of its twenty-third volume. The bill alleges that the acts of the defendant are a great and continuing injury to each of the plaintiffs, and prays for an injunction and an account of the profits arising to the defendant from the sale of said volume.

In No. 4,750, the Messrs. Black and John McAlan, a citizen of the State of New York, and administrator of the estate of the late Alexander Johnston, who was, when in life, a citizen of the State of New Jersey and of the United States, are plaintiffs. Mr. McAlan was appointed administrator by the surrogate for the County of Mercer, in the State of New Jersey. Prof. Johnston was the author of a book entitled "United States. Part I. History and Constitution," and secured a copyright thereof according to the provisions of the Statutes of the United States relating to copyrights. The other facts which have been stated in regard to the assignment of Walker's copyright, his title, and the acts of the defendant, exist in regard to Prof. Johnston; and the two bills are substantially like each other, *mutatis mutandis*. The difference between the cases is that in No. 4,750 a foreign administrator is the plaintiff.

The case stated in No. 4,719 is as follows: The two plaintiffs are citizens of the State of New York and partners by the name of Charles Scribner's Sons. Two other persons, Hewes and Gannett, both citizens of the United States, were the authors of a book entitled "Scribner's Statistical Atlas of the United States," and, before depositing a printed title thereof with the librarian of Congress, and before publication, assigned and transferred to the plaintiffs all their right in said book and the right to copyright it; and the plaintiffs became the proprietors of said book. The plaintiffs printed and published the book, and on December 29, 1883, secured a copyright thereof in accordance with the provisions of the Revised Statutes, and gave notice of such copyright by inserting on the page following the title-page,

in the several copies of every edition, the words, "Copyright 1883, by Charles Scribner's Sons." Afterwards the plaintiffs printed and published, and licensed others to print and publish, certain maps and charts which constituted a part of said book, but gave notice of the copyright by causing to be inscribed upon the face of each copy of every map or chart thus printed by themselves or others the words, "Copyright, 1883, by Charles Scribner's Sons." The defendant, since May 1, 1889, and without the plaintiffs' consent, published and sold a volume entitled the "Encyclopædia Britannica, Ninth Edition. Popular Reprint. Vol. 28," in which it printed eight maps which were copied from said copyrighted book. The bill prays for an injunction against selling copies of the book which shall contain in part said infringing maps, and for an accounting of profits.

The cause of demurrer in the two Black cases, which goes to the substance of the bills, is that they show no substantial right or equity in or on behalf of the plaintiffs, and that the acts of the defendant are not contrary to law. The point is this: Does the fact that the proprietor of a book copyrighted in this country has permitted an alien publisher of an encyclopædia to publish his book as a part of such encyclopædia enable another person, without other authority, to publish in this country the copyrighted article as a part of his reprint of such encyclopædia, the remainder of which is *publici juris*? It will not, probably, be seriously denied that a citizen of the United States who is the owner of a copyright can assign the whole of such copyright to a foreigner. "A nonresident foreigner is not within our Copyright Law, but he may take and hold by assignment a copyright granted to one of our own citizens." *Carte v. Evans*, 27 Fed. Rep. 861.

It is, however, contended that, while a copyright may be assigned as a whole by a written instrument, it cannot be subdivided, but is an entire thing, indivisible and incapable of apportionment. The Statute simply provides that the copyrights are assignable at law by an instrument in writing, and, obviously, the whole or an undivided part thereof may be assigned so that the copyright may become "the undivided property of joint owners." *Drone, Copyright*, 884.

To what greater extent copyrights may be subdivided at law the Statute does not declare, and in this case it is not necessary to inquire. Under section 4964, a license in writing, by instrument duly witnessed, may be given by the proprietor to any other person to the extent described in such license; and there is no restriction upon the power of the proprietor to assign or transfer, in equity, an exclusive right to use the copyrighted book in a particular manner or for particular purposes upon such terms and conditions as may be agreed upon. In such case the legal title remains in the proprietor; and a beneficial interest, to the extent which is agreed upon, vests in the other party, who has acquired an equitable right in the copyright, and who will be properly styled an "assignee of an equitable interest." *Curt. Copyright*, 225.

In these two cases, as the Messrs. Black and the proprietors of the legal title are all made parties, and properly so, whether the Blacks

are licensees or are owners of an equitable interest in the copyrights (*Goodyear v. New Jersey Cent. R. Co.* 1 Fish. Pat. Cas. 626; *Goodyear v. Allyn*, 8 Fish. Pat. Cas. 874), I do not conceive it necessary to determine at this time by what name the publishers' interest in the copyright may be the more properly called.

The question is reduced to this: Does the fact that the copyrighted books were inserted by permission in an encyclopædia, as a part thereof, permit an unauthorized use of them in a reprint of such work? If a poem or an essay for which a copyright had been secured in this country by the author, a citizen of the United States, should be permitted to be inserted in a volume of poems or essays, a part of which was *publici juris*, it could not reasonably be claimed that the author had thereby abandoned his copyright, and that his book could be reprinted, by itself, without his consent, in this country. It cannot be contended that the defendant would have a right to reprint Walker's or Johnston's treatises in separate volumes without the consent of the respective proprietors. Can, then, the poem or essay be printed, without the consent of the author, as a part of an unauthorized reprint of the entire volume? The defendant takes the affirmative in these cases, because (1) the work as a whole is a foreign work, and the bulk of the volume is *publici juris*; and (2) because the insertion of Walker's and Johnston's articles in the twenty-third volume was for the manifest purpose of preventing citizens of the United States from reprinting that volume, which would have been, but for those articles, *publici juris*, and therefore was an attempt which will not receive the favor of a court of equity.

Upon the first point there is no vital difference, in regard to the infringement of an author's copyright, whether it is printed in a separate volume, or in connection with authorized material. If the author has a valid copyright, it is valid against any unpermitted reprint of his book; and the fact that his book is bound up in a volume with fifty other books, each of which is open to the public, is immaterial. The argument of the defendant upon this part of the case is mainly directed in support of the second point, and is this: The Encyclopædia Britannica, as a whole, was the production of aliens, who could obtain no copyright in this country, and is a work of great value to the whole people. Except for the introduction of a few articles, which were copyrighted in the United States, it could have been reprinted here in cheap form; and the defendant, when he entered upon his undertaking, had good reason to suppose that it could be thus reprinted. The employment of citizens of the United States to write articles which were to be used in some of its volumes, and the purchase of an interest in the copyright of such articles, were an attempt to deprive the defendant, and other like-minded persons, of a privilege which they would have otherwise enjoyed, and were for the purpose of giving the foreign owners of the encyclopædia an advantage in the sales of the work in this country. The attempt contained an element of unfairness, because the book, if written by foreigners, could be reproduced here; and

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the complainants have only a color of copyright interest, and therefore should not receive the sanction of the courts. The statements in the preceding paragraph, with the exception that the effect of the plaintiffs' interest in the Johnston and Walker articles had an element of unfairness in it, are true, and present by themselves no adequate argument in favor of the defendant. The acts of Johnston and Walker were in accordance with the Statutes of the United States. The acts of the Messrs. Black were for the purpose of making a use of the Statutes which might assist them against pecuniary loss, and give them a more unobstructed field for their large commercial venture. The disputed point is whether there was an element of fraud or injustice in the scheme which would prevent a court from regarding it with favor. There was no impropriety in soliciting competent citizens of the United States to write upon its history, and I can perceive no unfairness or injustice towards the defendant Company in the plaintiffs' use of the Copyright Laws for their pecuniary advantage, and as a weapon with which to repel a competition which is more enterprising than considerate. There was no trap set for the defendant, whose officers must have known that the ninth edition was in great part a new work, and that its contributors would not be confined to one country. It must be recollected that the question now to be considered does not relate to the extent of the decree, but whether the bills show a right to any decree; and it will be a subject for future consideration whether the prayer of the bills should be granted to its full extent.

Several objections of a more technical character are made to the bills. They are demurred to for insufficiency of the affidavits. Bills, in certain cases which are specified in the chancery text-books, are required to be verified by the oath of the party; and the New York chancery practice required that bills for injunction should be thus verified. In the federal courts, whenever a bill for an injunction is to be used as evidence either upon a motion for preliminary injunction, or in any other way, it must be verified; but there is no imperative rule requiring verification of a bill, at the time it is signed, which prays for an injunction. *Woodworth v. Edwards*, 8 Woodb. & M. 120; *Hughes v. Northern Pac. R. Co.* 18 Fed. Rep. 106.

The next alleged cause of demurrer is that the bills are uncertain and contradictory because it does not appear whether the alien plaintiffs claim as co-owners of the copyright or as licensees. The bills allege the terms of the agreement of assignment, and then say that if, by such agreement, an interest in the copyright was not assigned and transferred to the Messrs. Black, the agreement was an exclusive license. This is a correct form of equity pleading. The facts are stated, and the conclusions therefrom are stated in an alternative form.

The next point is that it does not appear that the agreements or assignments between the authors and the Messrs. Black were in writing. The bills declare, in substance, that the complainants are the only persons who have a legal or equitable title to the copyrights, and allege

he nature and extent of the equitable title, and that it was acquired by assignment from the proprietors. It is further averred that the complainants are well seised of said copyright, and are the owners thereof. It is not necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants; and, if the owner of the entire legal title is a complainant, it is immaterial whether the equitable owners became vested by an instrument in writing or by parol.

The eighth cause of demurrer is to the effect that the bill of complaint does not show that the ownership of the copyright is vested in any of the Messrs. Black. I have so fully remarked upon the theory of the bill, and of the law in regard to legal and equitable ownership of copyright, that it is not necessary to discuss this point further.

The seventh cause is that the charge of infringement is not made upon knowledge. It is made positively, as a fact, but the affidavit does not assert that the averment is within the knowledge of the affiant. The averment is sufficient, and the necessity of an affidavit has heretofore been considered.

The ninth, tenth and eleventh points do not seem to me to require extended remark.

The defendant has also demurred in No. 4,750 upon a ground peculiar to that case, viz., that McAlan, being a foreign administrator, and never having taken out ancillary letters of administration in the State of New York, cannot sue in the courts of that State. The bill avers that he was appointed by the surrogate for the County of Mercer, in the State of New Jersey, and counts upon that appointment as his only authority. If the bill had simply averred that he was administrator, the objection could have been taken only by a plea or answer; but, when the defective title is fully shown in the bill, advantage of such defect can be taken by demurrer. Story, Eq. Pl. § 496; 1 Daniell, Ch. Pr. 325; *Childress v. Emory*, 21 U. S. 8. Wheat. 642 [5 L. ed. 705]; *Swaetzel v. Arnold*, 1 Woolw. 388.

The law upon the subject is thus declared in the syllabus of *Noonan v. Bradley*, 76 U. S. 9 Wall. 894 [19 L. ed. 757]:

"An administrator appointed in one State cannot, by virtue of such appointment, maintain an action in another State, in the absence of a statute of the latter State, giving effect to that appointment, to enforce an obligation due his intestate. If he desires to prosecute a suit in another State, he must first obtain a grant of administration therein in accordance with its laws."

This is not the case of a suit for infringement by an administrator to whom a reissue or an original patent had been granted. In such case the grant has been made to him, as administrator, by the government, and his title has been passed upon by the commissioner. A bill in equity by an administrator for an infringement in the lifetime of the intestate owner of the patent, or for infringement occurring after his death, is for an injury to the estate of the intestate; and, although there are decisions to the contrary, such a bill seems to me to fall within the general rule, and to re-

quire the foreign administrator to take out letters in the State in which he brings suit. It is true that the Statute vests the title of the intestate in his administrator; but the point of the objection is that a foreign administrator is not recognized as administrator, when he sues in that capacity, unless appointed by the courts of the State within which suit is brought. But, as said by Mr. Justice Miller in *Swaetzel v. Arnold*, *supra*: "The impediment to the exercise of the full power of an administrator in a jurisdiction foreign to that granting his letters is essentially technical and formal, and should not be strained beyond its necessary application."

The courts early found relief, in cases of equity, from too strict adherence to technicality upon the ground that "in equity a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing, which is not the case at law." 1 Daniell, Ch. Pr. 327.

Therefore, in *Humphreys v. Humphreys*, 8 P. Wms. 849, where the next of kin had brought a bill without administering, and the defendant demurred, the Lord Chancellor allowed the demurrer, and then permitted the complainants to take out letters of administration, which, when granted, he said, related to the time of the death of the intestate, and to allege the same by way of amendment or by supplemental bill.

The case of *Swaetzel v. Arnold*, *supra*, was on this wise: An administrator appointed in Kansas brought a bill in equity, in a court of Nebraska, for a foreclosure of a mortgage belonging to the estate of the intestate. The court sustained a demurrer upon the ground that the foreign administrator had taken no ancillary letters. The case having come into the United States circuit court, and the complainant having taken out letters in Nebraska, Mr. Justice Miller permitted an amendment upon the authority of *Humphreys v. Humphreys*. The substance of his decision is that "an administrator appointed in one State, like an executor who has not proved the will, may sue in the courts of another before he has letters therefrom, and, having obtained letters, may aver the fact by amendment," before answer filed, and after demurrer. "He has an interest in the subject matter, although he has no standing in court, and for that reason may support his suit, in order to defend his right, by authority afterwards acquired." To the same effect are *Bradford v. Felder*, 2 McCord, Eq. 168; *Blackwell v. Blackwell*, 33 Ala. 57, and *Giddings v. Green*, 4 Hughes, 446.

Upon this point the demurrer in No. 4,750 is sustained, with leave to the complainants to amend, if ancillary letters of administration shall be taken out in the State of New York, within thirty days after the date of the order upon the demurrer.

In No. 4,719 additional and different reasons of demurrer are relied upon. The principal new causes are that the alleged assignment of the inchoate right is not averred by the bill to have been in writing, and that it is clear upon the face of the bill that the reprinted maps were never legally copyrighted by the complainants. The position of the defendant is that an atlas is

a bundle of maps; that there is no such thing as a manuscript of a map, and therefore the manuscript cannot be transferred to the assignee; and, furthermore, that every assignment of an inchoate right before copyright is obtained must be in writing. The alleged invalidity of the copyright is upon the ground that the book or atlas was copyrighted, whereas it is said that each map should have been copyrighted. A statistical atlas is a book of maps, tables and printed text, and is not simply a bundle of maps, and is properly copyrighted as a whole. There was no necessity of copyrighting separately each map in the book. The unauthorized reprinting of eight maps from this volume, it being alleged that all of them were originated and prepared by the authors, is an infringement of the same character as the

reprinting of original statistical tables or other printed matter. An inchoate right to a copyright may, prior to the taking of the copyright, be transferred by parol. *Lawrence v. Dana*, 4 Cliff. 1; *Callaghan v. Myers*, 128 U. S. 658 [33 L. ed. 559].

The other additional points referred to the averments of the bill in regard to the plaintiffs' licenses, and to the propriety of attaching to the bill the maps as exhibits. The pleader attached to the bill copies of the infringed and of the infringing maps, as part thereof. His course in regard to these two particulars was proper.

The demurrers in Nos. 4,718 and 4,719 are overruled. The demurrer in No. 4,750 is sustained, with leave to amend as hereinbefore stated.

NEW YORK COURT OF APPEALS.

Lydia J. ROBERTS, *Appt.*,

STUYVESANT SAFE DEPOSIT CO., of
the City of New York, *Respnt.*

(.....N. Y.....)

1. When property in the custody of a safe deposit company for safe keeping and storage is demanded by third persons under color of process, it becomes the duty of the company to ascertain whether or not the process requires a surrender of the property, and if it does not then the company must refuse to surrender it and offer such resistance to the taking, and, if unsuccessful in this, adopt such measures for reclaiming it, as a prudent and intelligent man would offer and adopt if the demand was made and the property taken by a third person under a claim of right without legal process.
2. It is no defense to an action by the owner of property against a safe deposit company to recover for the loss of the property which was left with it for safe keeping and which it negligently permitted to be taken by a third person, that after it went into the possession of such person it was seized under legal process against the owner; but if it can be shown that the owner had the benefit of it by application through regular legal proceedings upon a judgment against him, such fact will go in mitigation of damages.
3. Where in an action by a property owner against his bailee for negligently permitting the property to be taken by a stranger the defense is that the property was levied on in the stranger's hands under legal process against the owner, plaintiff has a right to specific findings as to the validity of the levies and as to how far the property was legally applied in satisfaction of valid judgments against him.

(October, 1890.)

APPPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit dismissing the complaint in an action brought to recover damages for defendant's alleged negligence in permitting certain valuables deposited with it for safe keeping to be taken by a stranger. *Reversed.*

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The facts sufficiently appear in the opinion. *Mr. Ira Shafer*, for appellant:

The defendant was a bailee for hire and was bound to exercise at least "the care which every person of common prudence, and capable of governing a family, takes of his own concerns."

Edw. Bailm. 44.

The officer could not determine from the warrant whether or not he had the stolen bonds.

See Barb. Cr. L. pp. 499-501.

The officer must seize the goods described, and nothing else, and at the place described.

Crocker, Sheriffs, § 180; Barb. Cr. L. pp. 499-501.

Not being the property specified in the warrant, the taking was not justified by it, and was of course a trespass. The officers of defendant did not stop to see what was in the safe,—whether the contents corresponded with the warrant,—but let the men take what they chose. This was not "a diligent and faithful performance of duty."

See *Jones v. Morgan*, 90 N. Y. 4; Edw. Bailm. pp. 276-278, 284, 285, 301, 371, 374, 375.

Defendant should have brought replevin to recover the property.

Edw. Bailm. 278, 305, 306; 2 Bl. Com. 453; *Duncan v. Spear*, 11 Wend. 54.

Mr. Charles E. Miller, with *Mr. Joseph C. Jackson*, for respondent:

Under the search warrant Captain Petty had the right to enter the vault and break open the safe of the plaintiff described in the warrant.

Crocker, Sheriffs, § 80; *Bell v. Clapp*, 10 Johns. 263.

Defendant's liability is limited to the consequences which naturally flow from the wrong, and not from subsequent acts, and it is not responsible for mischief which no reasonable person would have anticipated.

1 Addison, Torts, pp. 28, 29; *Lowery v. Western Union Teleg. Co.* 60 N. Y. 198.

The levy and sale by the sheriff was disconnected with the taking by Captain Petty. The loss, if any, arose through such levy and sale. This was not defendant's fault. The seizure

by the sheriff brought the property in the custody of the law.

Thompson v. Button, 14 Johns. 84.

This furnishes a defense for everything but nominal damages.

Kaley v. Shed, 10 Met. 317; *Greenfield Bank v. Leavitt*, 17 Pick. 1; 1 Rolle, Abr. 5; *Moon v. Raphael*, 2 Scott, 489, 2 Bing. N. C. 310; *Squire v. Hollenbeck*, 9 Pick. 551; *Pierce v. Benjamin*, 14 Pick. 356; *Montgomery v. Wilson*, 48 Vt. 616; *Whitaker v. Moore*, 28 Barb. 526; *Day v. Bach*, 87 N. Y. 56.

Should it be held by the court that the levy under the attachments is not a complete defense, it appears that a judgment was obtained, execution issued and the property, excepting the money, was sold under such execution and the proceeds applied to the use of this plaintiff by satisfying her debt. Such application is a complete defense.

Stamford Steamboat Co. v. Gibbons, 9 Wend. 327, 831; *Ball v. Liney*, 48 N. Y. 6; *Higgins v. Whitney*, 24 Wend. 379; *Sherry v. Schuyler*, 2 Hill, 204; *Curtis v. Ward*, 20 Conn. 204; *Stiles v. Davis*, 66 U. S. 1 Black, 101, 17 L. ed. 83.

O'Brien, J., delivered the opinion of the court:

The legal relation which the defendant held to the plaintiff, and out of which this controversy has arisen, was that of a bailee or depository for hire. The fundamental question in the case is whether the defendant, upon the undisputed evidence in the record, discharged those duties and obligations to the plaintiff which the law imposed upon it in regard to the care and custody of her property. The defendant is a corporation, organized under and possessing all the powers conferred by chapter 111 of the Laws of 1867. It was authorized to receive on deposit as bailee for safe keeping and storage, jewelry, plate, money, securities and other valuable things, upon such terms and for such compensation as might be agreed upon by the said corporation and the owners of the property or the bailors. On the 26th day of July, 1873, the defendant delivered to the plaintiff an instrument, in the form of a receipt, whereby the defendant acknowledged that it had received from the plaintiff, residing at 206 West Twenty-first Street, in the City of New York, the sum of \$20 for the rental of safe No. 6,012 in the vaults of the Stuyvesant Safe Deposit Company for the term of one year from that date, "and subject to the rules of the Company printed on the back of this receipt." One of these rules provides that "the responsibility of this Company with regard to property deposited in the rented safes is limited to the diligent and faithful performance of their duty by the officers and employes of the Company." Another provided that no person would be allowed inside the vaults for the purpose of opening any safe therein except the renter, or his substitute, named in the books of the Company, and that two persons would not be allowed to enter the vault at the same time unless personally known to one of the defendant's officers. The plaintiff was furnished with a key to the safe thus rented, as provided for by the rules, and she placed a tin box in it for the purpose of holding such property as she desired to place therein. On the 15th of October, 1873,

the plaintiff had in this box, which was locked up in the safe rented from defendant, a large sum of money, some fourteen United States bonds, and also numerous other bonds issued by various railroad and telegraph companies, the whole amounting to over \$40,000 in value. On that day the recorder of the City of New York issued a search warrant under his hand and seal, reciting that complaint had been made to him on oath by one Pinkerton, that about December 10, 1872, one hundred United States bonds, of the par value of \$75,000, and four Louisville Water bonds, of \$1,000 each, had been feloniously stolen and carried away from the Third National Bank of Baltimore by certain persons named in the warrant, as was suspected, and that said property was then concealed in three certain boxes or safes in defendant's vaults, one of which was the box or safe rented by the plaintiff. The warrant, which was directed to the sheriff of the City and County of New York or to any policeman of the municipal police of said city, then commanded the officers to whom it was addressed to diligently search in the day-time the said boxes or safes in the said premises where the said property was suspected to be concealed, and when found to bring the same before him to be dealt with according to law. Armed with this warrant, a police captain, accompanied by another police officer and by Pinkerton, and a person prepared to break into the safe, appeared at the defendant's place of business and demanded access to the safe used by the plaintiff. It is found that the defendant's officers protested against the proposed action of these parties, but they made no other resistance and they furnished the officers with the means of identifying the safe in which the plaintiff's property was, and pointed out the safe to him, and the officer then broke it open and removed the tin box from the safe. After the formal protest on the part of the defendant's officers no attempt was made by them to interfere with the officers, who expressed a determination to enter the safe by force. A list of the contents of the box was made by one of defendant's officers and the police. There was found in it over \$9,000 in money, besides the railroad and telegraph company bonds, but nothing corresponding to the property described in the search warrant, except fourteen United States bonds, and as to these the warrant contained nothing that would enable anyone to identify them by number, date, issue or otherwise, as the stolen property or any part of it which was described in the warrant. The officer carried all the contents of the box away, and instead of bringing it to the recorder who had issued the warrant, and before whom it was returnable, and who had power to inquire in regard to the ownership of the property, the officer delivered the box and its contents to the district attorney. It does not appear that any investigation was ever made to ascertain whether any of the property thus carried away was, in fact, stolen. There is no proof or finding in the case that it was; and the defense of this action proceeded upon the theory that it, in fact, belonged to the plaintiff. The defendant's officers were not taken by surprise when the police captain and his associates appeared, and, upon the authority of a search warrant, demanded admission to the vaults.

It appears that a day or two before one of the assistants of the district attorney called at the defendant's place of business and inquired of the bookkeeper if the plaintiff's husband and another man had safes in the vaults. The bookkeeper refused to answer the question, and upon such refusal he was informed by the assistant, in substance, that he would show him that he "must tell." The next day the bookkeeper was served with a subpoena by the district attorney to testify before the grand jury, and to have with him all the books and papers of the defendant containing the names of depositors in the safes or vaults of the Company. The bookkeeper then consulted with the president, and they concluded that it would not do to bring the books into court, but that they would take a memorandum from them of the names of the parties, and in this way the district attorney became informed that the plaintiff also had a safe in the vaults of the defendant.

The defendant's officers were not bound to resist the execution of the warrant by the employment of force, but the warrant offered no excuse or justification for the removal of property from the defendant's custody that was not described therein, and hence in this case the police had no right to remove any of the plaintiff's property found in the safe, except possibly the United States bonds. As to all the other property, the defendant could have used such means to prevent its removal as would be proper and justifiable in case the same parties attempted to remove it without having any warrant or legal authority whatever. In carrying away property not called for by or described in the warrant the police and other persons assisting them were trespassers, and we think that the defendant's officers neglected to make such opposition to the trespass as they could and should have made under all the circumstances. The police could not have properly proceeded to execute the warrant without first exhibiting it, or at least stating its contents; and it must be assumed that they would have done so if requested. There is no proof and no finding that, after the safe was broken open and the tin box found to contain property not mentioned in the warrant, the defendant's officers called the attention of the police to this fact or forbade its removal. Indeed none of the defendant's officers asked to see the warrant, or informed themselves in regard to its contents, or took any means to ascertain whether the contents of the box or any part of it was called for by the process under which the police assumed to take possession of the property and remove the same from the defendant's custody. They made no attempt to notify the plaintiff of what had transpired, although they had her name and address, and she resided not more than three fourths of a mile distant. They made no attempt to procure a return of the property, which seems to have been delivered to the district attorney, instead of bringing it before the recorder, according to the command of the warrant to be "dealt with according to law." We think that the defendant's officers neglected to exercise in the care and keeping of the property which the plaintiff had confided to their charge that degree of diligence and

fidelity to which they were bound by the terms of the contract under which the property was deposited in the defendant's vaults, as well as by the legal relations which they then assumed to the plaintiff. *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263; *Jones v. Morgan*, 90 N. Y. 4.

It is, no doubt, true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner. *Bliven v. Hudson River R. Co.* 86 N. Y. 408; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Van Winkle v. United States M. S. Co.* 87 Barb. 122; *Livingston v. Miller*, 48 Hun, 232; *Stiles v. Davis*, 66 U. S. 1 Black, 101 [17 L. ed. 85].

But in this case the persons who took the property had no process that authorized them to do so, and hence the defendant had the right to make such resistance to it as it would have had if the same parties attempted to take it without any process whatever; and if overcome by surprise and force they could pursue and reclaim it by legal proceedings or otherwise in the same manner as if the search warrant had not been procured. When property, in the custody of a bailee for hire, is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse, and to offer such resistance to the taking and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to the bailor and owner of the property by merely making a formal protest against entering the vaults where the property was. A person who would allow his own property to be taken from him under like circumstances, and without doing more to prevent such a result or to repossess himself of it, when taken, could scarcely be called a prudent man. It follows that the defendant has not shown that the property was taken from its possession by legal process so as to excuse its loss.

The answer presents another very important question arising out of transactions in regard to this property after it was taken from the possession of the defendant. It seems that while the property was in the custody of the district attorney it was levied upon by parties who were or claimed to be creditors of the plaintiff. The answer, as amended before and at the trial, avers the commencement of four different actions against the plaintiff in which attachments were issued and levied, judgments recovered on some of them and levies made upon the property in question and sales thereunder and an application of the proceeds upon the judgments or some of them. The case was tried by the court without a jury, and while the findings state the commencement of the actions, the issuance of attachments and levy thereunder, the entry of judgment and levy of execution, there is no distinct finding that the

proceeds were applied upon any judgment against the plaintiff.

While a bailee, who permits the property of the bailor to be taken by a stranger, may excuse himself by showing that he yielded to the power of legal process, it does not follow that a seizure under such process, after the bailee has negligently allowed the property to pass into the hands of trespassers or persons who have no right to it, will be any protection to him in an action by the owner. When the defendant permitted the property to be taken from its custody, without using proper diligence and care to retain or reclaim it, the plaintiff's cause of action accrued and could not be defeated by the action of parties seeking to establish claims against the owner. The rule in such cases seems to be that when a bailee issued by the owner for the conversion or negligent loss of the property bailed, it is not a defense or bar to the action to show that after it went into the possession of others it was levied upon under process against the owner. If it can be shown that the bailor became repossessed of the property, or that it came to his use, or that he had the benefit of it by application through regular legal proceedings upon a judgment against him, such facts will go in mitigation of damages. 2 Greenl. Ev. § 276; *Ball v. Liney*, 48 N. Y. 6; *Whele v. Butler*, 61 N. Y. 245, 249; *Hanmer v. Wiley*, 17 Wend. 91; *Otis v. Jones*, 21 Wend. 894; *Higgins v. Whitney*, 24 Wend. 379; *Sherry v. Schuyler*, 2 Hill, 204; *Lyon v. Yates*, 52 Barb. 287; *Sprague v. McKim*, 68 Barb. 60; *Peck v. Lemon*, 1 Lans. 295; *Pierce v. Benjamin*, 14 Pick. 356.

We do not think that the mere levy of an execution or attachment upon the property by a creditor of the owner while it is in the possession of the tort-feasor is available as a defense or in mitigation. It must be shown that the owner has the benefit of it, in such a way as to operate in law as a restoration of the property. None of the authorities that have been brought to our attention maintain the proposition that to show a levy alone is sufficient, and such a rule could not be supported in reason or justice. The principles that apply in such cases were stated by Earl, J., in *Ball v. Liney*, *supra*, as follows: "After a conversion of property, the title still remains in the owner, and the property can be taken from the wrong-doer upon an execution against the owner and sold, and the proceeds applied upon his debt, and the owner will thus have the benefit of the property; and in such case the wrong-doer can set up the seizure and sale, not as an entire defense, but in mitigation of damages, for the reason that it would be unjust for the owner to recover the value of the property after he had thus had the benefit of it. It is not the fact of the seizure that gives the defense, but that it has been seized under such circumstances that the owner has had, or could have, the benefit of it." Three of the judgments set up in the answer were shown at the trial to have been reversed and discontinued, and of course, upon such termination of the suits, the attachments and executions fell with them. If any of the property in question was applied upon such judgments, the plaintiff therein would be compelled to make restitu-

tion, and it is difficult to see how the defendant could derive any greater measure of protection from these suits and the process and judgments therein than the parties themselves could, had the plaintiff brought an action against them to recover the property or its value. In such a suit the parties who had taken or appropriated the property could not justify or defend under process or judgments that had been reversed or set aside, and the same rule would apply to the defendant. There was, however, one of the judgments in force at the time of the trial. That was recovered for less than \$10,000, and the court found that the property in question, when taken, was worth about \$48,000, but, as before remarked, it is not found that any of the proceeds of this property were applied to the satisfaction of this judgment, though there is evidence that would warrant that conclusion.

The counsel for the plaintiff requested the court to make numerous findings of fact and law in regard to the manner in which the attachments and executions were served and the levy made, the dissolution of the attachments, the reversal of the judgments and discontinuance of the actions, which the court refused on the ground that they were immaterial. Some of them doubtless were, but many of them were not, and consequently should have been found, as there was no dispute in the evidence in regard to them. As to the judgment which was in force at the time of the trial, it was claimed by the plaintiff's counsel to have been entered upon an offer by an attorney for the plaintiff without authority for that purpose, and in fraud of her rights; that the execution thereon was issued after the attachment was dissolved, and that it directed the sale of the attached property in the same manner as if the attachment was in force; that the execution was issued to a person who had no authority to serve it or to sell the property, and that the sale thereunder was itself fraudulent and unfair. There was evidence to support some of these claims, and the court was requested to make specific findings thereon, which requests were refused, and for the same reason as the others. The plaintiff had a right to distinct findings as to the amount applied upon any of the judgments, the existence of the judgments themselves and of the attachments and executions, the manner in which any levy relied upon by the defendant was made, and whether any lien was acquired under them, and whether the person who made the sale had authority for that purpose. Without such findings, or at least some of them, it could not be legally determined that the property came to the plaintiff's use, or that she had the benefit thereof, as that result depended upon the extent to which judgments existing against her, and not reversed or set aside, had been extinguished. In this condition of the case it would be manifestly impracticable for us to attempt to decide what effect is to be given to the suits and proceedings therein which were instituted against the plaintiff after the property was taken from the defendant and while in the possession of the district attorney. None of these questions are alluded to in the opinion of the General Term, and, so far as they were passed upon at all by the trial court, it seems to have

been upon the theory that it was sufficient for all the defendant's purposes to show the issuing of the process and a seizure of the property thereunder. Whether these suits and the proceedings in them are available to the defendant in mitigation of damages, and to what extent, are questions to be settled upon another trial, or upon fuller findings of fact.

As we are constrained to differ from the

courts below in the conclusion that the defendant performed his duty with reference to the property which it held as bailee, we cannot say, as the case now stands, that the plaintiff was not prejudiced thereby.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

All concur.

ALABAMA SUPREME COURT.

ALABAMA GREAT SOUTHERN R. CO.,

Appt.,

v.

Nellie C. HILL.

(....Ala....)

(June 19, 1900.)

A PPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Edward Colston, Samuel F. Rice and Denson & Wood for appellant.
Messrs. E. T. Taliaferro and N. Smithson for appellee.

McClellan, J., delivered the opinion of the court:

1. If a proper case for granting a motion for the surgical examination by experts of the person of one seeking to recover for personal injuries is clearly made out, and the motion is refused by the trial court, an appellate court having before it all the facts involved in the determination of the matter in the lower court will reverse the judgment at the instance of the defendant making the motion.
2. The fact that a party to an action is of a nervous temperament or in a nervous condition involves no tenable objection to compelling her to submit to an expert surgical examination of her person where it appears that she has already submitted several times to such examination by her own physician safely and without pain, and that a tendency to nervousness can in her case be safely allayed by the use of opium.
3. Delicacy and refinement of feeling on the part of one seeking to recover damages for personal injuries is no ground for refusing a motion by defendant to compel her to submit her person to a surgical examination by experts when such examination is necessary to prevent possible injustice being done to defendant.
4. An expert surgical examination of plaintiff's person is necessary to the attainment of justice in an action to recover for personal injuries where her physician after an examination of her person testifies to a certain condition of disability as resulting from the facts which he found in the case, and his conclusion is disputed by several other reputable surgeons and physicians who have been examined as to their conclusions from the facts stated by him, and should be ordered where it will not involve any ill consequences to plaintiff.
5. That cross-ties under the track at the point where a railroad train was derailed by a broken rail were unsound, decayed and rotten, and that the rail which broke was old, and the company constantly repaired the old track with old rails, is evidence of such gross negligence on the part of the company as authorizes a verdict for exemplary damages in favor of one who was injured by the accident.

This is an action for personal injuries alleged to have been sustained by the plaintiff, who is appellee here, in consequence of defendant's negligence, whereby a car on which plaintiff was being carried as a passenger was derailed and overturned. The injuries chiefly complained of and relied on for the recovery which was sought and had in the court below are alleged to be internal and permanent in their nature, and very grievous, painful and dangerous. Neither the fact of their infliction nor their extent, character or probable consequences were determinable except by expert examination of the plaintiff's person in a manner most objectionable to a young woman of delicacy and refinement, as she is shown to be. Such examination had been several times made by her attending physician, who stood ready to testify and did testify in her behalf as to the results of his investigation. Prior to the trial on the day the trial was entered upon, and again pending the trial, after the plaintiff and her physician and other physicians had testified, the defendant moved the court for an order requiring plaintiff to submit to an examination by a reputable and disinterested physician or physicians to be appointed by and to conduct the investigation under the direction and control of the court at the cost of the defendant. When this motion was last made, plaintiff's attending physician, Dr. Drennen, had testified fully as to her injuries and Drs. Chew, Wyman and Whelan, who heard his testimony, had been examined in respect to the injuries described by him, and had to a greater or less extent drawn his diagnosis in question.

NOTE.—*Demonstrative evidence.*

The exhibition by plaintiff to the jury of an injured shoulder may be permitted in an action for damages caused by the unskillful treatment of a physician. *Hess v. Lowrey* (Ind.) 7 L. R. A. 80.

A personal examination by physicians or matrons skilled in such matters, may be ordered in an action for divorce brought upon the ground of

physical incapacity and malformation. *Anonymous* (Ala.) 7 L. R. A. 428.

It is within the discretion of the trial court to require plaintiff, suing for a physical injury, to submit to an examination by competent physicians, to ascertain the nature, extent and probable duration of the injury. *Richmond & D. R. Co. v. Childress*, 8 L. R. A. 808, and *note*, 82 Ga. 712.

In support of the motion the affidavits of three reputable and experienced physicians were put in evidence to the effect that the proposed examination would not be painful or at all hazardous; that the injuries described in the complaint, which were the same deposed to Dr. Drennen, were not of a character to produce such nervousness as would render the examination dangerous to the life or health of the plaintiff; and that if she was able to attend the trial of her case, which she did, the plaintiff could without risk sustain the ordeal of the proposed investigation. On the other hand, two affidavits were offered against the motion,—one by Drennen, that the plaintiff was a delicate and refined female about nineteen years old, of nervous temperament, and had been rendered exceedingly nervous, even hysterical, by the shock of the accident, and the consequent ills which had since afflicted her; and that the proposed examination would involve danger to her health, though it appears from this affidavit that he himself had made "several thorough surgical examinations of the plaintiff" of the kind proposed, without any ill results therefrom. The other opposing affidavit was by one of plaintiff's counsel. He deposes to her age, delicacy of feeling, nervous temperament, low state of health, etc.; to the high standing of Drennen as a physician and surgeon, and to the facts that Drennen had made the physical examinations proposed by the motion, and would testify in regard thereto on the trial. On this state of facts, the court severally and successively overruled the motion each time it was presented, and refused to require the plaintiff to submit to a physical examination. The propriety of this action of the court is one of the leading questions presented by this appeal.

The authorities are somewhat conflicting on the point thus presented. A pioneer case, declaratory of the power of courts to require the plaintiffs, in actions of this character, to submit themselves to physical examination by experts, a case, too, which is put forward by the appellant as a leading one in support of the right which the lower court denied to it, is that of *Walsh v. Sayre*, 53 How. Pr. 334, decided by the Special Term of the Superior Court of New York. This case was approved by the Special Term of Common Pleas of New York in *Shaw v. Van Rensselaer*, 60 How. Pr. 143, in an *obiter dictum*, though an application for an inspection of the person was denied on the facts there presented. Subsequently the question came under review in the supreme court of that State, and *Sayre's Case* was, in effect, overruled, and the power of the courts to order an inspection of the plaintiff's person was repudiated and denied. *Roberts v. Ogdensburgh & L. C. R. Co.* 29 Hun, 154.

So that the law may be considered settled in the State of New York against the exercise of this power by the courts. In Missouri, the course and history of judicial opinion on the subject have been precisely the reverse of that exhibited in New York. The Supreme Court of Missouri first held that "the proposal to the court to call in two surgeons and have the plaintiff examined during the progress of the trial as to the extent of her injuries is unknown

to our practice and to the law, . . . and the court had no power to enforce such an order." *Loyd v. Hannibal & St. J. R. Co.* 53 Mo. 509.

Afterwards this decision was seceded from, and the doctrine thoroughly established in that State that the trial court has the power to require the plaintiff to submit to surgical examination as to the character of the injuries complained of, but that defendant has no absolute right to demand an order for such investigation; and such examination is a matter of discretion with the court, the exercise of which will not be interfered with unless manifestly abused. *Shepard v. Missouri Pac. R. Co.* 85 Mo. 629; *Sidekum v. Wabash, St. L. & P. R. Co.* 98 Mo. 400, 10 West. Rep. 277; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169. The power of courts to this end is denied in Illinois in a very meager, unreasoned and unsupported opinion of the Supreme Court, in which the subject is dismissed with the assertion that "the court had no power to make or enforce such an order." *Parker v. Enslow*, 102 Ill. 272.

It is believed that no other than the cases referred to can be found which deny the power of trial courts to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examinations in respect thereto. Of these, one has been expressly and repeatedly overruled, another appears to have been decided without due consideration of the question and investigation of the adjudications upon it and the third, and only other, alone remains as an authority for the non-existence of the power. On the other hand, the Missouri cases, *supra*, and many others, concur in the establishment of the following propositions: (1) that trial courts have the power to order the surgical examination by experts of the person of a plaintiff who is seeking a recovery for physical injuries; (2) that the defendant has no absolute right to have an order made to that end and executed, but that the motion therefor is addressed to the sound discretion of the court; (3) that the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse; (4) that the examination should be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health, and without the infliction of serious pain; and (5) that the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule last stated, is such an abuse of the discretion lodged in the trial court as will operate a reversal of the judgment in plaintiff's favor. *Thomp. Trials*, § 859; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; *Stout City & P. R. Co. v. Finlayson*, 16 Neb. 878; *Stuart v. Havens*, 17 Neb. 211; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466; *Miami & M. Turnp. Co. v. Bailly*, 37 Ohio St. 104; *International & G. N. R. Co. v. Underwood*, 64 Tex. 463; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130; *Richmond &*

D. R. Co. v. Childress, 83 Ga. 719, 8 L. R. A. 808; *Sibley v. Smith*, 46 Ark. 275; *White v. Milwaukee City R. Co.* 61 Wis. 588.

The doctrine of these authorities has been fully recognized in Alabama in a case decided at the present term (*McGuff v. State*, 88 Ala. 147), and has quite recently been acted upon by this court in a proceeding for divorce, even to the extent of requiring both the complainant and the respondent to submit their persons to expert physical examination. *Anonymous* (Ala.) 7 L. R. A. 425. See also *Anonymous*, 85 Ala. 226.

Indeed the propriety of a resort to this practice in divorce cases, even with respect to the defendant, has been long established. *Devanbagh v. Devanbagh*, 6 Paige, 175, 5 N. Y. Ch. L. ed. 945; *Le Barron v. Le Barron*, 85 Vt. 365; *Newell v. Newell*, 9 Paige, 25, 4 N. Y. Ch. L. ed. 596.

It is apparent from the adjudged cases that the statement of the rule as to the revision of the trial court's action on a motion of this sort, to the effect that such action will not be interfered with unless it involves a manifest abuse of discretion, is inapt and misleading. What is really meant, the rule fairly deducible from the opinions, is that if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error. An examination of these cases, which are most emphatic in holding this matter to be in the trial court's discretion, free from appellate interference except in the contingency of manifest abuse, demonstrates the soundness of the construction we have placed on them. The Missouri cases, for example, while affirming the broad doctrine of non-interference except where discretion has been manifestly abused, in each instance give reasons for not reversing *nisi prius* action which show that that action, upon the strictest rules of appellate inquiry, was free from error. Thus the reason given in *Shepard's Case* was that "the order asked by the defendant was unreasonable in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three, . . . and this when she had once submitted to such an examination by Dr. Jackson, and again offered to submit to an examination by an eminent and reputable surgeon and physician of the City of St. Louis, where the cause was pending; but this did not satisfy the defendant, who proposed to summon a number of physicians and surgeons to participate in the examination." *Shepard v. Missouri Pac. R. Co.* 85 Mo. 634.

The refusal of the motion in the case of *Owens v. Kansas City, St. J. & C. E. R. Co.*, 95 Mo. 169, 15 West. Rep. 88, was based on the ground that without such examination there was abundant evidence as to the nature, cause and extent of the injuries complained of. In other words, the appellate court could see that a proper case had not been made for the examination, in that no necessity for it was shown, and the ends of justice could be met without it.

The facts in *Siddekum v. Wabash, St. L. & P. R. Co.*, 93 Mo. 400, 10 West. Rep. 277, were 9 L. R. A.

strikingly like those arising on the motion in the present case, so far as the testimony adduced by plaintiff is concerned. The application was made before the trial was entered upon, and refused "for the time being." The Supreme Court says: "The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being; and, as the defendant did not renew its application for such order at any stage of the proceeding, the court may have well concluded that, after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bone, which we have given in substance [and which was of much the same character as that given by Dr. Drennen in the case at bar], defendant did not deem it necessary to renew his motion or to insist thereon, but had abandoned the same." The clear and necessary implication is that, had the motion been renewed on a state of facts precisely like those involved here, omitting the affidavits and evidence of the physicians called by the defendant, its refusal would have been an error requiring the reversal of the judgment. What we have said applies also to the other cases cited, except that of *Sibley v. Smith*, 46 Ark. 275, which states the rule as deduced from the adjudged cases to be "that where the plaintiff, in an action for personal injuries, alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of the surgeon upon his condition,—an opinion based upon personal examination. In refusing to order the examination, as it may do when the evidence of experts is already abundant, the circuit court must exercise a sound discretion, and its action is subject to review in case of abuse." And the judgment below was reversed, and the cause remanded, really on the ground that a proper case had been made for the exercise of the court's discretion favorably to the application for an examination, and its refusal to so order was therefore a reversible error.

Guided by the rule deducible from these authorities, rather than by the expressions used when they attempt a formulation of it, we shall consider whether the defendant clearly presented a case upon which the lower court should have ordered the examination moved for. We are satisfied from the evidence which was before the court when the last application was made that such an examination would not have involved any ill consequences to the plaintiff. She had submitted to be so examined several times by Dr. Drennen safely, and even without pain. The fact that she was of a nervous temperament or in a nervous condition involved no tenable objection, especially in view of the opium habit which she had contracted, and which could, without hurt to her, have been utilized to allay nervousness. Her delicacy and refinement of feeling, though of course entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand and possible injustice to the defendant on the other, the law cannot hesitate

Justice must be done. Was it essential to the ends of justice that plaintiff should submit to this examination? We think it was.

It is true that Dr. Drennen had made the examination, and had fully deposed to the injuries complained of; but he was the plaintiff's physician and her witness. His sympathies were naturally with her, operating a bias in her favor even without consciousness of it on his part. Moreover, as we have said, his conclusions and opinions from the premises he testified to did not meet the approval or concurrence of the several other reputable surgeons and physicians who were examined as to their conclusions from the facts stated by him. A serious doubt was thus raised as to what were the real facts in respect to the injuries. To a satisfactory solution of that doubt the examination moved for was essential. The result of such examination by skilled and disinterested surgeons under the directions of the court would necessarily have been either to put the plaintiff's claim in this regard on impregnable ground or to have destroyed it altogether; and, in either case, there would have been an unquestioned assurance that justice had been done,—an assurance which finds no secure anchorage in the present record. Our opinion is that the court erred in overruling defendant's motion for the examination.

We shall notice briefly only such other assignments of error as are insisted on in argument. We discover no error in the rulings of the trial court on the question of punitive damages. There was evidence in the case tending to show that the cross-ties, or a considerable proportion of them, under the track at the point of the derailment of the car in which plaintiff was riding, the wreck being the result

of a broken rail, were "unsound," "decayed," "rotten;" that the rail which broke was an "old rail," as were others along there; and that the defendant Company was "constantly repairing that old track with old rails." With the weight or sufficiency of this evidence we have nothing to do. Whether or not its tendencies were entirely rebutted by other testimony is also beyond our inquiry. Those were questions for the jury. We are satisfied that it tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the Company as implied recklessness and wantonness,—such indifference to the probable consequences of its continued use, such disregard of the safety of passengers being transported over it, as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of. And if the jury found the facts to be in accordance with this tendency of the testimony they were authorized to return a verdict for exemplary damages. It has been many times ruled by this court that the refusal of the lower court to grant a new trial is not revisable.

The declaration of Allen to the conductor, made before the accident, indicating Allen's opinion that the "engineer was whooping them up pretty fast that morning," was, in our opinion, inadmissible. *Lake Erie & W. R. Co. v. Zoffinger*, 107 Ill. 199, 15 Am. & Eng. R. R. Cas. 371; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

Facts may possibly be adduced on another trial which will legalize this evidence, but they do not exist in this record. We discover no error in the other matters urged in argument.

Reversed and remanded.

INDIANA SUPREME COURT.

William MORGAN *et al.*, Appts.,
v.

Merrill KENDALL.

(...Ind....)

1. The refusal of the defendant in a civil action brought to recover damages for an assault and battery, when called as a witness, to answer questions in relation to the alleged assault and battery on the ground that his answers might subject him to a criminal prosecution may be considered by the jury in connection with the other evidence in the case in determining the question of his liability.

2. An allegation in an action to recover

damages for an assault and battery that by reason of the injuries inflicted plaintiff "was hurt and injured and became and was sick" is sufficient to admit proof of the extent of plaintiff's injuries as well as of his physical and mental suffering resulting immediately from the assault and battery, as a basis for damages, and such items need not be specifically set out in the complaint.

3. Plaintiff may recover in an action for damages for an assault and battery, such damages as are the natural result of his injury, without specific averment, though such damages accrue after the commencement of the suit.

4. A verdict of \$4,000 in favor of one who at midnight was taken from his home to a distant

NOTE.—Assault and battery; civil action, when it lies.

A civil action for damages lies whenever the facts would support a criminal prosecution for an assault and battery; and if defendant was the aggressor he cannot invoke the doctrine of self-defense; and if not the aggressor he must not have gone beyond the necessities of the case or inflicted excessive injuries on his assailant, to render such defense available. *Thomason v. Gray*, 23 Ala. 201.

Any placing of the hands upon the person of another, without legal justification, is an assault and battery. *Hammond v. Hightower*, 23 Ga. 290.

Where the assault and battery was unprovoked
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by plaintiff, and was wantonly, maliciously and wickedly inflicted, the jury was not confined to the actual damages proved, but might give in addition thereto exemplary damages. *Harrison v. Ely*, 8 West. Rep. 680, 120 Ill. 83.

The measure of damages is such sum as will compensate the plaintiff for the physical and mental pain which he has suffered in consequence, and for the insult and indignity to which he has been subjected, and a further sum as vindictive or punitive damages, if the assault was malicious. *Root v. Sturdivant*, 70 Iowa 55.

In such a case it is proper to allow plaintiff, in

field, stripped naked, tied to a tree and severely beaten, and then ordered to leave the county or he would be killed, rendered against the persons who committed the assault, will not be set aside as excessive.

(April 26, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Clinton County in favor of plaintiff in an action to recover damages for an assault and battery. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. T. J. Cason, W. A. Staley, J. C. Davidson and R. P. Davidson, for appellants:

If the whipping to which the appellee was subjected brought on "palpitation of the heart," "nervous affections," "general debility," "stomach trouble," "trouble in the head" and general "physical no-accountness," it ought to have been deemed of sufficient moment to be set out in the complaint, so that the defendants would be apprized of what they had to answer to.

Gilligan v. New York & H. R. Co. 1 E. D. Smith, 461; *Joelin v. Grand Rapids Ice Co.* 50 Mich. 516; *Tomlinson v. Derby*, 48 Conn. 568; *Taylor v. Monroe*, Id. 86; 1 *Sutherland, Damages*, 763; *Eggleston, Damages*, § 14; 2 *Sedgw. Damages*, 606, *notes*; 2 *Wait, Act. and Def.* 484; 2 *Thomp. Neg.* 1250; 2 *Addison, Torts (Wood)* § 1384; *Moak, Torts*, p. 78; *Teagarden v. Hetfield*, 11 Ind. 522; *Lindley v. Dempsey*, 45 Ind. 249; *Brown v. Byroads*, 47 Ind. 436; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Rothschild v. Williamson*, 83 Ind. 887.

Every element of damage should be specifically averred.

Kaufman v. Wicks, 62 Tex. 234; *Tucker v. Parks*, 7 Colo. 62.

Messrs. C. S. Wesner, O. D. Wesner and H. C. Sheridan for appellee.

Coffey, J., delivered the opinion of the court:

This was an action instituted in the Boone County Circuit Court by the appellee against the appellants to recover damages for an alleged assault and battery. Upon a change of venue, the cause was sent to the Clinton Circuit Court, where a trial by jury resulted in a verdict and judgment in favor of the appellee for the sum of \$4,000.

The complaint in the cause consists of two paragraphs. The first is in the form usually employed in actions of this kind. The second paragraph is as follows: "And for his second paragraph of complaint herein the

plaintiff says that the defendants, on the 7th day of June, 1886, at the County of Boone and State of Indiana, and about the hour of twelve o'clock at night, with force and violence took the plaintiff from his home to and into a certain field about the distance of a half mile from his home, and him, the said plaintiff, the said defendants did then and there tie, fasten and lynch to a certain tree, and the said defendants did then and there strip and tear all the clothing off the person and body of said plaintiff, and the said defendants did then and there with sticks, clubs, whips and switches beat, bruise and wound the said plaintiff on various parts of his body, by means whereof the said plaintiff was hurt and injured and became and was sick, and the said defendants, at the time they so beat and bruised the plaintiff as aforesaid, then and there ordered and commanded the plaintiff at once to leave and quit his said home and the said county, and then and there informed the plaintiff, and threatened that in case he should be found at his said home twenty-four hours thereafter that they, said defendants, would take his life, and the plaintiff being greatly in fear of the defendants, and believing they would execute their said threats on his failure to comply with their said demand, he did leave and abandon his said home and the county. And at the time of his being so compelled to leave said county and flee from his home by reason of the threats aforesaid, he was engaged in farming and had growing a large crop of corn, and he was compelled to and did abandon said crop, and has thereby lost the same; and said crop at said time was of the value of \$150; and by being so driven away as aforesaid, the plaintiff was thrown out of employment, and was compelled to and did go among strangers, and was at great expense in travelling about and paying for his living, to wit: the sum of \$250; that by reason of the wrongs and injuries done him by the defendants, as in this paragraph alleged, he has been damaged in the sum of \$10,000," etc.

The defendants answer by general denial. On the trial of the cause the appellee called each of the appellants as a witness, for the purpose of proving the identity of the persons who committed the assault and battery charged in the complaint, but each of the appellants declined to answer the questions propounded to him, assigning as a reason therefor that by so doing he might subject himself to a criminal prosecution.

Upon this branch of the case the appellants

aggravation of the offense, to prove that the indignity was committed under such circumstances that it soon became known to many persons. *Ibid.*

An instruction to the effect that exemplary damages may be recovered for a wrongful act, willfully or wantonly or maliciously committed, was approved. *White v. Spangler*, 68 Iowa, 222.

In trespass to recover for an assault causing a broken leg, nursing and medical expenses are proper elements of damages. *Hawes v. O'Reilly*, 126 Pa. 440.

The rule that a plaintiff who was guilty of contributory negligence cannot recover does not apply to an action for injuries caused by an assault.

Kain v. Larkin, 55 Hun, 79.

Exemplary or punitive damages in cases of tort.

Exemplary damages are allowable in an action for a tort, when the wrong is committed with a bad motive, or so recklessly as to imply a disregard of social obligations, or the act was done wantonly, maliciously or wickedly. *Day v. Holland*, 15 Or. 464.

Liability for punitive damages rests primarily upon wrong motive. *Haines v. Schultz*, 12 Cent. Rep. 506, 50 N. J. L. 481; *Webb v. Gilman*, 6 New Eng. Rep. 166, 80 Me. 177; *Wentworth v. Blackman*, 71 Iowa, 255.]

requested the court, at the proper time, to instruct the jury as follows:

"17. Some of the defendants were made witnesses by the plaintiff and declined to testify. The refusal of any one of them to testify is not a circumstance against them; it is not evidence against them, and cannot be so used. It raises neither presumption nor implication against them or him as to being guilty of the assault complained of. This refusal cannot in any way aid the plaintiff, or add to the strength of his evidence. The same force of evidence is required to find a verdict for the plaintiff with, as without, the refusal made by the defendants. In other words, it is not a matter for consideration in your minds, or of discussion in the jury room. Your duty requires you to see that your minds are not involuntarily influenced by it.

"18. The plaintiff must make out his case by proof of the affirmative fact, and the failure of the defendants to deny cannot be a substitute for affirmative proof.

"19. The fact that the defendants have not testified in their own behalf is not a circumstance that can be considered against them or against anyone not so testifying."

The court refused to give these instructions, but gave the following:

"64. If during the progress of the trial any of the defendants in this action may have been called to the witness stand, and declined to testify because of his privilege not to speak of the fact of the transaction, because it might subject him to a criminal prosecution, you are not to consider such refusal or such claim of privileges from testifying in determining the fact whether such defendant committed the act complained of against him, outside of and independent of this claim of privilege. The plaintiff must establish every material allegation contained in his complaint by a preponderance of the evidence given in the cause, and you will consider all other facts and circumstances present on the trial in determining what facts have been proved."

It is claimed by the appellants that the court erred in refusing the instructions as asked, and also in giving that last above set out.

The only authorities cited by the appellants supposed to have any bearing upon the question now under consideration are the cases of *Long v. State*, 56 Ind. 182; *Com. v. Scott*, 123 Mass. 239, and *People v. Maunusau*, 60 Mich. 15.

The case of *Long v. State* throws no light upon the question now under consideration, as that was a case where the counsel for the State referred in argument to the fact that the defendant in the case, which was a criminal prosecution, had not testified. It was held that by reason of the terms of our Statute upon the subject the judgment should be reversed for that reason.

The case of *Com. v. Scott*, *supra*, was a case where the court permitted the prosecuting attorney to comment on the fact that the defendant, in a criminal case, did not testify in his own behalf, and the judgment was reversed for that reason.

In the case of *People v. Maunusau*, *supra*, 9 L. R. A.

the witness who refused to testify was not a party to the prosecution, and it was held that his refusal to answer a question imputing to him a larceny, on the ground that his answer might subject him to criminal prosecution, was not to be considered as affecting his credibility.

None of these cases throw light upon the subject as to what effect, if any, is to be given to the refusal of a party to a civil action to answer questions, when called by his adversary, upon the ground that his answers would subject him to criminal prosecution on account of the matters involved in the issues in that particular suit. It will readily be conceded that such refusal to answer could not be used against him in a criminal prosecution, for that would effectually deprive him of the benefit of the rule that a person in a criminal case cannot be required to furnish proof against himself. *State v. Bailey*, 54 Iowa, 414.

The questions here involved incidentally arose in the case of *Carne v. Litchfield*, 2 Mich. 840. In that case the plaintiff called the defendant as a witness, who declined to answer the question propounded to him upon the ground that his answer thereto might tend to criminate him. During the argument of the cause counsel for the plaintiff was commenting upon the refusal of the defendant to answer the question propounded to him when on the witness stand, whereupon counsel for the defendant interposed an objection.

The court remarked, in the hearing of the jury, that such refusal of the defendant was not evidence against him, yet it was impossible to prevent the jury from having the whole case and knowing what was done, in open court, in the course of the trial before them, or to prevent counsel from commenting upon it. It was held that the refusal of the defendant to testify was not evidence against him, and that the court erred in not restraining counsel in their comments upon the fact of such refusal. This case, however, has not escaped criticism. Attached to the case and found in the volume where the same is reported is the following note: "The precise point involved in this opinion does not seem to have arisen in either Illinois or Wisconsin, nor in any other case in Michigan. The more it is analyzed the more doubtful it will appear. The jury have the right, and it is their duty, not merely to listen to the words which a witness utters, but to note his manner of testifying—not merely to note how far his knowledge extends, but to note equally where his ignorance, evasion, silence, hesitation or lapse of memory occurs; thus it becomes part of his manner to note in one sense what he testifies to, and what he declines to testify to, for certainly it is equivocal logic to say that if he stammers, hesitates, evades, etc., in testifying to a given matter, the jury may note his manner, but if he refuses to testify at all they cannot. In what mental condition shall they stand? Shall they try to occupy the same position as if the witness had answered the question frankly, either in the affirmative or negative? This, as a rule,

would be impossible. It is equally impossible for them to occupy the same mental attitude as if the question had not been asked.

The true position would seem to be that while the declination of the witness to answer is not to be taken as an admission of his guilt, yet it is a circumstance in his manner of testifying, which, like any other physical or mental circumstance, such as delay, pallor, evasion, etc., may, with other circumstances, be considered by them in weighing the witnesses' testimony. Indeed, no judge or jury could avoid being differently affected by the refusal to answer than they would by the answer; and if the fact be so it would seem to be idle ceremony for the judge at *non prius* to order that it should not be so."

The question now before us was directly involved in the case of *Andrews v. Frye*, 104 Mass. 234. In that case the question involved was as to whether the plaintiff had a license to sell intoxicating liquor. Upon being asked that question by the defendant the plaintiff declined to answer, assigning as a reason therefor that his answer might tend to criminate himself. In commenting upon this branch of the case the court said: "This refusal to answer, like any other refusal to produce evidence in his power, was competent evidence against him and his partner. A party offering himself as a witness in his own behalf stands differently in this respect from a third person brought into court to testify in a case in which he has no interest."

We think this case states the correct rule. Suppose A institutes suit against B to recover the value of a horse which A alleges B has stolen from him. On the trial of the cause A testifies that he saw B take the horse from the stable, and then places B upon the witness stand and asks him if he did not take the horse at the time and place charged. B declines to answer, alleging and stating as a reason that his answer would tend to criminate him. Can it be denied that such conduct on the part of B tends to corroborate the testimony of A?

So in this case, the appellee had testified to the identity of the appellants, and when placed upon the witness stand and questioned in relation to the assault and battery with which they were charged, they declined to answer upon the ground that their answers would tend to criminate them. We think such refusal was a matter proper to be considered by the jury, in connection with the testimony of the appellee. Nor does this holding violate the well-known rule that a party in a criminal case shall not be compelled to furnish evidence against himself, for, as we have seen, when prosecuted criminally, his conduct in refusing to testify in the civil case cannot be given in evidence against him.

We do not think the court erred in refusing to give the instructions asked by the appellants.

The instruction given by the court was as favorable to the appellants as they had the right to ask. It is not erroneous in assuming the existence of the assault and battery charged in the complaint, as the existence

of such assault and battery was not a disputed fact in the case. The controversy was over the identity of the parties who committed the wrong. In some particulars the instruction is somewhat obscure, but there is no reason to believe that the jury were misled thereby to the prejudice of the appellants.

The appellants also claim that the court erred in refusing to give to the jury instructions numbered 3, 4, 5 and 6, as asked by them. These instructions are as follows:

"3. No damages are laid in the complaint for injuries running beyond the time of commencing the action, and under the evidence in this cause none can be allowed.

"4. No special damages are laid in the complaint because of alleged injury to health or infirmities of any kind brought on by the alleged whipping, and there is no question of that kind before you.

"5. The plaintiff has testified in regard to his having palpitation of the heart and nervous debility, brought on, as he claimed, by the alleged assault and battery. He has set out nothing of the kind in his complaint, and you are instructed to disregard any evidence upon the subject of such consequential results.

"6. No special damages are laid in the complaint for the loss of time, nor is there any evidence upon that subject, and nothing of this kind can be allowed, nor for any alleged loss of crops."

The contention of the appellants is that the appellee cannot recover in this action for palpitation of the heart, or for any other suffering peculiar in its nature, without alleging such peculiar suffering by way of special damages.

It is argued that the appellants are only liable for such damages as they had a right to expect as the natural consequences of their act, unless other damages are specifically alleged in the complaint; and as palpitation of the heart is not the natural or usual result of personal chastisement, the appellee cannot recover on account of such suffering in this action, because it is not specifically set forth in the complaint.

It is no doubt true that a party cannot recover special damages without specifically alleging such damages in his complaint.

In *Sedgwick on Damages*, vol. 2, 7th ed. p. 707, the learned author quotes with approval from Mr. Chitty the following: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious in its consequences, as where words become actionable only by reason of special damages ensuing. It does not appear to be necessary to state the former description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts. But when the law does

not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damages should be shown with particularity."

In a note on page 608 of the same work it is said: "The law presumes damages and dispenses with their averment for bodily pain and suffering in actions for personal injury,"—citing *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534; *Swarthout v. New Jersey Steamboat Co.* 46 Barb. 223.

In such actions, the plaintiff may also recover for mental suffering without any specific averment upon the subject. *Wright v. Compton*, 53 Ind. 837; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 448, and cases cited.

The complainant in this case alleges that by reason of the injuries inflicted by the appellants he was hurt and injured and became and was sick. Under these allegations we think the appellee might prove the extent of his injuries as well as the extent of his physical and mental suffering resulting immediately from the assault and battery alleged in his complaint. Such physical and mental suffering was not the subject of special damages within the legal meaning of that term, and it was not necessary to specifically set them out in the complaint. For this reason the court did not err in re-

fusing to give the fourth and fifth instructions asked by the appellants.

The third instruction asked is not the law in any aspect of the case, and should not have been given. In an action to recover damages for an assault and battery, the plaintiff may recover such damages as are the natural result of his injury, without specific averment, though such damages accrue after the commencement of the suit. *Birchard v. Booth*, 4 Wis. 67.

The sixth instruction asked relates to a matter not within the issues or the evidence in the cause, and was properly refused by the court. The court instructed the jury correctly as to the measure of damages.

Finally, it is contended by the appellants that the damages assessed by the jury are excessive. We do not agree with this contention. The assault and battery charged and proven on the trial was of an aggravated character, and the jury who heard the evidence and had the parties and witnesses before it were the best judges of the amount necessary to compensate the appellee for the injuries he had received at the hands of the appellants.

There is no error in the record.

Judgment affirmed.

Petition for rehearing overruled June 25, 1890.

NEW HAMPSHIRE SUPREME COURT.

DUNTLEY

v.

BOSTON & MAINE R.

(.....N. H.....)

1. A regulation of a carrier with respect to the transportation of live animals, which fixes the ordinary value of horses

for which it will hold itself responsible in case of loss at \$200 each, and requires extra compensation for transporting animals of greater value, is reasonable and valid.

2. One who ships his horse as an ordinary one, knowing that a regulation of the carrier limits its liability in case of the loss of such animals to a certain sum, and requires extra compensation for transporting animals of greater

NOTE.—Duty to furnish cars for transportation, and safe mode of delivery.

A railroad company engaged in the business of transporting live stock is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business. *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

Where there is a provision that the shipper load and unload, carrier's servants to be subject to the order of the shipper, it is the duty of the shipper to secure the doors and of carrier to allow time therefor. *Newby v. Chicago, R. I. & P. R. Co.* 3 West. Rep. 170, 19 Mo. App. 381.

A shipper is not entitled to have his cattle carried in cars of a special construction, belonging to a third party, and superior to ordinary cattle cars. The refusal to use the cars desired by the shipper does not constitute unjust discrimination. *Morris v. Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 617.

A carrier is not bound to furnish cars to carry live stock on Sunday; yet having received stock into pens for transportation it becomes its duty to ship without unreasonable delay. *Guinn v. Wabash, St. L. & P. R. Co.* 3 West. Rep. 293, 20 Mo. App. 453.

The station agent of a railroad company has authority to receive and forward freight, and may

bind the company by a contract to furnish, on a certain day named, cars for the transportation of live stock, although in making such contract he may have exceeded his authority. *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 4 West. Rep. 742, 21 Mo. App. 273.

A railroad company in the carriage of live stock is not required to use the safest and best motive power, with the best appliances in use, but is only required to use such cars and motive power and appliances as are suitable, safe and sufficient. *Illinois Central R. Co. v. Haynes*, 68 Miss. 435.

It is the duty of a carrier of stock by railroad to provide a safe mode of delivery, by having a platform suitable for the purpose of unloading stock. *Owen v. Louisville & N. R. Co.* 87 Ky. 623.

The legal duty of carriers is not fully discharged by receiving on, and discharging from, their cars live stock at a depot, access to which must be purchased. *Keith v. Kentucky Cent. R. Co. (Ky.)* 1 Inters. Com. Rep. 601.

Duty to feed and water stock.

Under the Statute prescribing a penalty to be recovered by the owner against a carrier who shall fail to sufficiently feed and water live stock during transportation and until delivery, in order to authorize a recovery of such penalty the statutory

value, thereby elects to treat his horse for the purpose of transportation as of no greater value than that fixed by the regulation, and he cannot, in case of loss, insist on a higher valuation.

(July 20, 1890.)

EXCEPTIONS by plaintiff to a judgment of the Trial Term for Strafford County in his favor, but for a less amount than demanded, in an action brought to recover damages for injuries to his horse through the alleged negligence of defendant. *Overruled.*

grounds must be particularly set forth and clearly established by proof. *Good v. Galveston, H. & S. A. R. Co. (Tex.) 4 L. R. A. 801.*

A carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock to feed and water them at his own risk and expense. *Missouri Pac. R. Co. v. Fagan, 2 L. R. A. 75, 72 Tex. 127.*

The fact that one of two trains carrying cattle was more than twenty-eight hours on the road without feeding or watering them, in violation of U. S. Rev. Stat., § 4886, will not make the company liable for damages to the cattle during shipment, where the shipper had a special contract binding him to take care of, feed and water them on the road, and there is nothing to show what part of the damage to them was caused by failure to feed and water them. *Missouri P. R. Co. v. Texas & P. R. Co. 41 Fed. Rep. 912. See note to Missouri Pac. R. Co. v. Fagan (Tex.) 2 L. R. A. 75.*

Responsibilities of.

Where a railroad company receives for shipment a car of hogs which is overloaded, it assumes all the responsibilities of a common carrier with reference to it, and cannot escape liability for damage to the property, on the ground that the car was overloaded. *Kinnick v. Chicago, R. I. & P. R. Co. 60 Iowa, 606.*

When a carrier fails, without good excuse, to deliver the goods on demand after they have reached their destination, he continues to hold them as carrier at his own risk and peril. *Louisville & N. R. R. Co. v. McGuire, 79 Ala. 395.*

In the absence of statutory regulations, the liability of a common carrier continues after the goods have reached their destination, until the consignee has had a reasonable time to remove them; and after that time he is liable only as a warehouseman, or bailee for hire. *Ibid.*

The mere fact of giving a pass, so that a servant of the owner may go with cattle which are shipped, does not relieve the carrier from responsibility for them. *Feinberg v. Delaware, L. & W. R. Co. (N. J.) July 12, 1890.*

Where the carrier does not hold itself out as a common carrier of dogs, nor assume their transportation in that character, but, as a matter of accommodation to a passenger who was notified of its rules, permits its servant to receive them in its car, and accept pay for their transportation, such arrangement at most can only charge the carrier as a bailee, or private carrier. *Honeyman v. Oregon & Cal. R. Co. 13 Or. 852.*

Under a complaint charging the defendant as a common carrier, no recovery can be had upon proof of a liability as a private carrier only. *Ibid.* See note to *International & G. N. R. Co. v. Tiedale (Tex.) 4 L. R. A. 545.*

Forwarding by connecting line.

A carrier that receives cattle consigned to a point beyond its own road, with an agreement to deliver

Plaintiff shipped his horse over defendant's road as an ordinary one, understanding that if any injury occurred the Railroad had a regulation limiting its liability to \$200 for an ordinary horse, and requiring extra compensation for the transportation of animals whose value was greater than that amount. The horse was injured during the course of transportation and this action was brought to recover damages therefor.

The facts were found by referees, who reported generally in favor of plaintiff, fixing his damages at \$350. He took exceptions to their

to a connecting line, has the duty to deliver them to the connecting carrier safely, whether in the original cars or in cars furnished by the connecting road; and this duty includes providing suitable bedding for the cars, partitions to keep the cattle apart and proper care in not unduly crowding them. *Alabama G. S. R. Co. v. Thomas (Ala.) May 5, 1890. See note to Crossan v. New York & N. E. R. Co. (Mass.) 3 L. R. A. 768.*

The authority of the agent of a railroad company to keep cattle in the original cars, or transfer them to others furnished by a connecting road, involves the duty of putting cars furnished by the latter in suitable condition, or else allowing the shipper to do so, under his contract to care for them during transportation. *Alabama G. S. R. Co. v. Thomas, supra.*

Where a contract is made for the transportation of cattle to a point beyond the line of the road of the company with which the contract is made, the liability of the contracting road to cease at its terminus, a connecting company to which the cattle, after being transported over several roads, are finally delivered and by which they are delivered at their destination and all charges collected for carriage, is not liable as a partner or joint contractor for injuries received by the cattle on roads other than its own. *Ft. Worth & D. C. R. Co. v. Williams, 77 Tex. 121.*

A railroad company receiving horses from a connecting line, with notice that the shipper has attempted to prepay the freight for the whole transportation, but has not paid it in full at the regular rates, and also that he contemplates a continuous and speedy passage, has the right to carry the horses through to their destination, and claim a lien on them for the balance of the freight. *Crossan v. New York & N. E. R. Co. 3 L. R. A. 768, 149 Mass. 196.*

Damages for failure to transport.

For refusal of railroad company to transport stock, the measure of damages is the difference between the market value at the place of shipment and the place of delivery. *Birney v. Wabash, St. L. & P. R. Co. 3 West. Rep. 203, 20 Mo. App. 470; Gelvin v. Kansas City, St. J. & C. B. R. Co. 4 West. Rep. 742, 21 Mo. App. 273.*

It is error to consider their value at the market or place of destination, in the absence of evidence or averment in the complaint that defendant's agent, at the time of contracting to furnish cars, was informed that the cattle were intended for sale at such place. *Gelvin v. Kansas City, St. J. & C. B. R. Co. supra.*

In an action for damages for the breach of an agreement by a railroad company to bring all live stock transported over its road to plaintiff's stock yard, evidence of the number of cars loaded with stock and transported by the company is admissible in determining the question of damages. *Terre Haute & I. R. Co. v. Struble, 109 U. S. 381, 27 L. ed. 970.*

award, which were disallowed by the court, and to that decision he took these exceptions.

Messrs. G. E. Cochrane, J. G. Hall and J. Smith for plaintiff.

Messrs. Worcester & Gafney for defendant.

Clark, J., delivered the opinion of the court:

In *Hart v. Pennsylvania R. Co.*, 112 U. S. 331 [28 L. ed. 717], which, like the present, was an action to recover damages from a railroad for injuries received by the plaintiff's

horses during transportation by the defendant as a common carrier, the bill of lading issued by the defendant, and signed by the plaintiff, contained a stipulation that the carrier assumed a liability to the extent of an agreed valuation not exceeding \$200 for each horse, and the rate of freight was based upon that condition; and it was held that even in case of loss or damage by the negligence of the carrier, the contract should be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight received. In that

Liability for delay in shipment and delivery.

Cattle loaded on the cars at 6 o'clock P. M. on Friday, which are not moved by the railroad company until 4 o'clock on Saturday, when it is too late for them to reach their destination in time for the Saturday market, are not shipped within a reasonable time, and the company is liable for the delay. *Cincinnati, L. St. L. & C. R. Co. v. Case*, 122 Ind. 810.

A vessel is liable for the keep and loss of weight on cattle and sheep during the delay in sailing after notice to the shipper that she would sail on a certain day. *Goldsmith v. Tower Hill Steamship Co.* 37 Fed. Rep. 806.

A shipper of cattle cannot recover damages for delay in the sailing of a vessel on which they are carried, if, after knowing of the delay, they could have been sold without loss. *Ibid.*

Where live stock—cows and calves—were accepted, freight paid and receipt given, for transportation, without express contract or limitation, and, being delayed by a snow storm, were put in a stockyard, where they died, and others were injured by cold and exposure, the railroad company was liable for damages as a common carrier. *Feinberg v. Delaware, L. & W. R. Co. (N. J.)* July 12, 1890.

Where, during a wrongful detention of cattle by ship owners, to compel the payment of an unfounded claim for one day's demurrage, the market price declined, the ship owners were liable for the loss in the price of the cattle. *The Suffolk*, 81 Fed. Rep. 635.

Where, on account of a carrier's negligence, live stock arrives at its destination too late for the market that week, and there is no market until the first of the following week, when a portion of the stock is sold, and the rest, which might also have been sold at the same time, is kept by the owner till later in the week, when it is sold at a less price than it would have brought on the day when the former portion was sold, the owner is not entitled to recover for the depreciation in value up to the day of the final sale, but only to the day of the sale of the former portion. *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

The measure of damages for loss, by reason of the delay and by fall in the price of the cattle, is the difference between the market value at the place of delivery at the time the cattle would have arrived there if defendant had kept its contract, and their value at the same time at the place of shipment. *Gelvin v. Kansas City, St. J. & C. R. R. Co.* 4 West. Rep. 742, 21 Mo. App. 273.

It is error to consider their value at the market or place of destination in the absence of evidence or averment in the complaint that defendant's agent, at the time of contracting to furnish cars, was informed that the cattle were intended for sale at such place. *Ibid.*

Liability for miscarriage and wrongful delivery.

A carrier must deliver cattle to the party designated by the terms of shipment, or to his order, at 9 L. R. A.

the place of destination; and where it delivers them to one not entitled to receive them, it is accountable. *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. ed. 237.

Direction on way-bills to notify a third party named does not qualify the duty of the carrier to deliver cattle to the order of the consignee. *Ibid.*

The last carrier in connecting lines must deliver cattle at the place of destination, and to the consignee there, if he was made known to it on receiving the freight from the preceding connecting company. *Ibid.*

The custom of a company of delivering cattle without requiring the production of the bill of lading or authority of the shipper, does not relieve it from liability for cattle wrongfully delivered. *Ibid.*

Indorsement, by the shipper to plaintiff, of receipts taken on the shipment of cattle, transferred their title and gave plaintiff the right to their possession, and, if necessary, to sell them for payment of drafts taken by him against the shipper. *Ibid.*

Where the agent pointed out the car upon which hogs were to be loaded, and plaintiff loaded them on the car pointed out, but by mistake of the agents and employees of the company the consignment miscarried, the company is liable. *Wilson v. Wabash, St. L. & P. R. Co.* 23 Mo. App. 50, 5 West. Rep. 65.

The carrier must deliver cattle to party designated by terms of shipment, or to his order, at the place of destination; and where it delivers them to one not entitled to receive them it is accountable. *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, *supra*.

Indorsement by the shipper to plaintiff, of receipts taken on shipment of cattle gave plaintiff the right to their possession, and, if necessary, to sell them for payment of drafts taken by him against the shipper. *Ibid.*

Custom of the company, of delivering cattle without requiring production of bill of lading or authority of shipper, does not relieve it from liability for cattle wrongfully delivered. *Ibid.*

Damages for negligent loss or injury.

In an action for damages for injury and loss of cattle by negligence of the carrier, brought against the lessee of the road with which the contract of shipment was made, notice of loss given to the general freight agent of the lessor road, in pursuance of the terms of the contract, and service of summons upon the proper station agent of defendant company, is sufficient. *Reynolds v. St. Louis, I. M. & S. R. Co.* 4 West. Rep. 308, 23 Mo. App. 600.

Suit was brought to recover damages for injury to horses shipped by rail. The owner, for two days, refused to receive the horses at the place of destination, owing to some extra charges. It was held that no expense thereafter incurred could be properly charged to defendants. *Louisville & N. R. Co. v. Trent*, 16 Lea, 419.

Notice to a carrier that cows shipped are pregnant is not necessary in order to recover damages

case, as in this, the plaintiff claimed and offered to prove that his horses were worth much more than \$200, but it was held that his recovery must be limited to the amount stated in the bill of lading. The basis of the decision was that a common carrier may prescribe just and reasonable regulations to protect himself against fraud, and fix a rate of charges proportionate to the magnitude of the risk he assumes.

The doctrine of *Hart v. Pennsylvania R. Co.* is applicable to the facts in the case before us. The referees have found that the plaintiff shipped his horse as an ordinary horse, understanding that the Railroad had a regulation limiting its liability in case of injury to \$200 for an ordinary horse, and, if a higher valuation was given, a higher rate would be charged. Knowing that the freight charges were measured by the valuation put upon the property, and that the rate was fixed upon the basis that

the liability assumed by the defendant would not exceed \$200 in case of loss or injury, the plaintiff, by shipping his horse as an ordinary horse, fixed his value for transportation purposes at \$200, and, having elected to treat his value as \$200 for the purpose of securing a low rate of freight, he cannot insist upon a higher valuation in case of loss or injury. In fixing the freight charges on the assumed valuation of \$200, both parties understood that the liability assumed by the defendant was limited to \$200. The plaintiff's conduct was, in effect, a declaration as to the value of his horse, and an admission that the defendant's liability as carrier would not exceed \$200. The case is as if, upon inquiry by the defendant, the plaintiff had stated the value of his horse to be \$200, the sum named in the defendant's regulation as determining the freight charges, and the liability assumed in the transportation of a horse of ordinary value. The

for miscarriages caused by injuries to the cows in transportation. *Estill v. New York, L. E. & W. R. Co.* 41 Fed. Rep. 849.

A shipper of cattle is entitled to recover from the carrier for a loss in value of the stock caused by the gross negligence and carelessness of the agent of the shipper in handling and transporting the cattle, consisting of unnecessary delay in transportation, needless confinement in the cars at the different stations on the road, and bruising and bumping caused by improper transportation. *Good v. Galveston, H. & S. A. R. Co. (Tex.)* 4 L. R. A. 801.

In an action to recover damages for injury to cattle caused by negligence in the defendant railroad company, if its method of transportation was unsafe, as omitting means of ventilation and cleats on the floors to furnish footing, the fact that it was usual with the defendant cannot exonerate it from its contract to safely transport. Its own usage would have no tendency to show that it had adopted a safe method. *Leonard v. Fitchburg R. Co.* 3 New Eng. Rep. 842, 148 Mass. 807.

Where by special contract the owner agrees to and does take charge of the stock the burden of proving negligence is on him. *McBeath v. Wabash, St. L. & P. R. Co.* 8 West. Rep. 199, 20 Mo. App. 445.

Where mares being with foal are shipped, they constitute freight having what is called an inherent defect; and if they lose their foal on the way the measure of damages is not the difference in their market value as they are and what it would have been had they arrived in good condition; but if the loss is total, it is the price, less freight charges, they would have brought if delivered in reasonable time, having had due and necessary care while in the carrier's possession; and if the loss is partial, it is the difference between such price, less freight, and the actual value of the animals as delivered. *Missouri Pac. R. Co. v. Fagan*, 3 L. R. A. 75, 72 Tex. 127.

Notice of claim for damages.

When, on shipping cattle by a railroad, a written contract is entered into between the carrier and the shipper, that in case of loss no damages shall be paid unless a claim in writing for such damage shall be delivered to the carrier in five days after the removal of the cattle from the cars, no recovery can be had for a loss unless such written claim shall be so delivered. *McBeath v. Wabash, St. L. & P. R. Co.* 8 West. Rep. 199, 20 Mo. App. 445.

Where a railroad company accepts cost of transportation for an injured horse, with the full knowledge of his condition, and furnishes cars and the same agents to bring back the horse to the place of shipment who had charge of him when shipped to 9 L. R. A.

the place where he was injured, a stipulation in the contract by which the shipper agrees not to remove the horse if injured, before notice of a claim for damages, is waived. *Owen v. Louisville & N. R. Co.* 10 Ky. L. Rep. 558.

A condition in a contract of shipment, requiring the shipper, in order to recover for an injury to stock, to give written notice to some officer or the nearest station agent of the carrier before removing the stock from the place of destination, or before it is mingled with other stock, is not an unreasonable one. *Owen v. Louisville & N. R. Co.* 87 Ky. 623.

In direct conflict with this is the case of *Smith v. Louisville & N. R. Co.* 86 Tenn. 198.

Not liable for accidents.

A carrier transporting a mule in a suitable car with adequate equipments and appliances, without culpable delay or negligence or want of care on the part of its employees in handling the stock, over a track in good condition, is not liable for an accident to the mule by which his hoof is torn off, in the absence of evidence showing how it occurred. *Louisville, N. O. & T. R. Co. v. Bigger*, 66 Miss. 319.

A carrier is not liable for an injury inflicted by a live animal upon himself during transportation, or by other animals properly shipped in the same car, without fault on the part of the carrier. *Ibid.*

Contract limiting liability.

A custom requiring a shipper to agree, as a condition of shipment, that his measure of damages should not be more than the cash value of the stock shipped at the place of shipment, is illegal. *Missouri Pac. R. Co. v. Fagan*, 3 L. R. A. 75, 72 Tex. 127.

A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. *Ibid.*

A custom cannot require that a shipper should expressly agree, as a condition precedent to his right to damages for injury to stock during transportation, that he would give notice before removing the stock. *Ibid.*

A contract between a carrier and shipper of stock, limiting the carrier's liability, in case of a total loss of the stock by the carrier's negligence, to a certain price per head less than the full value of the stock, is invalid. *Southern P. R. Co. v. Maddox*, 75 Tex. 800.

The provision of a bill of lading limiting damages for injury to a horse during transportation is waived by a settlement of the damages, in which the horse is taken and a larger sum agreed to be paid therefor. *Chicago & E. L. R. Co. v. Katsenbach*, 118 Ind. 374.

rule or regulation of the defendant, of which the plaintiff had notice, was not designed and did not purport to relieve the defendant from its common-law responsibility as a carrier. The purpose was to secure information as to the value of the animals received for transportation, and compensation proportionate to the risk incurred. As such the regulation was a reasonable one, and not in conflict with the general principle that a common carrier cannot discharge himself of legal responsibility by a general notice. *Moses v. Boston & M. R. Co.* 24 N. H. 71, 90, 91. Such a stipulation is not prohibited on grounds of public policy.

In *Hart v. Pennsylvania R. Co.*, 112 U. S. 831, 840, 841 [28 L. ed. 717, 721], the court says: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss and to repudiate it in case of loss."

There is no injustice in restricting the shipper's claim for damages to the value he places upon his property for transportation. If the plaintiff obtained the lowest rate of freight by shipping his horse as of ordinary value, it is not unreasonable that his recovery should be restricted to \$200, which was the amount of the risk the parties understood the plaintiff paid for and the defendant assumed as carrier. *Magnin v. Dinmore*, 62 N. Y. 85, 20 Am. Rep. 442; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 245; *Graves v. Lake Shore & M. S. R. Co.* 187 Mass. 83; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 234.

The motion to set aside the award on the ground of disqualification of the referees, and the request for a further hearing on that motion, were questions of fact for the trial term, not ordinarily revisable at the law term, and no error of law appears in the denial of the motions. As greater damages were awarded the plaintiff than he was legally entitled to recover, he suffered no injustice from the award. *Holman v. Manning* (N. H.) 19 Atl. Rep. 1002; *Sanford Mfg. Co. v. Wiggins*, 14 N. H. 441, 450.

Exceptions overruled.

Blodgett, J., did not sit; the others concurred.

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William B. DURGIN
c.
AMERICAN EXPRESS CO.

(.....N. H.)

1. A shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and if he receives such receipt without objection his assent to its conditions will, in the absence of fraud, be conclusively presumed.
2. A stipulation placing an agreed valuation upon goods delivered to an express company for transportation, which is inserted in the shipping receipt and is designed to fix the extent of the company's liability in case the goods are lost, is binding on the shipper if he understands its purpose and knows that the freight charges are proportioned to the nature and extent of the risk; and the fact that neither the value of the goods nor the rate of charges is asked in a particular case is immaterial.
3. An express company cannot stipulate for exemption from responsibility for the negligence of itself or its servants, even by express contract.

(July 25, 1890.)

ACTION brought in Merrimack County to recover the value of certain goods lost while in defendant's possession for the purpose of transportation. *Discharged.*

On the 20th day of January, 1888, defendant's agent received from the plaintiff a box weighing thirty-seven pounds, and containing silver-ware of the value of \$680.20, to be carried by the defendants to the City of New York, and there delivered to Theodore B. Starr. There was in the plaintiff's possession a book of blank receipts furnished him by the defendants, to be filled up and signed by the defendants on the delivery of the goods to them for carriage. At the time of the reception of the box in question, one of these receipts was signed and delivered to the plaintiff by the defendant's agent. The printed portion of the receipt contains the following, among other stipulations: "It is further agreed that this Company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatever, unless, in every case, the said loss or damage be proved to have occurred from the fraud or gross negligence of said Company, or their servants; nor in any event shall this Company be held liable or responsible, nor shall any demand be made upon them, beyond the sum of \$50, at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The value of the box and contents was not stated, nor was any inquiry concerning its value made by the defendants or their agent, and neither the defendants nor

their agent had knowledge of the value thereof. The sum to be charged for carrying the box was not mentioned, and no charge therefor was paid by the plaintiff, it being understood that the express charges were to be paid by the consignee upon delivery. The goods were never delivered, but were lost or stolen. The price fixed by the defendants for the carriage of this box was 75 cents, but the plaintiff was not informed what the charge in this particular instance would be. If the actual value of the goods had been stated, the regular express charge would have been \$3.75. The plaintiff is, and for many years has been, a manufacturer of and dealer in silver-ware, at Concord, and during that time the defendant Company has received from him, to be carried by express, thousands of packages and boxes, the value of which in many instances was more than \$50, giving receipts like that given on this occasion, in which the value of the box or package was not inserted, and concerning which no information was given or inquiry made.

Messrs. William L. Foster and Chase & Streeter, for plaintiff:

By the stipulation printed in the receipt, defendant seeks to limit its common-law liability for the loss of the goods through its own negligence. This it cannot do.

Angell, Carr. §§ 67, 227; 8 Wood, Railway Law, 1578, *note 1*; *Muser v. American Exp. Co.* 1 Fed. Rep. 882; *American Exp. Co. v. Sands*, 55 Pa. 140; *United States Exp. Co. v. Bachman*, 2 Cin. Super. Ct. (Ohio) 251; *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 298, 114 Pa. 523.

There was no contract of exemption or limitation of the defendant's liability. A notice of such limitation, printed on the back or within the body of a receipt which is not signed by the shipper, does not amount to a contract, though the receipt with such notice in or upon it may have been taken by the shipper without dissent.

Michigan Cent. R. Co. v. Mineral Springs Mfg. Co. 88 U. S. 16 Wall. 818, 21 L. ed. 297; *New Jersey S. Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170.

Defendant could not thus limit its liability even by a special contract.

Adams Exp. Co. v. Stettaners, 61 Ill. 184; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374.

A carrier is bound to make inquiry in such cases. If he does not, and the package is received for such price for transportation as is asked, with reference to its bulk, weight or external appearance, the carrier is responsible for the loss, whatever may have been its value.

Gorham Mfg. Co. v. Fargo, 45 How. Pr. 90.

The case of the acceptance by the plaintiff of the defendants' receipt is no stronger in his favor than a public notice brought home to the shipper's personal knowledge, which is not sufficient to modify the carrier's liability.

Moses v. Boston & M. R. Co. 24 N. H. 71, 88; *Barter v. Wheeler*, 49 N. H. 9, 80, 81.

Messrs. Jeremiah Smith and Henry Robinson, for defendant:

There was a special contract exempting the
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defendant from liability beyond the sum of \$50.

Falkenau v. Fargo, 3 Jones & S. 332, 55 N. Y. 642; *Ghormley v. Dinsmore*, 21 Jones & S. 36; *Westcott v. Fargo*, 6 Lans. 323; *Grace v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.* 104 Mass. 144. See also *Breese v. United States Teleg. Co.* 48 N. Y. 132, 139, 141, 142, 28 Am. & Eng. R. Cas. 705.

The fact that the plaintiff accepted the receipt is evidence that he assented to the terms of said notice.

Lake Shore & M. S. R. Co. v. Davis, 16 Ill. App. 425; *Wabash, St. L. & P. R. Co. v. Jagman*, 2 West. Rep. 863, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680; *Seena v. True*, 53 N. H. 627, 632.

Plaintiff's claim is barred by the application of the doctrine of estoppel, pure and simple, entirely irrespective of contract.

Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 34, 35.

It would be a fraud upon the carrier to permit the shipper to recover a greater sum than the value voluntarily fixed by himself, with a view of obtaining a low rate of freight.

Harvey v. Terre Haute & I. R. Co. 74 Mo. 538, 546; *Magnin v. Dinsmore*, 62 N. Y. 85, 20 Am. Rep. 442; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 66; *Moses v. Boston & M. R. Co.* 24 N. H. 71, 85, 86, 90, 91.

Even if the language were less explicit, the intention to limit the liability for negligence might reasonably be inferred.

Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33.

This limitation was valid.

Hart v. Pennsylvania R. Co. 112 U. S. 831, 28 L. ed. 717; *Graves v. Lake Shore & M. S. R. Co.* *supra*; *Louisville & N. R. Co. v. Shorrod*, 84 Ala. 178; *The Lydian Monarch*, 23 Fed. Rep. 298; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

Clark, J., delivered the opinion of the court:

Common carriers may limit their common-law liability by express contract against risks not arising from their own negligence. *Merrill v. American Exp. Co.* 62 N. H. 514; *Rand v. Merchants Despatch Transp. Co.* 59 N. H. 363; *Barter v. Wheeler*, 49 N. H. 9, 80; *Moses v. Boston & M. R. Co.* 24 N. H. 71, 90.

The receipt signed by the defendants' agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and, in the absence of fraud, by receiving it without objection, he is conclusively presumed to assent to its conditions. *Merrill v. American Exp. Co.* 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505.

It is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is

just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk, and the degree of care required, is clearly reasonable.

In *Moses v. Boston & M. R. Co.*, 24 N. H. 90, while adhering to the rule that the legal responsibility of a common carrier cannot be discharged by a public notice, the court says: "We do not mean to hold that there are no cases in which the carrier may, by notice, define and qualify his responsibility. It may be quite reasonable that he should insist on proper information as to the value of the article which he carries. This would not seem to be any infringement upon the principle of the ancient rule. He must have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. We can see nothing that ought to prevent him from requiring notice of the value of the commodity delivered to him, when, from its nature, or the shape and condition in which he receives it, he may need the information; nor why he should not insist on being paid in proportion to the value of the goods, and the consequent amount of his risk." In conformity with these views, conditions and stipulations designed to secure to carriers information as to the character and value of the articles delivered to them, and to limit their responsibility to the amount and extent of the risk apparently assumed by the carrier and paid for by the customer, are upheld as just and reasonable. *Duntley v. Boston & M. R. Co.* 65 N. H.—(Strafford, June Term, 1890); Edw. Bailm. 2d ed. §§ 567–569; *Hart v. Pennsylvania R. Co.* 112 U. S. 831 [28 L. ed. 717, 721]; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 38; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284, 8 New Eng. Rep. 916.

If the question is raised in this case, it seems to be settled by great weight of authority that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants on grounds of public policy, even by express contract. *New York Cent. R. Co. v. Lookwood*, 84 U. S. 17 Wall. 357 [21 L. ed. 627]; *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* 129 U. S. 897 [32 L. ed. 788]; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174 [23 L. ed. 872]; *Willis v. Grand Trunk R. Co.* 62 Me. 438; *Mann v. Birchard*, 40 Vt. 326; *Squire v. New York Cent. R. Co.* 98 Mass. 289, 248; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Wallingford v. Columbia & G. R. Co.* 23 S. C. 253; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 5 Cent. Rep. 298; Edw. Bailm. § 563.

Case discharged.

Allen, J., did not sit; the others concurred.

COLORADO SUPREME COURT.

Clinton REED
v.

John C. MEAGHER *et al.*, *Appts.*

(....Colo.....)

1. An agreement by which several persons undertake to pay the expenses of developing a mining claim upon condition that another obtains a lease of the claim and transfers to each a certain interest therein, with the understanding that the mine shall then be operated as a partnership affair for the benefit of

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all the parties interested, does not form a partnership between them, since an executed agreement is necessary to constitute a partnership; and while the agreement remains executory the withdrawal of one of the parties and the substitution of a stranger in his place will not be followed by any of the legal consequences of a dissolution.

2. The obtaining of a lease of a mining claim and beginning the development thereof, and the furnishing of money to pay the expenses of such development in accordance with a previous agreement between the parties

that the lease should be acquired, the property developed and the expenses and profits shared in accordance with the respective interests of the parties therein, will execute the agreement so as to establish a partnership between the parties.

3. A partnership formed for the purpose of obtaining a lease of mining property with the sole or principal object of extracting the ores therefrom will be construed as a mining partnership unless the evidence clearly establishes that the intention of the parties was to form a general or commercial partnership.

4. A transfer of the interest of one of the partners in a mining partnership will not work its dissolution.

5. An agreement to form a partnership for the purpose of acquiring a lease of certain mining property and extracting the ores therefrom is not within the Statute of Frauds, but it may be proved by parol in a suit between the partners for a settlement of the partnership affairs; at least where the lease was applied to partnership uses under the agreement. And the fact that the lease was acquired by one of the partners with the understanding that he was to transfer to the others their respective interests therein is immaterial.

6. One member of a mining partnership in whose name the lease of the mining claim was taken can convey no interest in the leasehold estate other than his own without the consent of his copartners.

7. Failure on the part of a member of a mining partnership to answer a letter addressed to him requesting a contribution of supplies, and his neglect to give any attention whatever to the enterprise for a period of about six weeks, will not warrant the conclusion that he has abandoned and forfeited his interest so as to justify a disposal of it by his copartners to other persons.

(*Elliott, J., dissents.*)

(March 23, 1890.)

A PPEAL by defendants from a judgment of the District Court for Lake County in favor of plaintiff in an action brought to enforce plaintiff's alleged interest in a certain mining partnership. *Affirmed.*

The facts are fully stated in the commissioner's opinion.

Messrs. Teller & Orahood and Taylor, Ashton & Taylor for appellants.

Mr. J. B. Bissell for appellee.

Pattison, C., filed the following opinion:

This is an appeal from a judgment and decree rendered the 24th day of December, 1884, in a suit in equity brought by Clinton Reed, the appellee, to recover an undivided one-fourth interest in a leasehold estate in a certain lode mining claim, known as the "Felicia Grace," situated in the consolidated ten-mile mining district, Summit County, Colo., and for an accounting of the proceeds realized by the appellants in working that property. The suit was predicated upon an alleged partnership agreement between appellants and three other persons, who will be named hereafter, and the issues presented to this court are: *first*, whether the partnership was established by the

evidence; and, *second*, whether such evidence was legal and competent.

The first question necessarily involves a review of the evidence taken upon the trial. In the consideration of the case, only so much of the bill of complaint need be recited as defines the contract between the parties and their several interests in the property, and the proceeds of the property in controversy. It is alleged that in the month of April, 1884, the defendant J. C. Meagher, the appellee, Clinton Reed, A. A. Smith and John Van Avery, by parol, entered into an agreement of copartnership, wherein and whereby it was agreed by and between the said several parties that they would together obtain a lease upon the property known as the "Felicia Grace" lode-mining claim, and, after obtaining the lease of said property from the owners thereof, would together, as an association or copartnership, enter upon and into said mining property, and prosecute the work of developing and extracting the ore therefrom under and by virtue of the terms of said lease, for the joint benefit, profit and advantage of said several partners. That by the terms of said agreement the interests of said several parties were to be as follows: The said Reed was to be and become the owner of one fourth thereof, paying his proportion of the expense of working and developing said claim, and working it, and receiving such proportion of the profits thereof. That the said Smith was to own and enjoy in like manner one fourth, and the said Meagher one fourth. That by the terms of said agreement so entered into between the parties said Meagher was to procure from the owners of the property the lease thereof in his own name, and, after its procurement, to execute to the said parties proper and sufficient transfer and assignment of their interests therein. That thereafter, and in the said month of April, 1884, in accordance with the said terms of said partnership agreement so entered into between the parties, the said Meagher procured from the owners of the said property, in his own name, a lease thereof, for the period of eighteen months from the day of its execution. That said lease was executed by the owners of said property on or about the — day of April, 1884, and was thereafter duly recorded in the office of the recorder of deeds in Summit County, Colo. It is then alleged that after the execution and delivery of the lease Meagher, on behalf of the copartnership, took possession, and began developing the property; that complainant, as he was bound to do, contributed materials and funds to aid in the prosecution of the common enterprise. It is unnecessary to state the other allegations of the complaint, such allegations being such as are usually found in a suit brought between partners for an accounting and distribution of partnership property. The answer put in issue the allegations of the complaint, and interposed, as a separate defense, the Statute of Frauds. The case was tried to the court. It is unnecessary to recite the findings of fact, except such as define the relation of the parties to each other, and constitute the basis of the decree. Such findings are as follows:

"(1) In the fore part of April, 1884, the defendant John C. Meagher, the plaintiff, Clinton

Reed, A. A. Smith and John Van Avery formed a copartnership for the purpose of procuring and working a lease on the Felicia Grace mine, situate in Summit County, Colo.; that each of said persons was to own an undivided one-fourth interest in said lease when the same was procured, and upon the suggestion of the defendant Meagher that he, being an owner of the property, could probably procure a lease on better terms than others, it was agreed that he should procure the lease in his own name, and after the procurement thereof should transfer to the other parties their respective interests, and until such transfer was made that he should hold their interests in his own name for their benefit. (2) That some time about the 24th day of April the lease was made, and on the 26th day of April Meagher and Patrick Barker, who succeeded to the interest of Van Avery in the premises, went to work. (8) Intervening the time when the agreement was made and the work commenced, Van Avery notified Meagher that he would not be able to take his interest in the lease. Thereupon, by agreement between Meagher and Barker and the other parties, Barker took that interest, an undivided one fourth. (4) That such agreement and transfer was made prior to the time of the actual execution of the lease itself. (5) That on the 26th day of April work was commenced under the lease in accordance with the terms of the agreement antecedently made. That thereafter, on the 27th of April, as had been agreed, the defendant Meagher applied to A. A. Smith to furnish supplies under the copartnership arrangement. That on that day the plaintiff, Reed, sent Meagher the supplies asked for, amounting to the extent and value of \$18.05, which was received by Meagher, and by him used in the prosecution of the enterprise. (6) That afterwards, and about the 1st day of May, Meagher wrote to A. A. Smith for \$25, to be used in the payment of the current expenses of the prosecution of the work. That the said sum so applied for was sent to him by the check of plaintiff, Reed. (7) That Meagher thereafter, and until the commencement of this suit, made no other request or application to Reed for other supplies or money to be used in and about the work. (8) That it was agreed at the time of the formation of the original copartnership arrangement with Meagher that the several parties were to contribute whatever supplies and money might be needed in the prosecution of the common enterprise only, and whenever they should be called for by Meagher for their proportion of the expenses." The other facts found by the court do not appear to be material to the discussion of the case. By the twenty-third finding it is declared that the said lease will by its terms continue until October 24, 1885; that there has been opened in the said premises a large and valuable body of ore; that the developments show that during the continuance of the lease there will probably be taken, mined and removed from the said premises upwards of 3,000 tons, at the rate at which said mine is now being worked; and that the ore so mined will be of the probable value of \$50 per ton, and of the net value upwards of \$100,000, of which the said Reed's share will be about \$25,000. By the twenty-fourth finding it is declared that the said Clin-

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ton Reed is now the owner of an undivided seven thirty second in the said lease, and entitled to that extent to share in the benefits and advantages accruing thereunder, and to that proportion of the profits of all the ores mined; and that he is entitled to occupy, possess and enjoy the said premises under the said lease with the said Meagher and the other defendants interested in said lease. If these findings are sustained by legal and competent evidence it is clear that the judgment and decree based upon them must be affirmed.

It is first necessary, therefore, to determine by a review of the entire case whether the findings of the court are warranted by the facts disclosed and established by the evidence. The evidence tends to prove that for some time prior to April 1, 1884, the appellant J. C. Meagher was one of the owners of the property in question. The property was undeveloped and its value unknown. A shaft had been sunk upon the premises to a considerable depth, but no valuable deposit of mineral had been found. In an adjoining property, known as the "Robinson Lode Mining Claim," a deposit of mineral had been discovered some time before, the dip or direction of which was towards the "Felicia Grace." Meagher having learned of this discovery, and believing that the same deposit, or a continuation of it, might be found within the territory of the property named, became desirous of securing a lease from his co-owners for the purpose of developing the property, and ascertaining whether this deposit of mineral could be found. Being without means it was essential for him to associate others with him to aid in the enterprise. Some time in the month of March, 1884, Meagher met at Leadville one Dr. A. A. Smith, and had some conversation with him in relation to the matter. He succeeded in interesting Smith, and obtained from him a promise that he would undertake to pay one fourth of the expense of developing the property, if a lease was obtained, in consideration of the transfer to him of an undivided one-fourth interest in the lease when it was made. In this conversation it appears that Smith suggested that Clinton Reed would also take a quarter interest, and pay one fourth of the expenses. Before the lease was actually obtained a definite understanding was arrived at between Meagher, Smith and Reed, that Reed and Smith would each pay one fourth of the expense of developing the property, in consideration of which Meagher undertook to transfer to each of them an undivided one-fourth interest in the lease when obtained. At about this time Meagher had some conversation with one John Van Avery in relation to the property. Van Avery then thought that he might also be able to take an interest in the property, and undertook to furnish an engine to be used in its development in consideration of the transfer to him of a one-fourth interest if the lease should be obtained. The remaining one fourth was to be held by Meagher, in consideration of his obtaining the lease and giving his time and labor to the working of the property. Before Meagher succeeded in obtaining the lease Van Avery decided that he would not interest himself in the enterprise, and so notified Meagher. Thereupon one Patrick Barker became inter-

ested to the extent of one quarter, but upon what terms the record does not clearly disclose. After these conversations were had with the several parties named Meagher succeeded in obtaining a lease of the property for the term of eighteen months. The lease is in form a mining lease, and bears date April 26, 1884. It was made by John A. Hall, Jr., Martin Warner, Henry Woodford, James Dorland, George McClusky, J. W. Woodford, C. F. Woodford, W. N. Clark, C. H. Pierce and A. W. Etter, as lessors, and John C. Meagher, as lessee. No money was expended by Meagher, or by any of the parties, to obtain the lease. No rental is reserved by the lease, except that by its terms the lessee covenanted to pay to the lessors, as royalty, fifteen per cent of the price paid or contracted to be paid for any ore extracted from the claim. After the execution and delivery of the lease it appears to have been delivered by Meagher to Smith, who seems to have retained it for a considerable time. It was recorded in the office of the clerk and recorder of Summit County, Colo., May 20, 1884. After the lease was secured Meagher and Patrick Barker immediately entered into the possession of the property, and began the work of development. The relation of the parties as disclosed by the record at this time was clearly defined. There seems to be no uncertainty as to the intention of the parties in the premises. The lease had been acquired as contemplated by the several parties in interest, and apparently in consummation of the understanding and agreement which had been entered into between them. When Meagher and Barker began the work of development there seem to have been four parties interested, and their respective interests seem to have been equal.

Attention is now called to so much of the evidence as relates to the conduct of the parties under the agreement after possession was taken of the mine. On April 27, 1884, the day after the date of the lease, Meagher addressed a letter to Smith as follows:

Robinson, April 27, 1884.

A. A. Smith, Esq.:

I started to work yesterday in the sixty-foot shaft. I find by the Robinson mine maps that the mineral in their tunnel is going straight for the Felicia Grace. I was in to see the new strike, and I think it is going to be as big an ore-shoot as the old one. It is ten feet high, and can't tell how wide. John Hall was here, and signed one copy of the lease. The other he will sign and send back. Sent it to him three or four days ago. I have taken this man Barker in. He is working with me here. I will have to put on another man. It will take three men to work this shaft. It is only about 125 feet from the Robinson mineral, so I think we will get it in 40 feet more, and if the water don't stop us, I think we will be able to get there in thirty days. If we get water we will have to put up an engine. The snow is four or five feet deep, so we will have a hard time to get an engine here. If you see Van Avery tell him not to go to any expense until he hears from me that other arrangements might be made. If you and Mr. Reed take half of the lease there will be no interest left

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for Van. George and I took one eighth each and Barker one fourth. John Hall says he can't take an interest, as he is hard run for money. I wish you would send me ten pounds of giant powder; 200 feet fuse; one box giant caps; one box candles; two hammer handles; 2 picks. Please send the bill.

Yours, respectfully,
John C. Meagher.

Between April 27 and May 10 Meagher addressed a letter to Smith asking him for \$25 to pay expenses. The letter was presented to Reed, who immediately gave his check for \$25, which was sent to Meagher, inclosed in the following letter:

Leadville, Colo., May 10, 1884.

My dear John:

Yours reached me to-day, and I hand you herewith Clint's check for am't called for. I hope you will catch on to some pay soon. I will back you up to the best of my ability till I get some money which I am looking for every day. I will try to get up to see you some time next week. Do the best you can, and write me any new developments in the mean time. Clint has no faith in the thing, but if we find some then he will have more faith.

Yours, truly,
A. A. Smith.

The supplies above mentioned were purchased by Reed, and sent about May 8. On that day Smith wrote Meagher as follows:

Leadville, May 8, 1884.

My dear John:

Yours reached me on Tuesday, and, owing to the excitement of the convention, was not attended to at once, and Clint struck out for Denver, and only returned this morning, when I proceeded to bounce him rough-shod, and have ordered the supplies, which will probably not reach you before Monday. As the express company will not take powder, it will have to go by freight. Clint and I take one half of it. I think I will have plenty of money in a few days, and will not hesitate doing all in my power to push the work, and will not have to run Clint down every time anything is to be done. I regret the delay in your first order. You know I have always been prompt in our operations together heretofore. Let me hear from you.

Smith.

About the last of May, it became necessary to obtain an engine on account of trouble with water. Meagher left the mine, and came to Leadville, and had some conversation with Reed in regard to this matter. Reed mentioned one or two engines which he thought he could obtain, but no definite arrangement was made. Meagher had an account showing the amount which had been expended in labor and supplies up to that time in the development of the property. The amount was \$285.60, and the share of Reed was stated to be \$71.40, less the \$38.05 he had heretofore paid. Reed inquired of Meagher at the time whether he wished him to pay the balance then due from him, to which Meagher replied that he did not, as Reed would be compelled to incur expense in obtaining and sending the engine to Robinson.

No engine was obtained by Reed at any time. On June 7 Meagher addressed the following letter to him:

C. Reed, Esq., Leadville, Colo.

Dear Sir:

I have written to Dr. Smith to know what you have done about the engine, and have not received answer. It is about time that we had this shaft down, as the Robinson company is running an incline towards us night and day. Write, and let me know what you can do.

Yours, respectfully, J. C. Meagher.

This letter was received by Reed, but was not answered. June 9, 1884, the following letter was addressed to Meagher by Smith:

Dear John:

I saw Clint a minute on Saturday, and I have not seen him since. Just now learned that he went to Denver last night again, and will not return until Tuesday or Friday. I don't think that he wants to do anything, or that he means to. The question is as to what we can do under the circumstances. I am still unable to do anything of myself, and if Clint won't do anything that seems to cook my goose till I am in a position to act for myself. If you can sell us out you had better do so, and I will make Clint surrender. I have received no money yet, and of course cannot tell when I will. No man can regret my circumstances more than I do myself, for I believe it to be a good thing. Would like to hold on.

Yours, truly,
Smith.

It does not appear that Reed had any knowledge that a letter of this tenor had been written by Smith, or that he had authorized or suggested that any sale of his interest should be made. June 14 another letter was addressed by Meagher to Reed as follows:

Dear Sir:

Not hearing from you, I have made an arrangement for an engine which will answer for the present. I received a letter from Dr. Smith saying that he would have to give up his interest. I am very sorry that he can't carry his interest, as I think it is a good lease, and must stop the Robinson company from going through to the Champion ground. Mr. Hall is here, and will take an interest in the lease, and I would like to know what you intend to do. I am not going to give up after spending what I have. Hoping to hear from you soon, I am, very truly yours,

J. C. Meagher.

P. S. Please tell Dr. Smith to send the lease to me.

J. C. M.

This letter was not received by Reed until some time in July, nor until after a large body of mineral had been discovered in the property. It appears that he was absent continuously from Leadville, on professional business, from about June 16 until some time in July. June 16 Smith wrote the following letter to Meagher:

Dear John:

I finally had an interview with Clint, and he don't seem inclined to do anything at all, and

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tells me to sell the thing out; and if I could do so for enough to pay what we owe I would be glad to have you do it. I have not received any money yet. Would be glad to stay in and put up, but I don't see how I can at present. Clint is going east soon, liable to leave on any train, to be gone a week or two. Can you see any chance to do anything? Let me hear from you at once.

Smith.

In relation to this letter Reed testified that he never had the interview with Smith mentioned, and that he never authorized Smith to direct Meagher to sell his interest in the property.

On June 12, 1884, Meagher addressed the following letter to Barker:

P. Barker, Esq., Leadville, Colo.:

Dear Sir:

I have been working on the lease since I returned, fixing for an engine, but the engine has not been shipped yet, and there is no telling when it will. The doctor did not get his money yet, and is unable to pay his part. I was to see Rice's engine yesterday, but it can't be got out of the snow for two or three weeks yet, so the only thing I can do is to work the shaft by hand until I can get an engine of some-one here, as we can't get the one in Leadville without paying for it, and that we can't do at the present time. The water is about twenty feet from the top of the shaft, but I think we can hoist it out in three or four days, and then we may be able to keep it down easier than when we worked it before. I would like to hear from you as to what you think of the situation and if you are coming back to work, or what you intend to do. You know I must work, or give up the lease. I can get men here who will work for \$3 a day, but they must be paid at the end of each week or they will not work. Or their pay must be guaranteed by some responsible person. Hoping to hear from you soon, I am, very truly yours,

J. C. Meagher.

Smith never contributed any part of his share of the expenses. After June 14, the date of his last letter, he seems to have relinquished all interest in the enterprise. Barker worked twenty-eight and one-half days and then left the property and never returned. He appears to have transferred his interest to John A. Hall, one of the appellants. After the conversation between Reed and Meagher in May, no demand appears to have been made upon Reed for money or supplies. No communication seems to have been had between them except the two letters of June 7 and June 14, in which Meagher asks Reed what he is going to do in relation to the engine. Neither does it appear that Reed ever offered to contribute either money or supplies after that conversation was had. As has already been stated, he was absent from Leadville during the greater part of June and July, and had no knowledge of the transactions in relation to the property hereinafter mentioned. It seems to have been his understanding at the time this conversation was had that there was so much snow at the mine that an engine could not be shipped at that time, and that Meagher should return to

the property and perform the work necessary to prevent a forfeiture of the lease, as by its terms the suspension of work for ten days would work such a forfeiture. It further appears that after receiving the letter from Smith of June 16 Meagher began to dispose of interests in the property. On June 14 he made an arrangement with Samuel Rice and L. C. Swain to lease an engine for which he was to pay \$25 per month. Afterwards, on July 1, being unable to pay the rental of the engine, he transferred an eighth interest in the lease to Rice and Swain for the use of the engine and other considerations. Other interests were transferred by him for small sums of money and labor. In July a very large and valuable deposit of mineral was uncovered. When Reed returned to Leadville he demanded his interest in the lease and in the proceeds of the property, which was refused. Thereupon this suit was brought.

Upon the foregoing statement the first question naturally suggested is whether a copartnership was ever actually entered into between Meagher, Reed, Smith and Van Avery, as declared by the court below by the first finding. A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be "launched." To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubtedly true that a partnership *in præsenti* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance or an action at law for the recovery of damages, should any be sustained. It is clear, therefore, that the first finding of the court, to the effect that the parties named entered into a copartnership for the purpose of acquiring the property in controversy, and engaging in a mining enterprise thereon, is unsustained by the evidence, and unsupported by the law. At best, the negotiations had between these parties constituted but an undertaking on their part to enter into a joint relation upon the terms proposed, if Meagher should obtain a lease satisfactory to them. The several parties named having never undertaken the project together, Van Avery having decided to withdraw, it follows that as between them the partnership relation never existed. 1 Bates, Partn. § 78; *Wilson v. Campbell*, 10 Ill. 883; *Parsons, Partn.* 6.

Appellants' counsel claim that the finding of the court declaring that Meagher, Reed, Smith and Van Avery entered into a copartnership is 9 L. R. A.

unsustained by the evidence; that the second finding, that Barker, by consent of the parties, succeeded to the interest of Van Avery, is in legal effect a finding that a partnership agreement was made and a partnership relation entered into, different from that alleged in the complaint as the basis of the action, and that there was therefore a fatal variance between the complaint and the proof. This proposition is predicated upon the principle that the relinquishment or transfer of his interest by a partner works a dissolution of the partnership. This contention is based upon the additional assumption that the partnership alleged, the partnership proved, if any, and the partnership found by the court was a general partnership, and subject to all of the legal and equitable principles incident to a commercial partnership of the usual character. Admitting this to be true, it does not follow upon the facts proven that the withdrawal of Van Avery from the agreement could have produced the result for which appellants contend. The mere refusal of a party to perform an executory agreement and to enter into the partnership relation cannot effect a dissolution, nor be followed by any of the legal consequences of a dissolution, for the reason that an executory contract of this nature does not constitute a partnership. Until the partnership agreement is consummated any one of the parties may refuse to enter upon its performance, and such refusal will simply subject him to an action for damages. It follows, therefore, that before the agreement is actually executed one party may withdraw with the consent of the others and another be substituted in his place. The fact, therefore, that the first finding of the court is not warranted by the evidence is not material unless it can be said that the fact that the complaint alleged a partnership between Meagher, Reed, Smith and Van Avery, while the proof established only an executory agreement between them from which Van Avery withdrew and in which Barker was substituted, was such a fatal variance as to require that the judgment be reversed. Upon this proposition very little need be said. It does not appear that the question was ever raised except in this court. Such variance is not assigned for error. Proof of the facts, upon which the second finding of the court was predicated, was not objected to except upon the ground that such proof was incompetent under the Statute of Frauds. This question, therefore, may be passed without further consideration.

The second question suggested is whether a partnership relation between Meagher, Reed, Smith and Barker was established by the evidence, and, if so, what was its nature? The lease bears date April 26, 1884, and seems to have been executed about that time. Prior to this time a clear understanding existed between Meagher, Reed and Smith as to the enterprise and their relations and interests in it. It was settled that Reed should take and carry the burden of an undivided one-fourth interest. The interest of Smith appears to have been the same. In the letter of April 27, addressed by Meagher to Smith, it is stated that Barker was to have one fourth. It appears that Barker and Meagher went to the property together and began work, and that after this time Hall came

to Robinson, and signed the lease. At the time the enterprise was set on foot, and prior to the execution of the lease, the four parties named seem to have undertaken to acquire a lease of the property in question, and to develop and work the same for the purpose of extracting the mineral therefrom, and to pay the expenses and share the profits, if any, in accordance with their respective interests therein. That this arrangement constituted a partnership between the parties cannot be doubted. What was the nature of the partnership? Was it a general partnership, and subject to all the incidents and principles of the law of partnership, or was it a mining partnership, as defined in the text-books and by the authorities? In England and in America the operation of mines has long been considered a species of trade. The nature of the business, and particularly the necessity for the continuous operation of mines, the practical impossibility of each owner acting independently, and the consequent necessity of community of interest in the conduct of the business, have induced a careful consideration by the courts, in the many cases which have arisen, of the principles of law and equity properly and legally applicable to the business of mining, and the relation of mine-owners to each other. The result has been the application to the relation of co-owners of mines, at least while engaged in their joint operations, of the principles of partnership law so far as such application has been essential to the successful prosecution of mining operations, and the protection of the rights and interests of the parties as between themselves and towards third persons. In law the owners of mines hold their property as joint tenants or tenants in common, and not as partners. The courts in applying the principles of the law of partnership to the relation of such owners, when conducting mining operations upon their property, have departed from the principles of the law of co-tenancy only so far as the nature of the business and the rights and interests growing out of the business and the remedies for their enforcement and protection have seemed to require. For this reason a mining partnership has been usually, if not always, considered and treated as a particular and not a general partnership. It is undoubtedly a general rule that when two or more persons acquire mining property solely or principally for the purpose of extracting the ores, in the absence of an express intention to enter into a general commercial partnership in the conduct of their mining operations, the relation existing between them in the transaction of their common business is a mining partnership, and not a general partnership. 1 Bates, Partn. § 163.

In this case the principal, if not the sole, object of obtaining the lease of the "Felicia Grace" was the extraction of ores from the property. It is claimed by appellants that the partnership alleged in the complaint and found by the court is a general or commercial partnership, which would be necessarily dissolved by the transfer of the interest of any one of the parties. It is clear that this position is untenable unless the evidence clearly establishes the fact that it was the intention of the parties to enter into such a relation. That there is no such evidence is apparent. Neither is there

any fact or circumstance upon which the conclusion that such was the intention of the parties can be predicated. The relation, therefore, between Meagher, Reed, Smith and Barker, when the lease was obtained and at the time and after the work was begun, was that of a mining partnership, the members of which were changed from time to time as the work went on.

In Collier on Mines ('88) it is said: "A question of some nicety sometimes arises whether persons working mines are trading partners or mere joint occupiers of the land, using the minerals as part of its produce. The result of the cases on this subject (some of which are somewhat conflicting) may be stated to be that this question will turn on the consideration whether the land be obtained wholly or principally for the purpose of trading in the ore, or whether the selling of the ore be only incidental or appurtenant to the occupation of the land. Where, however, companies of adventurers have been formed for the purpose of mining, and obtained leases either of the land or the minerals, or license to work in pursuance of that object, the courts of equity have long since recognized such associations as a species of trading partnership." Again, at page 89, it is said: "The dissolution of partnerships so numerous by death, bankruptcy, outlawry or felony of any one partner, would have been incompatible with that continuous working of a mine which is necessary to success. It would have been highly inconvenient if no partner had been allowed to part with his share without the consent of each of his copartners. Moreover, the spirit of speculation and adventure, without which concerns so hazardous as those of mining would seldom be commenced or persevered in, and the fluctuating nature of the property, indicated the expediency of a ready transferability of shares. Again, it would have been somewhat hard upon the mining adventurer if each of his associates, whom he had not the means of selecting, had power to bind him by engagements with the public as extensive as those of partners in ordinary trading concerns. Accordingly, mining partnerships were early recognized as differing from ordinary trading partnerships in not being founded on *electus persona*, from which principle the rights and obligations of ordinary trading partners are mainly derived. It was decided, after many doubts, that the mining partner had a right either to relinquish or transfer his share without the consent of his copartners, and that upon his death or bankruptcy the law, instead of dissolving the partnership, would transfer it to his executors or assignees, and the power of partners to bind each other by engagements entered into with non-partners were restricted." Finally, the author, after reviewing numerous cases, at page 125 says: "The result of the foregoing cases may perhaps be thus shortly stated: That a mining company is a trading partnership, a share of which may be acquired without such a conveyance as is necessary to pass an interest in land; that it differs from ordinary trading partnerships in not being founded on the *electus persona*, a difference which limits the powers of mining partners; that the mere constitution of such a company is no evidence of an implied authority from one partner to another to pledge his credit by draw-

ing bills of exchange or borrowing money, even on the greatest emergency; that such constitution is, however, evidence for the jury of authority to order necessities on credit; that, wherever there is any question for the jury of implied authority, either to a mere partner or to a manager, the proper direction to them is to consider whether it be proved that such authority is necessary to the carrying on of the concern or usual in similar concerns." These principles have been recognized again and again by the courts of England and this country. *Crawshaw v. Maule*, 1 Swanst. 495; *Fereday v. Wightwick*, 1 Russ. & M. 45; *Williams v. Aitenborough*, 1 Turn. & R. 70; *Dickinson v. Valpy*, 10 Barn. & C. 128; Collyer, Partn. §§ 801, 808; 1 Bates, Partn. § 163; *Charles v. Eshleman*, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128; *Skillman v. Lachman*, 23 Cal. 199; *Duryea v. Burt*, 28 Cal. 569; *Kain v. Central Smelting Co.* 102 U. S. 641 [26 L. ed. 266]; *Bissell v. Foss*, 114 U. S. 252, 260 [29 L. ed. 126, 129]; *Rock Mines*, 574; *Lamar v. Hale*, 79 Va. 147.

The cases cited not only clearly define the nature of a mining partnership, and distinguish such a partnership from a general partnership, but they also show that, except in the particulars mentioned, the affairs of a mining partnership are governed by the same principles in equity as a general partnership. In no case does this appear more clearly than in *Fereday v. Wightwick*, *supra*: "A lease was taken of certain mines, the lessees consisting of six persons; at the same time a lease was taken of the surface of the property. The mines and surface were used with a communion of expense and a communion of profit. The first question is whether this is a partnership property liable to be sold and disposed of to pay the partnership debts, and whether, a partner having sold part of his shares, his interest is to be considered subject, in the first place, to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are to some purpose trading concerns, but they are not so to all. They are not so in this particular, viz., that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the partners. In these particular instances, they have not all the incidents of a trading concern. In other respects, it has been repeatedly held that they have. Now, it is a universal principle in regard to all property, whether real or personal, acquired for the purpose of a partnership, that property so acquired is, upon the dissolution of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts. That is a universal principle. To apply the rule to this particular case, the property was acquired by these partners for the purpose of the partnership concern. Therefore, though in the nature of real property, it is subject to all the debts of the partnership, and subject to the debts of one of the partners incurred in the administration of the property, there can be no doubt that the plaintiffs have a right to make this claim."

These principles are clearly stated and elaborated in *Duryea v. Burt*, *supra*. The relation, then, which existed between the parties

before and at the time the appellant Meagher obtained the lease of the property in question, was that of mining partners. The lease having been acquired by Meagher as one of the partners, pursuant to and in consummation of the partnership agreement, and the property having been applied to the uses of the partnership for the purpose of conducting the business of mining thereon, the interest in the property, to wit, the leasehold estate, must be deemed to be partnership property.

Third. That the interest in the premises acquired by the lease is an interest in lands, within the meaning of the Statute of Frauds, cannot be doubted. The question to be now determined is whether the arrangement or agreement between the parties, upon which the appellee predicated his rights in the premises, could be established by parol testimony. Can a copartnership entered into for the prosecution of a specific venture, necessarily requiring the acquisition of an interest in a particular parcel of land, be proven by parol, or is such an agreement within the provisions of the Statute of Frauds of this State? Gen. Stat. § 1515.

That such a partnership differs very materially from a partnership entered into to trade in lands is manifest. Nevertheless, as the reasoning of the authorities maintaining the affirmative of the question would seem to apply to partnerships of either class, a review of the whole subject seems to be necessary. This precise question has never been presented to nor passed upon by this court. In the case of *Murley v. Ennis*, 2 Colo. 300, the agreement construed was stated by the court in the following language: "If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that while each explorer becomes invested with his due share and estate in the premises no provision of the Statute of Frauds is violated. . . . But in the case supposed neither of the parties has at the date of the association any interest or estate which can be the subject of sale, and the contract of association does not contemplate that either shall part with any. Nor does the interest or estate which is afterwards acquired vest or inure by virtue of the agreement, but by the occupation and appropriation alone."

Such an agreement is clearly distinguishable from that under discussion. The question was incidentally considered in *Kayser v. Maugham*, 8 Colo. 232, but was not involved in the decision of the case. The court said: "It is true that a trust in lands cannot be predicated upon proof of an oral agreement to create a partnership for the purpose of purchasing and handling or improving such lands, the partnership relation not having existed prior to the acquisition of title, and no partnership funds having been invested in the property. To recognize a trust in such cases would be to abrogate the Statute of Frauds in this particular; it might as well be said that an oral contract providing directly for the purchase of an interest in lands is not obnoxious thereto. But the foregoing principle is not applicable to the case at

bar, for the reason that here the partnership existed several months prior to the acquiring of title by defendants; that the partnership contract does not rest entirely in parol, and that the purchase of the mine was not contemplated by this contract."

The proposition actually decided is that contained in the last clause of the paragraph quoted. The counterpart of that proposition is that which is involved in this case, to wit, whether a partnership agreement to acquire a lease of a particular property for the purpose of extracting ores therefrom, made before the lease has been obtained, can be proved by parol, when it appears that it was acquired in the name of one of the partners pursuant to the agreement, and applied to partnership uses under the agreement. It is a well-settled elementary principle that if a partnership be proven to exist by competent evidence it may be shown by parol that a whole or a part of its assets consist of real estate. The real question now presented is whether the fact that the acquisition of a leasehold interest in the property in question was actually contemplated at the time the contract was made changes the rule of evidence so as to require that such contract be proven by instrument in writing. It is also an elementary principle that a contract to enter into a copartnership in a business which requires the acquisition of an interest in land as a necessary incident to the business may be proven by parol. The question here presented is whether a parol agreement to acquire a leasehold interest in a particular mine, as a necessary incident to the development of the property, and the extraction of ores therefrom, is within the Statute of Frauds. The further question is also presented whether the fact that by the terms of the agreement the interest in the mine was to be acquired by one, and the respective interests of the others to be transferred to them by him, in any wise changed the rule applicable to the case. And finally, the general proposition is presented whether in this and in all cases of this nature the ultimate and only issue to be determined is not whether the property in controversy is or is not partnership property, within the meaning of the principles of partnership law. If this be found to be the real issue, then it necessarily follows that neither the Statute of Frauds nor the Law of Trusts has any application to the case. There is a very considerable conflict in the authorities bearing upon these questions. Whether a partnership to trade in lands can be proven by parol has frequently been considered by the courts. The question has been discussed with great ingenuity, learning and ability by many able jurists, but, even when the authorities are in harmony, the reasons and principles upon which the decisions have been predicated are by no means the same. In many cases the Law of Trusts, with its doubts and uncertainties, has been invoked, and the issue determined by applying principles, the application of which was by no means certain. It has been assumed that for all purposes an interest in lands must be held by a title, either legal or equitable, within the meaning of the law. This is undoubtedly true, but to define this title it is not necessary to resort to the Law of Trusts. If the land is partnership

property, the title is vested in the partnership, and is defined, governed and controlled by well-settled principles of partnership law; and this is true whether the title is vested in one of the partners, or in all. A careful analysis of the more recent authorities clearly discloses a marked tendency to limit the issue to two independent propositions: *First*, is there a partnership? This may be proven by competent evidence. *Second*, of what does the partnership property consist? If of real estate, its treatment and disposition are regulated by the principles of partnership law, without reference to the title, or its character as realty.

In *Bates on Partnership*, § 281 (the latest work on this branch of the law), the following language is found: "Real estate bought or leased with partnership funds, for partnership purposes, and applied to partnership uses, is deemed to be partnership property whether the title is in all the partners as tenants in common, or in less than all, in the absence of any agreement. There is no necessity for any agreement in such cases. The Statute of Frauds has no application, but the title is held in trust for the firm. So of property originally contributed as stock, or if originally paid for by each out of his separate means, or brought into the use of the firm at its formation, and subsequently agreed to be converted into partnership property, it becomes part of the capital."

Is not this rule applicable to all cases where lands are purchased or leased for partnership purposes, whether the purchase of such lands or the leasing of the same was either an incident of the business of the copartnership or the express object for which it was formed?

The same author, at section 801, says: "Where a partnership holds land, not as the chief purpose of its existence, but as an incident to the business, the Statute of Frauds does not apply, and the land may be shown to be a part of the partnership stock, and affected with partnership equities, by oral evidence. The partnership requires no writing to prove it, and exists outside of the ownership of real estate." Section 802: "The authorities are divided on the question whether a partnership to trade in lands may be proved by parol in order to affect the lands with partnership liabilities and equities. The preponderance is in favor of considering that the Statute does not apply if the land was or is to be purchased with the joint fund, whether the title be taken in one or all."

And, commenting upon the authorities cited in support of the text, the author defines the real question out of which the conflict of authorities has arisen. "In those cases the partnership was formed to deal in land, and was not itself a transfer of the title, the land not being bought by the contract of partnership, but in pursuance of it, and out of the partnership funds. In the present class of cases the contract itself purported to be a transfer of interest."

In 1 *Lindley on Partnership*, 88, the author says: "With respect to that part of the 4th section of the Statute of Frauds which relates to lands, it is held (1) that a partnership constituted without writing is as valid as one constituted by writing; and (2) that, if a partnership is proved to exist, then it may be shown by

parol evidence that its property consists of land."

The opposite view is adopted by *Judge Story* in his work on Partnership. At section 88, he says: "But although there is no positive incompetency at the common law of creating a partnership in the buying and selling of lands on joint account, and for the benefit of the parties by way of commercial speculation and commercial adventure, yet such a contract must, from the nature of the case and the positive rules of law and the Statute of Frauds, be reduced to writing; and then the stipulations of the parties will constitute the sole rule to ascertain their intent and to enforce their respective rights."

Do the authorities sustain the principles of the author last cited? The leading case in support of this proposition is *Smith v. Burnham*, 8 Sumn. 435. In this case, after commenting upon the provisions of the Statute of Frauds, it is said: "Now, taking these clauses together, or separately, the same conclusion would seem to follow as to the parol agreement in the present case. If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the Statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments, but that it is the case of the declaration or creation of a trust or confidence in lands, not arising or resulting by implication in operation of law. The trust arises *eo instanti* upon each purchase, and is then to attach, if at all. . . . It has been ingeniously argued that the interest of the plaintiff is in a moiety of the profits or proceeds of the sale, and not in the land itself, and that therefore, at least when the land has been sold by the defendant, the agreement attaches to the moiety of the proceeds. But the agreement, if good at all, attaches also to the land at the time of the purchase, and it is then an agreement for an interest by way of trust in the land, a sort of springing trust; and it is in virtue of this trust estate, and of this only, that any right can attach to the moiety of the proceeds. The right to follow the proceeds is a right which, if it exists at all, flows from the interest in the lands, and the trust created in favor of the plaintiff. It is not collateral, but direct." Again he says, at page 461: "Then it seems clear that this is not the case of a resulting trust by implication or construction of law. It is not the purchase of an estate by one man in the name of another, where the purchase money is paid by the former, and the deed taken in the name of the latter. It is not the case of a purchase confessedly paid for out of the funds of an existing partnership for partnership purposes, and the deed taken in the name of one partner. In each of these cases a resulting trust will arise by operation of law in favor of the party or parties advancing the money. . . . The trust in the present case, if any there was, was one arising directly *ex contractu*, and not by implication or operation of law."

In the above case it will be seen that a con-
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tract of partnership entered into for the purpose of trading in lands is regarded as a contract in respect to an interest in lands, within the meaning of the Statute. It is assumed that such interest in land, or a trust therein, is transferred or created by the contract itself; that such interest or trust cannot be separated from the contract of copartnership; and that the issue in such cases is not alone whether a copartnership was entered into, but whether a copartnership was entered into the purpose of which was to acquire an interest in land. If such was the object of the agreement, then perforce of that fact it comes within the statute, and cannot be proved by parol.

This view of the question is adopted in a number of authorities, the most important of which is *Bird v. Morrison*, 12 Wis. 138. The court, at page 155, says: "These cases, therefore, go no further than to establish three propositions: (1) Where real estate is bought with partnership funds for partnership purposes, there is a resulting trust in favor of the partnership, though the title be taken in the name of one. (2) Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the law will imply its partnership character, and such trusts as resulted therefrom. (3) A partnership in any branch of trade or business may be shown by parol as an existing fact, and then whatever real estate is held for the purpose of such business is regarded as an incident thereto, and the law will imply a trust in favor of the partnership, where the legal title is not in all." And, as an illustration of the application of the principle contained in the third paragraph quoted, he says, page 159: "If the bill had alleged that the partnership extended to the carrying on of an hotel business, that would have been a partnership, and might, so far as the hotel lots were concerned, have laid the foundation for applying the doctrine of implied trust to the real estate used for the hotel, as being incident to the business. But it only alleges that they were to build an hotel, and this does not make it a partnership, more than it would if they had built a boarding house, or a mill."

So far as the particular question under discussion is concerned, the correctness of the judgment under review might be rested upon the principles above stated alone. The acquisition of the lease was but an incident to the business contemplated, to wit, the extraction of the ores. The law would therefore necessarily imply a trust for the benefit of the members of the copartnership in the leasehold estate. But it is unnecessary to rest the case upon so narrow a principle, for the reason, as it will clearly appear, that by the decided weight of authority a partnership to deal in lands may be established by parol.

The leading case upon the subject is *Dale v. Hamilton*, 5 Hare, 869. The conclusion arrived at, after prolonged argument and careful consideration, is stated in the syllabus in the following language: "A partnership agreement between A and B that they shall be jointly interested in a speculation for buying,

improving for sale and selling, lands, may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the Statute of Frauds; and, such an agreement being proved, A or B may establish his interest in land, the subject of the partnership, without such interests being evidenced by any such writing."

In *Forster v. Hale*, 5 Ves. Jr. 808, Lord Chancellor Loughborough observed, in response to the suggestion that the question was whether there was a declaration of trust within the Statute of Frauds: "That was not the question. It was whether there was a partnership. The subject being an agreement for land, the question, then, is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, as if there was an issue upon it. If, by facts and circumstances, it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership." A like principle is laid down in *Essex v. Essex*, 20 Beav. 442.

Attention is now particularly called to the language of the court in *Chester v. Dickerson*, 54 N. Y. 1: "On the other hand it is claimed that such an agreement is not affected by the Statute of Frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of and administer upon all the partnership property, whether it be real or personal, and in such case will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the Statute of Frauds,"—citing cases. "I am inclined to think this doctrine to be founded upon the best reason and the most authority. . . . But suppose two persons by parol agreement enter into a partnership to speculate in lands, how do they come in conflict with the Statute of Frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands. While they are doing this, do they not act as partners, and bear partnership relations to each other? Within the meaning of the Statute in such cases, neither conveys or assigns any land to the other, and hence there is no conflict in the Statute. The Statute is not so broad as to prevent proof by parol of an interest in lands. It is simply aimed at the creation or conveyance of an estate in lands without a writing."

Again, in the case of *Fairchild v. Fairchild*, 64 N. Y. 471, Church, Ch. J., uses the following language: "Real estate purchased as partnership property is not within the prohibition of the Statute. In the first place it is not the

case where the consideration is paid by one person, and a conveyance taken in the name of another. The consideration is paid by all. It is not, therefore, within the letter of the Statute. But a more substantial reason is that property thus held is regarded as personal property, for the purpose of paying debts and adjusting the equities between the partners, and the individual member holding the legal title is a trustee for the partnership in respect to the property as personality; and when the debts are paid, and the claims of the several members as between themselves paid, the trust for the partnership is discharged, and a trust results to the other members of the firm, and the heirs of such as have died, in the remainder, by operation of law, which is saved by section 50 of the Statute; and the holder of the legal title then becomes a trustee of such remainder, as real estate, for the benefit of persons interested." *Traphagen v. Burt*, 67 N. Y. 30; *Wormser v. Meyer*, 54 How. Pr. 189; *Bissell v. Harrington*, 18 Hun, 81. This same rule has been adopted in Indiana. *Holmes v. McCray*, 51 Ind. 358. Also in *Bopp v. Fox*, 63 Ill. 540; *Wallace v. Carpenter*, 85 Ill. 590.

In *Allison v. Perry*, 180 Ill. 9, decided in October last, the same court declares that "the law does not require that the agreement of co-partnership shall be in writing to enable the firm to purchase lands. Where a partnership is constituted under a parol agreement, it may be shown that its property consists of land, and it may own, possess and enjoy the same."

In this case the partnership was entered into for the purchase of coal lands, and the development of the same, with a view to profit. This doctrine is adopted by the Supreme Court of Iowa in many well-considered cases. *York v. Clemens*, 41 Iowa, 95.

In *Richards v. Grinnell*, 63 Iowa, 44, it is held that, "while the decisions are conflicting, the decided weight of authority, as well as sound reason and correct principles, supports the conclusions reached in this case, that a contract of partnership for the purpose of dealing in real estate is not void under the Statute of Frauds because it is not evidenced by any writing, but rests in parol; and, after the dissolution of such partnership, either partner may establish his interest in the partnership without such interest being evidenced by any such written contract." In the course of the opinion, Rothrock, Ch. J., says: "We think the cases above cited are in accord with the decided weight of authority, and in our opinion they are founded upon sound reason and correct principles. It is everywhere held that, where land is held by a partnership, it is, as between the parties, and as to the creditors of the firm, to be treated as personal property. Such being the law, it would seem to follow that the Statute of Frauds can have no application to lands thus held and owned."

In *Pennybacker v. Leary*, 65 Iowa, 220, Beck, J., says, in the following language: "It will be observed that the lands, as we have before stated, were not purchased by the contract for the copartnership, but by a subsequent purchase made in pursuance thereof. The case, then, assumes the aspect of the purchase of lands by a copartnership. While the title of the lands was under this purchase vested in de-

fendant, they were really held by him in trust as partnership property. Plaintiff's interest in the lands is that of a partner, as prescribed by the contract of copartnership."

A like doctrine has been adopted by the Supreme Court of California. In *Coward v. Clanton*, 79 Cal. 23, in the course of the opinion, Works, J., says: "The defendant contends in this court that, conceding that the contract was one of partnership, as it was in parol, it was within the Statute of Frauds, and cannot for that reason be enforced. It was held by this court in an early case that a partnership the object of which was to deal in real estate could not be formed by a contract resting in parol. *Gray v. Palmer*, 9 Cal. 616, 639. The question seems not to have been very thoroughly considered, and the case is clearly against the great weight of authority."

The same doctrine prevails in Oregon. *Knott v. Knott*, 6 Or. 142. Also in Montana. *Hirbour v. Reading*, 8 Mont. 18. To the extent of holding that a partnership entered into to share the profits realized from speculation in lands is not within the Statute of Frauds, the rule has been recognized in Connecticut, Missouri and Minnesota. *Bunnet v. Taintor*, 4 Conn. 568; *Snyder v. Wolford*, 38 Minn. 175; *Hunter v. Whitehead*, 42 Mo. 524.

The numerous authorities cited clearly establish the proposition that a partnership entered into to trade in lands can be established by parol. It therefore follows that the admission of the testimony offered by appellee in the court below to establish a copartnership for the purpose of acquiring a lease of the "Felicia Grace" and carrying on the business of mining thereon was not error.

It has already been said that upon the facts proven the nature of the partnership was that of a mining partnership. But whether it was a mining or a general partnership is immaterial in the discussion of the question now presented. That question is suggested in the consideration of the authority of Meagher to dispose of interests in the lease. For the purposes of this case, it is not necessary to determine to what extent the real estate belonging to the copartnership is converted into personal property, nor when, in equity, it ceases to be regarded as personal property, and becomes real estate. It is sufficient to say that the real estate of a mining partnership is, in equity, treated in precisely the same manner as the real estate of a general or commercial partnership. *Duryea v. Burt*, 23 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490.

Had Meagher any authority to transfer any interest in the leasehold estate except his own, without the authority and consent of his associates? If he could not, then it follows that the transfers made by him must be confined in their effect to his interests alone. This question is determined by principles so well settled as to be elementary.

In *Parsons on Partnership*, p. 876, it is said: "No partner, and no proportion of the partners, can sell or transfer the real estate of the firm outright for money, or by way of mortgage to secure a debt, or to assignees in trust for debts, without the consent or authority of the other partners. On the first point, that he who happens to have the legal title cannot sell the

real estate without the consent and authority of the rest, so as to give title to a grantee having notice, . . . we are quite sure that must be the law; and, if he make a mortgage to secure a debt or an assignment in trust for creditors by which the legal title would pass, it seems that equity will not sustain the transaction, even supposing it free from taint of fraud." 1 Bates, Partn. §§ 408-405.

Finally, it is contended that appellee abandoned his interest, and that Meagher had a right to treat the same as forfeited. This proposition is entirely untenable. There is no evidence to warrant it. The claim is predicated upon the fact that Reed failed to answer the letter addressed to him by Meagher on or about the 7th of June, and that for a period of less than six weeks he gave no attention to the enterprise. This is not sufficient to justify the conclusion that he had abandoned, or intended to abandon and forfeit, his interest. If in the month of July, 1884, instead of uncovering a valuable deposit of mineral, the parties had discovered that the property was absolutely barren, and had instituted an action against appellee for the contribution of his share of the expense, could he then have been heard to say, in defense of such an action, that he had abandoned the enterprise in the month of June, and that he was therefore not liable? Certainly not. The language of the chancellor in the case of *Hartman v. Woehr*, 18 N. J. Eq. 833, is suggestive in this connection: "They deny that he is or ever was a partner, on the ground that he has never complied with the partnership agreement by paying up his share of the capital. The position taken on their part is that until that is paid up he is not admitted as a partner. But this agreement was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in \$10,000 of the capital, but it was not a condition precedent. The complainant, by his deed, paid up at the time of the agreement \$5,667 of his share, and the defendants accepted it, and used, and continued to use, the property in the partnership business. Neither of them paid up his share at that time, but at intervals of weeks or months afterwards; but the business of the partnership, the erecting of the brewery, and manufacture of beer, went on. Each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed and the partnership business commenced or carried on to any extent, there is a partnership. The defendants had a remedy if he did not comply with his engagement. They could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this agreement he was a partner for five years, unless the partnership was sooner dissolved."

So in this case Meagher and his associates had the right to demand that appellee perform his agreement and contribute the share of the expense which he was obliged to contribute by the agreement. If he refused to comply with such demand, then they might have assumed that the partnership was at an end, so far as he was

concerned. But no demand was made, except so far as such demand may be inferred from letters of June 7 and June 14, 1884. But it affirmatively appears that these letters, except that of June 7, did not reach the hands of Reed until some time in July, after Meagher had assumed that he had abandoned the enterprise, and had undertaken to sell his interest to other parties. Such conduct on the part of Meagher was entirely unwarranted by the circumstances, and in violation of appellee's rights in the premises.

Many other questions are suggested by the argument of counsel in this case, but it is not deemed necessary to consider them. Many findings of the court have been discussed by counsel for appellants with great ability, for the purpose of showing that they are not sustained by the evidence. It may be that some of them are unwarranted, but if the conclusions already reached are correct they are sufficient to sustain

the decree. The judgment should be affirmed.

Richmond and Reed, CC., concur.

Per Curiam:

The principal purpose of the partnership, as stated in the exhaustive opinion of *Commissioner* Pattison, was to carry on the business of extracting and marketing ores during the period specified. This purpose has been accomplished, and it only remains to settle the partnership affairs, and distribute the partnership assets. These assets include no interest in realty, and, in our judgment, the right to a settlement and distribution does not depend upon the legal status, under the Statute of Frauds, of such an interest.

The judgment of the court below is accordingly affirmed.

Elliott, J., dissenting.

MONTANA SUPREME COURT.

Albert PRICE, *Appt.*,

v.

L. L. LUSH, *Resp't.*

(....Mont....)

1. The provisions of an Election Law, which adopts the leading features of the Australian Ballot System, relating to the nomination of candidates for office, are mandatory, and the name of a person who is not nominated in the manner fixed by the Statute cannot lawfully be published or printed on the official ballot with those of the lawful candidates.

2. Officially publishing the candidacy for office of a person not legally nominated, and printing his name on the official ballot, gives him an advantage to which he is not entitled under the Australian Ballot System, and will prevent his taking the office, even if elected, although he could have announced himself to the public as a candidate, and could then lawfully have received the votes of any electors who chose to vote for him.

(July 23, 1890.)

A PPEAL by plaintiff from a judgment of the District Court for Lewis and Clarke County in favor of defendant in an election contest. *Reversed.*

The case fully appears in the opinion.

Mr. Alexander C. Botkin, for appellant:

Failure to observe the provisions of law prescribing the several things to be done before the name of a candidate can be printed upon an official ballot is, by the courts of Great Britain and her Colonies, held to invalidate the election.

Budge v. Andrews, L. R. 8 C. P. Div. 511; *Mather v. Brown*, L. R. 1 C. P. Div. 601; *Monks v. Jackson*, L. R. 1 C. P. Div. 688; *Reg. v. Parkinson*, L. R. 8 Q. B. Div. 11; *Burgoyne v. Collins*, L. R. 8 Q. B. Div. 450; *Gothard v. Clarke*, 42 L. T. N. S. 777 (1880), disapproved in 24 Journ. Tur. 298; *Wigmore, Australian Ballot System*, 186, 187; *Reg. v. Miller*, 1 Australian Jur. 56 9 L. R. A.

(Victoria, 1870); *Howes v. Turner*, L. R. 1 C. P. Div. 670.

A statute requirement that nominations be filed "seven days at least" before election day requires seven clear days to intervene, exclusive of the days of election and nomination.

Ex parte Huret, Re DeClewett, 9 Sup. Ct. Rep. (N. S. Wales) 177; *Wigmore, Australian Ballot System*, p. 187; *Zouch v. Empsey*, 4 Barn. & Ald. 522.

Messrs. Gunn & Freeman and McConnell & Clayberg, for respondent:

Are the provisions of the Act under consideration directory or mandatory?

The rule of construction by which this fact is determined is, What did the Legislature intend? *Comp. Laws*, First Div. § 630; *Lindley v. Davis*, 6 Mont. 455.

If the Statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, then the provisions are mandatory, whether they affect the result of the election or not. But, if, as in most cases, the Statute provides that certain acts or things must be done within a particular time, or in a particular manner, but does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the result of the election.

McCrary, Elections, 190; *Wells v. Taylor*, 5 Mont. 210; *Fowler v. State*, 68 Tex. 80; *Cooley, Const. Lim.* 618.

In view of the great public purposes which election statutes accomplish, the courts construe them with great liberality, and hold that informalities caused either by carelessness or misconduct, which have not affected the result, shall not defeat the election.

Cooley, Const. Lim. 617, 618; *Whipley v. McKune*, 12 Cal. 852; *Sprague v. Norway*, 81 Cal. 174.

This contest cannot be maintained, because there is no allegation or showing that the irregularities complained of affected the merits of the election.

Cooley, Const. Lim. 619; McCrary, Elections, 402; *Whitney v. Blackburn*, 17 Or. 564.

Blake, Ch. J., delivered the opinion of the court:

This is an election contest, involving the right of the respondent to the office of justice of the peace. It is alleged in the statement: That Price, the appellant, is a citizen of the United States and the County of Lewis and Clarke, Territory of Montana, and a resident and elector in Marysville Precinct, Belmont Township, county aforesaid. That an election was held October 1, 1889, in said township, for the office of justice of the peace for the term of three years. "That said L. L. Lush appeared upon the tickets that were voted at said election as a candidate for said office of justice of the peace, as above set forth, and was voted for by the electors of said Belmont Township as a candidate for said office." That the ballots were counted by the judges of election for said precinct, and the returns made to the chairman of the board of county commissioners, and that the board of canvassers of said county canvassed October 16, 1889, the returns, and "declared said L. L. Lush duly elected justice of the peace in and for said Belmont Township." That said Lush was not elected a justice of the peace of said township at said election, and was not entitled to hold said office by virtue of said election. "First. L. L. Lush was not nominated for office of justice of the peace for said Belmont Township in the manner required by law, for the reason that the pretended nomination was not made by any organized assembly of delegates representing any party or principle. Second. The certificate of nomination which was forwarded to the county clerk and recorder of Lewis and Clarke County was not in accordance with the requirements of the Statute in this, that said certificate did not contain the name of said Lush; it did not contain his business; it did not designate the name of the party or principle which said convention or primary meeting represented; it was not signed by any person whatever as presiding officer or secretary of said alleged convention or primary meeting; nor was there any name or signature attached to said certificate whatever. Third. Said certificate purported to be a certificate of nomination to fill a vacancy which had happened in the nominations for justice of the peace, but failed to set forth the cause of the vacancy, or the name of the person nominated, or the office for which he was nominated, or the name of the person for whom the nomination was to be substituted; nor did it set forth the fact that the committee, or any committee, was authorized to fill any vacancy. Fourth. Said nomination certificate was not filed within twenty days before the election, being filed on the 14th day of September, 1889, and less than sixteen days before the election. Fifth. Because said pretended nomination for the office of justice of the peace was not published by the county clerk of said county in any newspaper within the County of Lewis and Clarke, as certified to him under the provisions of the law, and the pretended publication in the *Helena Independent* of the name of L. L. Lush as a candidate for said office of justice of the

Q L. R. A.

peace was without authority of law, and unwarranted by the provisions of the Statute, and was in no way authenticated by said county clerk and recorder of said Lewis and Clarke County." This statement was filed October 19, 1889, in the office of the county recorder, November 27, 1889, by the clerk of the court below. Upon the motion of Lush, the statement was quashed as being "insufficient in law," and upon the ground that it did not set forth "a cause of action under the General Election Law of the State." Judgment was thereupon entered in favor of Lush, and declared that he was "the duly elected justice of the peace of Belmont Township, Mont." The Sixteenth Legislative Assembly of the Territory passed a law entitled "An Act to Provide for Printing and Distributing Ballots at the Public Expense, and to Regulate Voting at Territorial and Other Elections," which was approved March 18, 1889. The sections which relate to this inquiry provide, substantially: "Sec. 2. Any convention or primary meeting . . . held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public office to be filled by election within the Territory. A convention or primary meeting . . . is an organized assemblage of electors or delegates representing a political party or principle." "Sec. 3. All nominations made by such convention or primary meeting shall be certified as follows: The certificate of nomination, which shall be in writing, shall contain the name of each person nominated, his residence, his business, his business address and the office for which he is named, and shall designate, in not more than five words, the party or principle which such convention or primary meeting represents, and it shall be signed by the presiding officer and secretary of such convention or primary meeting, who shall add to their signatures their respective places of residence, their business and business addresses. Such certificates, made out as herein required, shall be delivered by the secretary or president of such convention or primary meeting to the secretary of the Territory or to the county clerk, as hereinafter required." "Sec. 4. Certificates of nomination for county and precinct officers shall be filed with the clerks of the respective counties wherein the officers are to be elected." The 5th section provides that a certificate of the nomination of a candidate for an office otherwise than by a convention or primary meeting shall be signed by a certain number of the electors. The 6th section provides that no certificate of nomination shall contain the name of more than one candidate for each office. The 7th section requires the secretary of the Territory and clerks of the several counties to preserve in their offices for one year all certificates of nomination filed therein under this Act, and provides that "all certificates shall be open to public inspection under proper regulations, to be made by the officers with whom the same are filed." "Sec. 8. Certificates of nomination herein directed to be filed with the county clerk shall be filed not more than sixty days, and not less than twenty days, before the election." "Sec. 10. At least ten days before an election to fill any public office other than a municipal office, the

county clerk of each county shall cause to be published in one or more newspapers within the county the nominations to office certified to him under the provisions of this Act. The county clerk shall make such publications daily, until the election, in counties where daily newspapers are published." The 12th section provides that, if "any certificate of nomination be or become insufficient or inoperative from any cause," the vacancy may be filled in the manner required for original nominations. "If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination." This certificate shall have the same force as an original certificate of nomination. "Sec. 13. When any vacancy occurs before election day, and after the printing of the tickets, and any person is nominated according to the provisions of this Act, to fill such vacancy, the officer whose duty it is to have the tickets printed and distributed shall thereupon have printed a requisite number of stickers, and shall mail them by registered letter to the judges of election in the various precincts interested in such election, and the judges of election, whose duty it is made by the provisions of this Act to distribute the tickets, shall affix such stickers in the proper place on each ticket before it is given out to the elector."

The statement of contest points out many particulars wherein the foregoing requirements of the Statute have not been complied with. Are these provisions directory or mandatory? When this question is decided, the appeal will be determined. The law embraces the leading features of what is termed popularly the "Australian Ballot System." The mode of selecting candidates for public trusts at the hands of the people which has generally prevailed in the United States during the past century has been revolutionized. The Territory has duly recorded upon her book of laws this legislation, which has been enforced and interpreted in Great Britain and her Colonies. The regulations prescribed for the nomination of candidates, which have been stated *supra* are foreign to American jurisprudence, and the rules of construction relating to elections, which have been correctly expounded in *Wells v. Taylor*, 5 Mont. 202, and cases there cited, are not applicable to this controversy. The Legislative Assembly did not incorporate into the Act any provision respecting its interpretation. We must accept, then, the doctrine which seems to have been announced by the courts of the Union regarding the construction of the foregoing sections.

In *Pennock v. Dialogue*, 27 U. S. 2 Pet. 1 [7 L. ed. 827], Mr. Justice Story says, in the opinion: "It is obvious to the careful inquirer 9 L. R. A.

that many of the provisions of our Patent Act are derived from the principles and practice which have prevailed in the construction of that of England. It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of these statutes by courts of law has been considered as silently incorporated into the Acts, or has been received with all the weight of authority." See also *McDonald v. Hovey*, 110 U. S. 628 [28 L. ed. 271]; *Allen v. St. Louis Bank*, 120 U. S. 34 [30 L. ed. 576]; *Metropolitan R. Co. v. Moore*, 121 U. S. 572 [30 L. ed. 1026]; *Hunter v. Truckee Lodge No. 14*, 14 Nev. 24; *Pratt v. Am. Bell Teleph. Co.* 141 Mass. 225, 1 New Eng. Rep. 760.

In *Com. v. Hartnett*, 8 Gray, 450, Mr. Justice Metcalf, for the court, says: "We do not suppose that any English statutes for the punishment of larceny were ever held to be in force in Massachusetts (7 Dane, Abr. 168); yet the provisions of some of them, and the provisions of Acts of Parliament for the punishment of other offenses, have been enacted by our Legislature in every stage of our history. And in such cases, as well as in cases where English statutes respecting civil concerns have been enacted here, it has always been held that the construction previously given to the same terms by the English courts is the construction to be given to them by our courts. It is a common learning that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an Act which has been passed by the Legislature of one State or country, is afterwards passed by the Legislature of another; . . . for, if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention."

The case of *Com. v. Hartnett*, *supra*, was followed in *Com. v. Taylor*, 182 Mass. 261, and the court asserts that certain statutes "were passed adopting substantially the same language as the English statute; and, if there was nothing more to aid in ascertaining the intention of the Legislature, the presumption would be strong that it was intended to adopt the same construction which had been given to the statute in England."

In *Adams v. Field*, 21 Vt. 256, the court holds: "When we adopt an English statute we take it with the construction which it has received; and this upon the ground that such was the implied intention of the Legislature." This court in *First Nat. Bank of Butte v. Bell, S. & O. Min. Co.*, 8 Mont. 32, carried into effect this principle of interpretation concerning a statute which had been passed originally in the State of California, and adopted subsequently by the Territory.

The courts of England have always held that the statutory requirements, *supra*, are mandatory. In the case of *Reg. v. Parkinson*, L. R. 3 Q. B. 11, which was decided in 1867, it appears from the information that "the defendant was nominated in writing for one of the vacant offices (town councillor) by one William Whiting, and that Whiting was not entitled to vote at the election of councillors for

the Minster ward, in respect of which he assumed to make the nomination, nor was he on the burgess roll of the St. Mary ward; that the defendant was not nominated as by the Statute is required, and by reason thereof was not duly elected a councillor." Judgment was entered for the crown, and *Chief Justice Cockburn*, in the opinion, said: "The section clearly requires that the person nominating should be entitled to vote at the election for which he nominates, whether it be for the whole borough, if not divided into wards, or for a particular ward, when the borough is divided."

In 1876, the case of *Mather v. Brown*, L. R. 1 C. P. Div. 596, was determined, and *Lord Coleridge, Ch. J.*, said: "The question arises thus: At the last election of town councillors for Southport the petitioner was nominated as a candidate, and the nomination paper was in all respects in proper form, and duly delivered, except that it was not signed with the full Christian name of the candidate, who had signed it 'Robert V. Mather,' his second Christian name being Vicars; and the question is whether that is a fatal objection. The objection was taken in proper time, and was overruled by the mayor. I feel obliged to hold that the objection was a good one, and ought to have been allowed. The Municipal Elections Amendment Act, which passed last year (88 & 89 Vict. chap. 40), directs, among other things, that the nomination paper shall state the surname and other names of the persons nominated, according to the form given in the second schedule. . . . I repeat that I yield to the objection with great reluctance. . . . It must be remembered that in dealing with cases under these Acts we are sitting as a final tribunal of appeal, in the exercise of a duty cast upon us under peculiar circumstances, and as a sort of compromise between conflicting parties in the Legislature, and therefore are more especially bound to keep ourselves strictly within the letter of the Acts, and to abstain from any attempt to strain the law."

In *Hovess v. Turner*, L. R. 1 C. P. Div. 670, *Mr. Justice Brett* says: "The material facts are these: The notice given by the town clerk under section 1 of the Municipal Elections Act of 1875 (88 & 89 Vict. chap. 40) was a bad notice. Though issued in proper time, it gave notice that nomination papers of candidates at the forthcoming election of councillors were to be delivered to him on Saturday, the 23d of October, whereas they should have been delivered to him on the 22d. . . . Here, it is clearly proved that one of the candidates was misled by the error in the notice, an error which even a skillful person might well have committed. It is impossible to say which of the candidates would have been elected if that mistake had not occurred. It seems to me, therefore, that such a defect as has had that result is fatal, and on that ground I think we ought to hold this notice to be so bad as to have rendered the whole election void, and, under the circumstances, to have disqualified the successful candidate from being elected." The candidate who was thus misled delivered his nomination paper to the town clerk "Saturday, the 23d, which was not in proper time."

In *Monks v. Jackson*, L. R. 1 C. P. Div. 683, it appeared that the nomination papers of certain

candidates were delivered to the town clerk by the agent of the petitioners and their proposers and seconders. The Statute requires the nomination papers to "be delivered by the candidate himself, or his proposer or seconder, to the town clerk." *Lord Coleridge, Ch. J.*, said: "I am clearly of opinion that this Statute is imperative, and not merely directory; . . . and, it appearing on the face of the case that the petitioners were not duly nominated, there is no ground for questioning the election of the respondents." *Burgoyne v. Collins*, L. R. 8 Q. B. 452.

In the work of Wigmore on Australian Ballot System, 2d ed., 186, 187, we find the following notes of decisions which are reported in volumes that are not at our command: "A nomination made by persons 'not entitled to vote' because of taxes unpaid is not valid, even though at a previous election they were qualified and voted. *Ex parte Drew*, 9 Sup. Ct. Rep. (N. S. Wales) 169." "A nomination paper was not filed until after 4 P. M., the prescribed time, on the day of nomination. Held, that the election was void, though no other person was nominated. *Reg. v. Miller*, 1 Australian Jur. 56 (Victoria, 1876)." "A statute required that nominations be filed 'seven days at least' before election day. Held, that this required 'seven clear days to intervene, exclusive of the days of election and nomination.' *Ex parte Hurst, Re DeClewett*, 9 Sup. Ct. Rep. (N. S. Wales) 177." "A statute provided that 'whenever any day provided or appointed by or under this Act for any purpose shall in any year happen on a Sunday, New Year's day, etc., or any day proclaimed as a holiday, then such provision and appointment shall take effect as of the following day.' The last day for filing nominations fell on a Sunday. On Saturday nominations had been made for all vacancies, but on Monday further nominations were accepted. Held, that these were invalid, that Statute applying only where a single day was specified for an event, and not where Sunday was one of several days on which an act might be done. *Reg. v. Hennessy, Ex parte Knight*, 5 Australian Jur. 85 (Victoria, 1874)."

Mr. Paine considers this matter in his treatise on Elections, and observes: "The proceedings of an election, in England, commence with the nomination of candidates. The nomination is no longer made *visa voce*, in public, but in writing, in the designated room where the returning officer attends, on the day and at the hour specified in the notice. . . . The nomination papers may be delivered to the returning officer during the two hours fixed for the election, and not afterwards. No person nominated after the expiration of the two hours will be entitled to have his name inserted in the ballot papers." Section 427.

We assume upon this hearing that the facts which are properly pleaded in the statement of the contest have been established. The force of these authorities, which construe the English statutes that have been adopted partially by our legislative department, must be recognized. The principle which has called into being this law, that prescribes the conditions for the nominations of candidates for office before the day of election, demands the enforcement of every provision. We are compelled to

hold that the respondent was not nominated for the office of justice of the peace of Belmont Township in the manner fixed by the Statute, and that his name should not have been published in the Helena Independent, or printed on the official ballot, as a candidate therefor. The specifications which are contained in the statement support these propositions. The publication of the candidacy of the respondent, and the printing of his name upon the ballot, gave him a position and advantage which the law declares he shall not enjoy. If any person has not been nominated in a legal manner, or if the notification of his nomination has not been filed within the period named in the Statute, he can announce to the public that he is a

candidate for an office. The fifteenth section allows every voter to write or paste on his ballot "the name of any person whom he desires to vote for," but the respondent is not aided by this provision. Our conclusion is that the election of the respondent should be adjudged void, but we cannot direct that a final judgment be entered.

It is therefore ordered and adjudged that the judgment be reversed, with costs, and that the cause be remanded, with instructions to overrule the motion of the respondent to quash the statement of the contest.

Harwood and DeWitt, JJ., concur.

INDIANA SUPREME COURT.

William JOHNSON, *Appt.*,

v.

James W. HESS, Sheriff, etc., *et al.*

(.....Ind.....)

The record of a general judgment against William M. is not constructive notice of one against H. W. M. so as to render it a lien upon his real estate after it has come into the possession of a remote grantee, who purchased bona fide, for value and without notice, further than that furnished by the record, that H. W. M. and William M. were one and the same person.

(October 10, 1890.)

APPEAL by plaintiff from a judgment of the General Term of the Superior Court for Marion County, affirming a judgment of the Special Term in favor of defendants in an action brought to enjoin the sale of certain real estate which was alleged to belong to plaintiff, under an execution against a third person. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Ayres & Brown and Baker, Hood & Hendricks for appellant.

Messrs. Claypool & Ketcham for appellees.

Berkshire, Ch. J., delivered the opinion of the court:

The appellant was the plaintiff and the appellees the defendants below. The complaint was in the nature of a bill in equity to enjoin the officer from levying an execution held by him in favor of his co-appellee upon certain real estate, the title to which was then in the appellant. The cause was put at issue and tried at special term, and a special finding returned by the court. Upon the facts as found by the court it stated its conclusions of law, and to the conclusions of law as stated the appellant reserved a proper exception, after which the court rendered final judgment. Upon appeal to general term the judgment at special term was affirmed, and from the judgment in general term this appeal is prosecuted.

The correctness of the latter judgment de-

pends entirely upon the propriety of the conclusions of law announced by the court at special term upon its finding of facts. The special finding is quite lengthy, and, notwithstanding, we feel that it is proper to set the same out in full in this opinion, to a full understanding of the questions involved, and it is as follows:

"1. On the 18th day of December, 1880, Thomas Graves was seised in fee simple of lot number three (3) in Little's subdivision of outlot eighty-five (85) in the City of Indianapolis, Marion County, Indiana.

"2. On the 18th day of December, 1880, Thomas Graves conveyed the fee simple of the real estate described in the last preceding finding to one William Mankedick, who was described in said deed as H. W. Mankedick, which deed was duly filed for record in the recorder's office of Marion County on the 25th day of July, 1881.

"3. On the 10th day of June, 1881, the said William Mankedick executed to James G. LaFonte a deed of general warranty conveying to said LaFonte the real estate described in the first finding. This deed was duly recorded in the recorder's office of Marion County, Indiana, on the 25th day of July, 1881. In this deed the grantor described himself as H. W. Mankedick.

"4. On the 19th day of August, 1881, James G. LaFonte executed to William Johnson a deed of general warranty conveying the real estate described in the first finding to the grantee, and this deed was duly recorded in the office of the recorder of Marion County, Indiana, on the 20th day of August, 1881; and thereupon said Johnson entered into possession of said real estate and has continued in possession of the same until the present time. The consideration named in said deed was \$1,800, which consisted of \$600 paid in cash by said Johnson to said LaFonte at the time of the execution of said deed, and the assumption and payment by said Johnson of the two mortgages executed by Thomas Graves to the Middlesex Banking Company, hereafter named.

"5. On the 18th day of December, 1880, Thomas Graves executed to the Middlesex Banking Company a certain mortgage upon the real estate described in the first finding, to

secure the payment to said company of one coupon bond of that date, for the principal sum of \$1,000, payable on the 18th day of December, 1885, with interest at the rate of 8 per cent per annum, payable semi-annually.

"The then value of 2 per cent of said interest until maturity of said bond was paid by the mortgagor on said bond.

"And said mortgage was also to secure the payment from the mortgagor to the mortgagee of ten interest coupons attached to said bond executed by the mortgagor to the mortgagee, due in 6, 12, 18, 24, 30, 36, 42, 48, 54 and 60 months respectively, each for the sum of \$80. This mortgage was duly recorded in the recorder's office of Marion County, Indiana, December 31, 1880.

"6. On the 18th day of December, 1880, William Graves executed to the Middlesex Banking Company another mortgage of the real estate described in the first finding, to secure the payment, when they severally became due, of three promissory notes dated 18th day of December, 1880, executed by the mortgagor to the mortgagee, and due in 8, 14 and 20 months after date, with interest at the rate of 8 per cent per annum after maturity. This mortgage was duly recorded in the recorder's office of Marion County, Indiana, December 18, 1880, each note for the sum of \$63.95.

"7. Upon the bond, interest coupons and notes executed by said Graves to said Middlesex Banking Company, and secured by the mortgage heretofore referred to, William Johnson, on the 20th day of August, 1881, paid \$30 of interest. On the 31st of August, 1881, he paid \$63.95, paying off the first note. On December 19, 1881, he paid \$80, the amount of the second interest coupon. On the same day he paid \$63.95, the amount of the second note. On September 25, 1882, he paid \$80.50, the amount of the third interest coupon, and on the same day he paid \$63.95, the amount of the third note. On the same day he paid \$1,017.88, being the principal of the bond, and the accrued interest thereon up to September 25, 1882,—in all \$1,299.88, being full payment and satisfaction of said mortgages and the choses in action secured thereby.

"These payments were paid by William Johnson for the purpose of paying off the incumbrances created by said mortgages and for the purpose of relieving said real estate from the lien thereof, he believing all the time that he was the owner of said real estate in fee simple, and that the title thereto was perfect in him, except as it was incumbered by said mortgages. At the time said Johnson purchased said real estate there were some buildings thereon, but the same were not in a tenantable condition, and for the purpose of making them tenantable he expended in the way of necessary repairs of a permanent character \$309, and of the present value of \$200. The present value of the real estate described in the first finding, without buildings or improvements, is \$30 a front foot, or \$1,350. The value of the improvements upon said real estate, outside of those made by William Johnson, is \$1,400, making total value \$2,950, of which value \$200 represents improvements put on by William Johnson. William Johnson has received as rent upon the real estate described in the first

finding, from the time he went into possession of said real estate as follows, up to and including December 29, 1883, \$223.25, and from this date to May 24, 1884, inclusive, the further sum of \$65.75; from the last date up to and including April 8, 1886, the sum of \$233.55, making the total collection \$518.55. To the last figures should be added \$57 interest from the time William Johnson purchased said real estate up to the present time. He did not live on the real estate himself, but occupied the same by his tenants, and used due diligence from the date of his purchase until this time in procuring tenants to occupy the same, and in obtaining the highest rent he could procure for the same.

"8. Since the purchase of said real estate described in the first finding by William Johnson he has paid taxes on the same and the improvements thereon as follows: The amounts paid for city, township and state purposes for the different years are then stated, the sum total being \$146.44, to which should be added the sum of \$19 as interest.

"9. On the 7th day of March, 1874, Wiley Hazard executed to the Union Mutual Life Insurance Company his mortgage of that date on lot number three (3) in Foster and Harmon's subdivision of lots number 12, 13, 14 and 15, in G. Sherman's subdivision of a part of the north half (½) of the east half (½) of the northeast quarter (¼) of section thirty-five (35), township sixteen (16) north, of range three (3) east, situate in Marion County, Indiana, to secure a loan then made by the mortgagee to the mortgagor of \$2,500, and the interest thereon, said loan maturing five (5) years after date. Said mortgage was duly recorded in the recorder's office of Marion County, Indiana, on March 11, 1874. On the 24th day of June, 1875, said Hazard conveyed said mortgaged premises to Joseph M. Beck, and in and by said deed said Beck agreed to pay said mortgage. That afterwards said Beck sold and conveyed said real estate to John F. Council. That afterwards said Council sold and conveyed said real estate to William Mankedick, hereinbefore mentioned, and in and by said deed said Mankedick assumed and agreed to pay said mortgage. That afterwards, and on the second day of June, 1879, said Union Mutual Life Insurance Company filed in the Superior Court of Marion County its complaint numbered 24,735, to which said Wiley Hazard, the said William Mankedick and others were made parties defendant, and said William Mankedick was duly served with process therein.

"That afterwards such proceedings were had in said cause that on the 18th day of June, 1879, by the consideration of said superior court, said Union Mutual Life Insurance Company recovered a personal judgment against the said William Mankedick and others in the sum of \$3,358.92, and there was a decree foreclosing said mortgage of the real estate therein described, and ordering the same to be sold to pay said judgment and the costs of suit. The decree also provided that after the sale of the real estate therein named, the residue, if any, should be levied on any other property subject to execution of the said defendant, William Mankedick. That a certified copy of this decree was issued to the sheriff on the third day

of July, 1879, and, under the provisions of the decree, the sheriff sold the real estate therein described to the Union Mutual Life Insurance Company for the sum of \$1,000 on the 26th day of July, 1879, of which amount \$948.80 was applied to the payment of the principal and interest, and \$56.70 to the costs of the action.

"That afterwards, on the 24th day of November, 1883, the judgment against said William Mankedick being unpaid, except as to the sum of \$948.80, paid on the 26th day of July, 1879, and the sum of \$19.85, paid on the 21st day of February, 1880, an execution issued thereon by order of said Union Mutual Life Insurance Company to the sheriff of Marion County, Indiana, which execution was by the sheriff of said county, on the 26th day of November, 1883, levied upon the real estate described in the first finding, and said real estate was advertised for sale upon said execution, and the sale was set for the 29th day of December, 1883, and the sheriff was, on the 28th day of December, 1883, enjoined from selling said real estate by an order of court made in this action.

"That afterwards, on the 24th day of May, 1884, the injunction having been modified by the court, and notice having been posted and given according to law, the said real estate was by said sheriff exposed to sale and sold to said Union Mutual Life Insurance Company for the sum of \$950, and on the 31st day of May, 1884, said sheriff executed and delivered to said insurance company a sheriff's certificate of sale for said real estate, from which there has been no redemption, and on the 6th day of May, 1886, the sheriff executed a conveyance to the Union Mutual Life Insurance Company. In the judgment docket of the Superior Court of Marion County, at page 131, appears the following entry: Under the head of 'Parties,' 'Judgment-defendant Mankedick, William, judgment-plaintiff, Union Mutual Life Insurance Co.' Under the heading 'Amount of Judgment,' 'Dollars, 8,358.' Under the heading 'Cents,' '.92.' Decree, 'Date of Judgment,' 'June 18th, '79. Order Book, Vol. 79, page 445. Number of cause 24,785.' Under the heading 'Receipts, Satisfaction, Assignment and Remarks,' is the following: 'For credit by sale, see Execution Docket 28, page 145. For credit by sale, see Execution Docket 82, page 152,'—the three credits above referred to being the credits of July, 1879, for \$948.80 upon the sale of the real estate originally mortgaged; the credit of February 21, 1880, for \$19.85, upon the sale of personal property, and of \$950 of the 31st of May, 1884, by virtue of the sale of the real estate described in the first finding hereinfore stated.

"10. The full baptismal name of the said William Mankedick was Henry William Mankedick, but in the City of Indianapolis, in Marion County, in the State of Indiana, where he resided at the time of making of the deed to him by Thomas Graves, and at the time of the making of the deed by him to James LaFonte, and at the time of the rendition of the judgment against him in favor of the Union Mutual Life Insurance Company, as hereinbefore found, he was generally known as William Mankedick, and was so known and called by his

relatives and acquaintances. He left the State of Indiana soon after June 10, 1881. From 1879 until he left the State of Indiana, he was not in any particular business. During all of the time that the said William Mankedick resided in the City of Indianapolis he had a brother residing about three miles from said city, whose full baptismal name was Christian Henry Mankedick, but who was commonly known among his relatives and acquaintances as Henry Mankedick.

"11. When William Johnson was negotiating with James LaFonte for the purchase of the real estate described in the first finding, for the purpose of furnishing said Johnson evidence as to the condition of the title to said real estate, said LaFonte handed said Johnson an abstract of the title of said real estate and the incumbrances thereon, portions thereof prepared by Elliott and Butler; portions by William C. Anderson; portions by Ignatius Brown, and portions by Fred D. Miner, bringing the title to said real estate down to August 18, 1881. The said Elliott and Butler, William C. Anderson, Ignatius Brown and Fred D. Miner, were at the time they prepared the portions of said abstracts prepared by them, and still are reported to be competent, careful, reliable and responsible abstractors at said City of Indianapolis, and were known to be such by said William Johnson, and he relied upon said abstracts as showing the true condition of the title of said real estate and the incumbrances thereon. Said abstract of title did not show the judgment of the Union Mutual Life Insurance Company against said William Mankedick, or against any other person.

"Joseph T. Elliott, of the firm of Elliott and Butler, had been engaged in the business of abstracting titles in the City of Indianapolis for nineteen years, and said Ovid D. Butler has lived in the City of Indianapolis from his birth, forty-eight and one-half years ago. Joseph T. Elliott and Ovid D. Butler formed a partnership in the abstract business in said city in 1878, and have been in business ever since. Said Elliott, for many years prior to his partnership with said Butler, and said Butler and Elliott from the formation of the partnership up to the present time, kept in the books of their office accurate statements showing the chain of title of the various town lots and portions of town lots in the City of Indianapolis, and of the real estate in said City of Indianapolis, and of the real estate in said county outside of said city, and showing the mortgages made and judgments and decrees entered in said county. That it was their habit from day to day to ascertain and enter upon their books all deeds and mortgages filed for record with the recorder of Marion County, and all judgments and decrees rendered in the courts of said county. On the 26th day of July, 1881, they prepared an abstract of title to the real estate described in the first finding, commencing their examination at December 14, 1880, and coming down to July 26, 1881, which covered the date of the record of the deed from Thomas Graves to H. W. Mankedick and H. W. Mankedick to James G. LaFonte; but did not place in said abstract the judgment and decree in favor of the Union

Mutual Life Insurance Company against William Mankedick.

"They had in their office at the time, on their books, an entry showing the rendition of said decree, but they did not place the same upon said abstract because they did not know or believe that H. W. Mankedick and William Mankedick were one and the same person. That said abstractors knew that there was a judgment against a man by the name of William Mankedick, but they made no effort to learn who William Mankedick was; whether William and Henry W. Mankedick were different persons; that they (said abstractors) had no acquaintance with anyone named William Mankedick, and they had no knowledge or information of the existence of such a person in Marion County, Indiana, and believed that William and H. W. Mankedick were different persons.

"12. William Johnson resides on Flake Street, in the northwestern portion of the City of Indianapolis, and has resided at the same place ever since the autumn of 1857. At the time of his negotiation with LaFonte and his purchase of the real estate described in the first finding and its conveyance to him by LaFonte, he was not acquainted with any person named Mankedick, and had never heard of the name until he saw the name of H. W. Mankedick in the abstract furnished him by LaFonte. He did not know and had no reason to believe that H. W. Mankedick and William Mankedick were the same person, and had no knowledge or information other than may be implied, if any may be implied, from the facts herein found, that the Union Mutual Life Insurance Company had a judgment against William Mankedick, and the first information he had that it was ever claimed that H. W. Mankedick and William Mankedick were the same person, or that the Union Mutual Life Insurance Company had a judgment against William Mankedick, was immediately before the commencement of this suit, when William Johnson purchased from said LaFonte the real estate described in the first finding, and when the deed for the same was executed by said LaFonte to him; and from that time until immediately before the commencement of this suit, he believed in good faith that he was acquiring and had a perfect title in fee simple in said real estate, subject only, however, to the mortgages of said Thomas Graves to the Middlesex Banking Company, and said mortgages were paid off by him, said improvements made by him and said taxes were paid by him, believing in good faith that he had and possessed such perfect title.

"13. This action was commenced on the 26th day of December, 1893.

"14. The said William Johnson is entitled to interest upon the \$1,299.68 mentioned in finding No. 6, to the amount of the aggregate sum of \$889.79, counting interest on the items which make up the \$1,299.68 at the rate of 8 per cent per annum, except as to the item of \$1,000, on which interest is counted at 6 per cent per annum up to the date of maturity of the bond set out in finding No. 6. The interest upon said sum of \$1,299.68 is, counting interest at 6 per cent throughout, \$308.47.

"15. The court further finds that the bond

and the several interest coupons and notes mentioned in the seventh finding above, provided for the payment of attorney's fees, and that the reasonable and customary attorney's fees amount to \$60.

"Upon the foregoing facts the court finds the following conclusions of law:

"1. That the judgment in favor of the Union Mutual Life Insurance Company against the said William Mankedick became a lien upon the real estate purchased by the said William Mankedick from Thomas Graves on and after the date of said purchase, December 18th, 1890.

"2. That the plaintiff, William Johnson, when he purchased the said real estate, purchased the same subject to the lien of said judgment for so much thereof as then remained unsatisfied.

"3. Said plaintiff is entitled to be subrogated to all rights of the Middlesex Banking Company in and to said real estate, by reason of the payment by him of the debts secured by said mortgage executed to said company by Thomas Graves; and as between the plaintiff and the defendant herein, the Union Mutual Life Insurance Company, the principal and interest of said mortgage indebtedness paid by the plaintiff to the said Middlesex Banking Company is to be treated as still outstanding and unpaid, and due to the plaintiff and a lien upon said real estate; and in taking the account between him and the said defendant, the Mutual Life Insurance Company, the plaintiff is entitled to credit for principal and interest paid by him of said mortgage indebtedness.

"4. That said plaintiff is also entitled to interest in the taking of said account for the taxes upon said real estate paid by him since his purchase thereof.

"5. That said plaintiff is also entitled to credit in the taking of said account for the present value of the permanent improvements made by him on said real estate since his purchase thereof.

"6. That said plaintiff is chargeable with such parts of the rents and profits collected by him out of said real estate since he went into possession thereof, as is expressed in the following propositions, that is to say, as the whole value of said real estate (including as well the improvements upon it at the time of plaintiff's purchase thereof, as also those made by him thereon since his purchase) is to the whole value of the improvements made thereon by him, so is the whole amount of rents collected by him to the part of such rents for which he is chargeable in taking the account with said defendant.

"7. That the plaintiff is entitled to have the foreclosure of the said mortgage executed by Thomas Graves to the Middlesex Banking Company, and to have said real estate sold as upon a decree of foreclosure, and proceeds applied to payment of plaintiff's claim in case the Mutual Life Insurance Company fails to pay the amount of said claim.

"8. That the plaintiff should recover as and for his attorney's fees the above sum of \$60 in addition to his other claim.

"9. That each party ought to pay their own costs up to and including the final entry, of which final entry each party should pay one half."

As will be readily observed, the single question presented is, whether or not the judgment of the appellee was a lien that could be enforced against the real estate in the hands of the appellant. That it was a lien upon the real estate that could have been enforced against H. W. Mankedick so long as he held the title, or against his grantees with actual notice, must be conceded. The question is therefore reduced to this: Was the judgment as recorded constructive notice to the appellant of the existing lien? He was a purchaser in good faith for value, and had no actual notice that would even create a suspicion that the appellee Company held a lien upon the real estate. The record of the judgment carried with it constructive notice of all facts therein expressly recited, and as well of such facts as might be fairly inferred from its recitals, but nothing more.

Mr. Pomeroy in his Equity Jurisprudence says: "The test is a plain and simple one. It is whether the record if examined and read by the party dealing with the premises would be an actual notice to him of the original instrument, and of all its parts and provisions. By the policy of the Recording Acts such a party is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title to the lands with respect to which he is dealing. A record can only be constructive notice, at most, of whatever is contained within itself.

"Finally, the record will not be notice unless it and the original instrument of which it is a copy correctly and sufficiently describe the premises which are to be affected, and correctly and sufficiently state all other provisions which are material to the rights and interests of subsequent parties. The premises should be described or identified, that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what they were.

"The same rule applies to the record of mortgages and all other incumbrances which can be recorded. The language of both the original and of the record must be such that if a subsequent purchaser or incumbrancer should examine the instrument itself he would obtain thereby an actual notice of all the rights which were intended to be created or conferred by it." § 634.

And though the section above relates more particularly to instruments such as deeds, mortgages and contracts to which Registration Laws are applicable, the author elsewhere states that the discussion is equally applicable to judgments. In a note appended to the foregoing section the editor says: "An illustration of such mistakes affecting the operation of the record as constructive notice would be an error in the description or location of the premises included in the original deed or mortgage, an error in the name of the grantor or mortgagor, or an error in the amount of the debt for which the mortgage is a security, and the like;" and the following cases are cited: *Jennings v. Wood*, 20 Ohio, 261; *Miller v. Bradford*, 12 Iowa, 14; *Hughes v. Debnam*, 8 Jones, L. (N. C.) 127; *Wyatt v. Barwell*, 19 Ves. Jr. 489; *Peck v. Mallams*, 10 N. Y. 509. We cite *Gilchrist v. Gough*, 68 Ind. 576.

9 L. R. A.

If there should be any difference in the application of the rule as stated by Pomeroy, "A record can only be constructive notice at most of whatever is contained within itself," it should be applied with more strictness to judgment-lien holders than to any other class of persons to whom it is applicable. A judgment lien is strictly a legal lien, general in its character, resting upon statute.

In *Shirk v. Thomas*, 121 Ind. 147, the history and character of judgment liens were thoroughly and exhaustively considered, and as the result the following conclusion was reached: "In strictness, neither a judgment nor an attachment is a lien upon land; both are simply charges against land existing by virtue of statutes. 'Lien upon a judgment,' said an eminent English judge, 'is a vague and inaccurate expression.'"

In *Boyd v. Anderson*, 102 Ind. 217, this court said: "It is settled law in this State that judgment creditors are in no sense purchasers; that their judgments are general liens upon whatever interest the judgment defendants may hold in the land."

In the further consideration of the case it will not be amiss to keep in mind that on which depends the contention of each of the parties—that the claim of the appellee Company rests wholly and entirely upon a mere technical statutory right, while that of the appellant has for its foundation not only the legal title to the land in question, but such title is supported and upheld by well-grounded equities.

We will assume that the rule as stated in *McPherson v. Rollins*, 107 N. Y. 816, 9 Cent. Rep. 882, 1 Am. St. Rep. 826, is correct as applicable to the facts of this case (and in view of the authorities it is certainly fair to the appellees), and it must follow that the appellant was a purchaser without notice. The court in that case said: "The important inquiry before the referee was whether the defendants had any notice, actual or constructive, of the plaintiff's rights or of the character in which Deming held the mortgage. His finding that they had no actual notice reduces our inquiry to the effect of the Recording Act. As intending purchasers they must be presumed to investigate the title and to examine every deed or instrument forming a part of it, especially if recorded. They must therefore be deemed to have known every fact disclosed. *Acer v. Westcott*, 46 N. Y. 884, 7 Am. Rep. 855, and every other fact which inquiry, suggested by those records, would have led up to." (The italics are our own.) "Thus, they are plainly chargeable with notice of the mortgage and of all the facts of which the mortgage could inform them."

The appellant was chargeable with the fact that the appellee Company held a judgment against William Mankedick and of the amount and terms and conditions of the judgment, but nothing more. He was not chargeable with notice that his remote grantor, H. W. Mankedick, and the William Mankedick named in the judgment, was the same person. The judgment did not disclose this fact, nor did it suggest inquiry which "would have led up to" an ascertainment of the fact. For all legal purposes the full name of the appellant's

grantor was Henry Mankedick. The middle initial was unimportant and suggested nothing. *Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardinier*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102; *Clute v. Emmerich*, 99 N. Y. 342; *Schofield v. Jennings*, 68 Ind. 232; *Morgan v. Woods*, 83 Ind. 28; *Zellars v. State*, 7 Ind. 659; *Vawter v. Gilliland*, 55 Ind. 278; *Gardner v. State*, 4 Ind. 632; *Burton v. State*, 75 Ind. 477; *Allison v. Thomas*, 72 Cal. 562.

In *Games v. Stiles*, 39 U. S. 14 Pet. 322 [10 L. ed. 476], the Supreme Court of the United States said: "The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial; and it is competent for the party to show that he is known as well without as with the middle name." *State v. Smith*, 12 Ark. 622, 56 Am. Dec. 287; *Edmundson v. State*, 17 Ala. 179.

As a question of law, the notice which was carried to the appellant was that he held title through Henry Mankedick, and that the appellee Company held a judgment against William Mankedick. But if it had occurred to the appellant that William Mankedick, the judgment debtor, and H. W. Mankedick, the remote grantor, were but two names for the same person, there was nothing in the record to suggest to him where he could acquire the information. There was nothing to suggest to the purchaser that the judgment creditor had such knowledge; he had a right to assume to the contrary, as the judgment had been taken against William Mankedick, for he had a right to assume that the creditor had taken judgment against the debtor by his baptismal name.

But had the appellant undertaken to have made inquiry he might or he might not have learned that the appellee Company's judgment debtor was in fact his remote grantor. Had he made diligent inquiry and reached a wrong conclusion, the legal effect of the record, as constructive notice, would not have been changed thereby. If, upon inquiry, the appellant had ascertained that the judgment debtor and his remote grantor were in fact but one person, he would then have had actual notice; but the question here is one of constructive notice under a statute. The record must conclusively create notice or there is no constructive notice. If the information which it conveys or the inquiry which it suggests will, if pursued, unmistakably lead to a discovery of the truth, then there is constructive notice of the title or incumbrance; otherwise there is no such notice.

In speaking of the American theory under the Recording Statutes, in section 649 of his work on Equity Jurisprudence, Mr. Pomeroy says: "By this theory the object of the Legislature is that the proper record of every such instrument should be absolute notice of its contents, and of all rights, titles or interests, legal or equitable, created by or embraced within it to every person subsequently dealing with the subject matter, whose duty or interest it is to make a search of the records." See also § 654, *supra*. See also § 655.

There may be a species of constructive notice arising from information of some extraneous facts which may be rebutted, but no 9 L. R. A.

such rule is applicable to the question of notice under the Recording Statutes. Pom. Eq. Jur. § 607.

This must necessarily be so, for if the fact of constructive notice arising from a public record might be rebutted in one case it might in all, and the result would be that notice under the Registration and Recording Statutes would be *prima facie* only.

The case of *Acer v. Westcott*, referred to with approval in *McPherson v. Rollins*, *supra*, involved the question as to whether a recital in a deed, that it was made pursuant to a certain contract of sale between the grantor and the grantee, was constructive notice to a mortgagee of the grantee of existing equities in favor of the grantor arising out of the contract. The recital was as follows: "This conveyance in pursuance of a contract of sale of said premises made and entered into by the party of the first part for the conveyance thereof to one Ezra W. Acer, of whom the said party of the second part has become the assignee or purchaser, and, as such, entitled to the fulfillment thereof by virtue of this conveyance, said contract being dated January 29, 1884."

It was insisted that the recital was constructive notice to the defendant of the plaintiff's equities in the property, and, having this notice, he was bound to have examined the contract, and thus he would have found the plaintiff's equities. The court, in reply to this contention, said: "In all cases, other than conveyances or assignments by parties themselves competent to assign, the purchaser is bound to see that the conveyances have been made according to law, so as to carry the title. Not so when the recital states nothing to arrest the attention or arouse the suspicion of a person of ordinary care, as that the conveyance is made pursuant to a contract with the vendor, or with Mr. Acer, the assignor of the vendee, who assigned the contract to him, and he is entitled to a deed in fulfillment thereof. The parties being all competent to convey, no constructive notice of Acer's equity is found there." See *Taylor v. Harrison*, 47 Tex. 354, 26 Am. Rep. 304.

In that case it is said: "But purchasers and creditors are only charged by construction with notice of the facts actually exhibited by the record, and not with such as might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make."

In *Birdsall v. Russell*, 29 N. Y. 250, the court said: "The rights of a purchaser are not to be affected by constructive notice unless it clearly appear that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing, but hidden at the time. There must appear to be in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter."

The doctrine here enunciated was approved in the case of *Jones v. McNarrin*, 68 Me. 334, 28 Am. Rep. 66.

The case of *Gilchrist v. Gough*, 63 Ind. 576, is, we think, much against the position taken by the appellee. The facts in that case,

shortly stated, were as follows: Gough and wife executed a mortgage to the appellant to secure the sum of \$5,000. After its execution the mortgage was left at the recorder's office for record, and on the day named it was duly recorded, except, because of the oversight or mistake of the recorder, he wrote the words "five hundred dollars" instead of the words "five thousand dollars," as it should have been, so that the record only showed a mortgage for \$500. In the "Index of Mortgages" kept by the recorder, in a column thereof kept for that purpose the mortgage was entered as for \$5,000. Afterwards Gough and wife executed a mortgage to Jacob Huffman for \$3,500, and thereafter a second mortgage to Huffman. The two mortgages to Huffman were duly recorded. At the time Huffman received his mortgages he had no knowledge or notice of the amount of the appellant's mortgage except as disclosed by the record, as found in the recorder's office. It was held in that case that Huffman was not bound by the index kept by the recorder, though it stated the amount of the appellant's mortgage correctly, for the reason that the law did not require the amount of the consideration to be recited therein, and that Huffman was only held to constructive notice of the record of the mortgage as the recorder had made it. He had actual notice of the contents of the index, and when it and the record were considered together, necessarily a mistake in the index or in the record was suggested, as well as the source for ascertaining the correct information, that is, the original mortgage. But the court holds that Huffman had a right to look to the record—that it was conclusive as constructive notice. As we have already said, there was nothing to suggest to the appellant that H. W. Mankedick and William Mankedick were two different names for the same person, and he had a right to assume that the appellee Company knew the baptismal name of its debtor and had taken its judgment accordingly. If the lien had been specific the description of the real estate might have been sufficient to have called the purchaser's attention thereto.

It was the duty of the said appellee to have ascertained the correct name of its debtor and to have sued him in that name, as it was the duty of Gilchrist to see that his mortgage was properly recorded. Had it done so, the questions here involved could not have arisen. The following cases fully support our conclusion: *State v. Davis*, 96 Ind. 539; *Lovry v. Smith*, 97 Ind. 466; *Moore v. Davis*, 58 Mich. 25; *Grundies v. Reid*, 107 Ill. 804; *Thomas v. Desney*, 57 Iowa, 53; *Wood v. Reynolds*, 7 Watts & S. 406; *Ridgway's App.* 15 Pa. 177, 58 Am. Dec. 586; *Saylor v. Com.* (Pa.) 5 Atl. Rep. 237; *Hutchinson's App.* 92 Pa. 186; *Battenhausen v. Bullock*, 11 Ill. App. 665; *Galway v. Machow*, 7 Neb. 285; *Barnard v. Campau*, 29 Mich. 162; *Gales v. Morris*, 29 N. J. 232; *Buchan v. Sumner*, 2 Barb. Ch. 165, 5 N. Y. Ch. L. ed. 599, 47 Am. Dec. 806; *Bell v. Davis*, 75 Ind. 814; *Shep. Touch.* 866, *note*.

We have not overlooked the case of *Gillespie v. Rogers*, 146 Mass. 610. This case is in conflict so far as it may not seem to agree with the conclusion which we have reached with our 9 L. R. A.

own cases, to wit, *Gilchrist v. Gough* and *Lovry v. Smith*, *supra*.

We have not considered the question of agency so ably discussed by counsel for the appellees, as it becomes wholly unimportant in view of the conclusion to which we have come, as it does not appear that the abstractors had any other notice than such as the record discloses.

For the reasons herein stated, *the judgment of the Superior Court in General Term, affirming its judgment at Special Term, is reversed*, with costs, and with directions to remand the cause to Special Term for a restatement of the conclusions of law in accordance with this opinion, and for judgment in favor of the appellant.

Elliott, J., did not sit in this case.

Joseph McCLURE, *Appt.*,

Antony RABEN.

(....Ind....)

1. A conveyance of the grantor's expectant interest as heir in his ancestor's real estate by a deed containing no covenants of warranty is not binding upon the grantor even although as heir he subsequently comes into possession of the interest so conveyed.
2. An attempted sale of the interest which the grantor expects to receive as heir in his ancestor's real estate will not be enforced against him in equity when as heir he comes into possession thereof, although the purchase was made in good faith, unless the price paid was the full and fair market value of the property at the time of the purchase, and the ancestor was made acquainted with all the facts and acquiesced in the sale.

(September 20, 1890.)

APPEAL by defendant Joseph McClure from a judgment of the Circuit Court for Posey County overruling his demurrer to the cross-complaint of his co-defendant Raben filed in an action for the partition of certain real estate, and seeking to have title quieted in him

NOTE.—*Conveyance of property in expectancy, valid.*

A deed which purports to convey property which is in expectancy or to be subsequently acquired, or which is not of a nature to be grantable at law, though inoperative as a grant or conveyance, will be held as an executory agreement, and enforced according to its intent, if supported by a valuable consideration, whenever the grantor is in a condition to give it effect. *Bailey v. Hoppin*, 12 R. I. 563; *Williams v. Winsor*, Id. 9; *Baylor v. Com.* 40 Pa. 87; *Holroyd v. Marshall*, 10 H. L. Cas. 191.

A sale of the expectancy of an heir is not void within the court of equity, but if made bona fide and for a fair consideration, will be supported. *Parsons v. Ely*, 45 Ill. 243.

But all conveyances and charges and contracts of sale of future and expectant interests, reversionsers and other expectants during the life of their ancestor or life tenants upon an inadequate consideration will be relieved against in equity and either wholly or partially set aside. 3 Pom. Eq. Jur. 476.

to a portion thereof as against McClure. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. William London and Fred. P. Leonard, for appellant:

The contract between McClure and McReynolds has in it all the elements of a wagering contract and is not enforceable.

Parsons v. State, 2 Ind. 499; *Nudd v. Burnett*, 14 Ind. 25. See also *Davis v. Leonard*, 69 Ind. 218; *Chaifant v. Payton*, 91 Ind. 202; *James v. Jellison*, 94 Ind. 292; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380.

A contract made by an heir expectant to convey, on the death of his ancestor, a certain undivided part of what shall come to him by descent, is a fraud upon the ancestor, productive of public mischief, and void as well at law as in equity.

Boynnton v. Hubbard, 7 Mass. 112.

Mr. G. V. Menzies, for appellee:

Although void at law, the contract is enforceable in equity whenever the legal estate or interest becomes vested in the assignor; and equity will specifically enforce such contract by decreeing a conveyance, where all was fair and a valuable consideration paid.

8 Pomeroy, Eq. Jur. § 1271, 1287; Smith, Eq. p. 306; 2 Spence, Eq. Jur. p. 852; *Wright v. Wright*, 1 Ves. Jr. 411; Snell, Eq. p. 91; Adams, Eq. p. 54; Bispham, Eq. § 164, 165, 167; 1 Bouvier, Law Dict. *Assignments*, 14th ed. p. 156; *Fitzgerald v. Vestal*, 4 Sneed, 258; *East Lewisburg L. & Mfg. Co. v. Marsh*, 91 Pa. 96; Story, Eq. Jur. § 1040, 1055; *Field v. New York*, 6 N. Y. 179; *Ruple v. Bindley*, 91 Pa. 296; *Re John Wilson's Estate*, 2 Pa. 325, 330; *Varick v. Edwards*, 1 Hoffm. Ch. p. 382, 6 N. Y. Ch. L. ed. 1180. See *Read v. Mosby*, 87 Tenn. 759.

Olds, J., delivered the opinion of the court: Thomas McClure, Jane W. McClure, John Wilson and others filed their petition in the Posey Circuit Court against George Danley, Mary E. Pool, Joseph McClure, the appellant, and Antony Raben, the appellee, and others, praying for the partition of certain lands situate in said Posey County, Indiana, and for the quieting of the title thereto, as against certain parties.

In said proceedings the appellee, Antony Raben filed his amended cross-complaint against the appellant Joseph McClure, which cross-complaint is as follows:

"Antony Raben, one of the defendants in the above-entitled cause for amended cross-complaint against his co defendant, Joseph McClure, says that heretofore, to wit, on the 30th day of March, 1853, Leah McClure, the mother of said Joseph McClure, was a widow, and was the owner in fee simple and in possession of all the lands described in the complaint in this action and in the deed hereinafter mentioned.

"That on the date aforesaid said Leah McClure was a person of unsound mind, incapable of managing her own estate, and that she so continued without a lucid interval until her death, on the 10th day of March, 1886. That she died in said State and county intestate, leaving as her only heirs at law the said Joseph

McClure and six other persons whose names are unknown; that on the date first mentioned, the 30th day of March, 1853, the said Joseph McClure, at that time over twenty-one years of age, as an expectant heir of his mother, the said Leah McClure, by his deed of bargain and sale, a copy of which marked 'A' is filed herewith as a part of this amended cross-complaint, sold and assigned to one Samuel D. McReynolds his expectant interest in the lands therein described, as heir at law of said Leah McClure.

"That the said Joseph McClure received from the said McReynolds the full value of his said expectant interest, and the contract by which the said Joseph McClure sold and assigned his said expectant interest was bona fide, and without any fraud practiced upon the said Leah McClure or the said Joseph McClure.

"That afterwards, to wit, on the 15th day of June, 1863, the said McReynolds sold and conveyed to said Raben the interest in said lands sold and assigned to him by the said Joseph McClure.

"That said Joseph McClure claims to be the owner in fee simple of one undivided full seventh part in value of said lands as one of the heirs-at-law of said Leah McClure, and adversely to the interest of said Raben, thereby casting a cloud upon his, the said Raben's, title to one seventh part in value of said lands.

"Wherefore said Raben prays for judgment against Joseph McClure to quiet the title of said Raben to an undivided one seventh in value of said lands, and inhibiting said Joseph McClure, or those claiming under him, from settling up any right or title to and into any of said lands, as an heir at law of said Leah McClure, adverse to the title of said Raben, and for all proper relief."

"EXHIBIT A.

"This indenture witnesseth that Joseph McClure, of Posey County, Indiana, in consideration of three hundred dollars to him paid by Samuel D. McReynolds, of the same place, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to the said McReynolds, his heirs and assigns forever, the following real estate in Posey County and State of Indiana, and described as follows, to wit:"

Here follows a description of the land, being the same described in the petition: "Or all the estate, right and title that the said McClure may have in and to the same at the death of his mother, the widow of John McClure, deceased, as one of her heirs at-law, together with all the privileges and appurtenances to the same belonging, to have and to hold the same to the said Samuel D. McReynolds, his heirs and assigns forever. In testimony whereof the said Joseph McClure has hereunto set his hand and seal this 30th day of March, 1853.

"Joseph McClure."

Said deed was duly acknowledged and recorded. To this amended cross-complaint the appellant filed a general demurrer. The court overruled the demurrer to said amended cross-complaint and appellant reserved exceptions, and failing to answer the amended cross-complaint, judgment was pronounced against him

in accordance with the prayer of the same. The only error assigned is the overruling of the appellant's demurrer to the amended cross-complaint of the appellee Antony Raben.

The question presented is as to whether or not the sale and conveyance by Joseph McClure of his expectant interest in the real estate owned in fee simple by his mother, and of which she was in possession at the time of the sale, is valid either in law or in equity, so as to pass the title thereto to his grantee on Joseph's survival of his mother. The broad question is presented as to whether a child during the lifetime of his father or mother can make a valid sale and transfer of an expectant interest in the real estate at the time owned by and in the possession of the parent, as in this case. It is conceded that the deed in this case contains no covenants of warranty by which an after-acquired title would pass to the grantee, but it is contended on behalf of the appellee that the cross-complaint shows the sale to have been made in good faith and for a valuable consideration and without fraud, and that it is valid in equity, and that the grantee is entitled to have it specifically enforced on the estate vesting in the grantor. In this contention of the appellee we cannot concur. It is a general rule that a sale in the absence of property conveys no title. There must be something to sell or else there can be no sale. It is conceded that the rule which applies in case of a deed of general warranty whereby the heir would be barred from setting up a subsequently acquired title, does not apply; and applying the rule applicable to quitclaim deeds, and treating the conveyance in this case as such, the heir is not estopped from setting up the subsequently acquired title.

In the case of *Bryan v. Uland*, 101 Ind. 477, it is said by the court that "a quitclaim deed is effectual to pass the estate which the grantor has at the time it is made, and no more. It does not estop him from asserting an after-acquired interest;" and this doctrine is so well settled that we need not cite other authorities.

But it is contended that the specific interest contracted for by the grantee in this case, and intended to be sold by Joseph McClure, the grantor, was his expectant interest,—that which he would inherit in case she died intestate and he survived her; and that such a sale when made in good faith and in the absence of fraud and for full value, as averred in the cross-complaint, is valid in equity and may be enforced against the heir after he inherits the title, should he inherit as in this case; and we concede that some authorities can be found in support of such a doctrine, but as we view them they are based upon a very narrow foundation, as it is almost universally held that even in the absence of fraud the heir may tender back the consideration paid and rescind the contract, though he be of full age when the sale and contract or deed is made, and that the burden is upon the purchaser to show that the sale was in good faith, and that no fraud was practiced upon either the heir or the ancestor, and that full value was paid and an inadequate consideration alone will defeat an enforcement of the contract. On the other hand, there are numerous authorities which

hold that such a sale gives no right to any subsequently acquired interest.

The case of *Alves v. Schlesinger*, 81 Ky. 290, is a case directly in point. In that case the court says: "By the terms of a written contract dated in 1878, Samuel J. Alves undertook, for a valuable consideration, to sell and convey to his sister appellant, Augusta Posey, all the right, title and interest he then had or might thereafter acquire by gift, devise or descent from his mother, Mrs. Augusta Alves, in the land in controversy, and furthermore agreed to execute and deliver to Mrs. Posey all necessary and proper deeds to perfect the title to the land whenever it could be done, or his interest in the property might be determined. When the attempted sale was made by Samuel J. Alves to appellant, Mrs. Alves was alive and held the fee-simple title to the land, and he then had no right or interest therein, legal or equitable, vested or contingent. In fact, what he sold and undertook or agreed to convey had neither actual nor potential existence. And as the existence of the thing sold or subject matter of the contract is essential to the validity of a sale, of course the attempted sale to appellant in this instance did not prejudice appellee, who was a creditor, or prevent the levy and sale of the interest of Samuel J. Alves in the land after the death of Mrs. Alves, when, for the first time, it had an existence."

The identical question involved in this case was decided by the Supreme Court of Ohio in the case of *Hart v. Gregg*, 32 Ohio St. 502, and it was held that the conveyance by a son of his expectancy in land owned by his father, which would descend to him if he survived his father, and the latter should die intestate owning the same, is the conveyance of a naked possibility, not coupled with an interest, and possesses no estate or interest in the land; that such a conveyance does not operate to defeat the grantor's title afterwards acquired by descent, except by way of legal or equitable estoppel; and that if such conveyance contains no covenants of warranty or recitals, and there are no acts of the grantor amounting to an equitable estoppel, he is not estopped from asserting an after-acquired title. In that case it is said by the court: "In the deed before us, as there are no covenants of warranty, nor any recitals of fact that he had any title or any right to make the conveyance, there is nothing that would estop the grantor, either in law or in equity, from setting up an after-acquired title when, as in this case, there is no possession under the deed and no charge of fraud in the transaction." See *Boyn-ton v. Hubbard*, 7 Mass. 112.

Indeed, many of the authorities which assert that such conveyances may be upheld and enforced by courts of equity declare that the *onus* is upon the purchaser to show that the transaction was a bona fide one and based upon a full consideration, and that the ancestor from whom the estate is expected was informed of and acquiesced in the sale, and that inadequacy of consideration alone is sufficient to avoid the contract. Even the enforcement of them under such circumstances is regarded of doubtful propriety.

Story, in his work on Equity (1 Story, Eq. Jur. 12th ed. § 328), says: "Let us now pass to

the consideration of the third class of constructive frauds, combining in some degree the ingredients of the others, but prohibited mainly because they unconscientiously compromise, or injuriously affect the private rights, interests or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties or intentions of third persons."

Again it is said, section 828: "But the great class of cases in which relief is granted under this third head of constructive fraud is that where the contract or other act is substantially a fraud upon the rights, interests, duties or intentions of third persons. And here the general rule is that particular persons in contracts and other acts shall not only transact bona fide between themselves, but shall not transact *mala fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it; and as the rest of mankind besides the parties contracting are concerned, the rule is properly said to be governed by public utility."

Sec. 834. "It is upon this ground that relief has been constantly granted in what are called catching bargains with heirs, reversioners and expectants, during the lifetime of their parents or other ancestors. Many, and indeed most, of these cases (as has been pointedly remarked by Lord Hardwicke) have been mixed cases, compounded of almost every species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting from weakness on one side and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor or relation from whom was the expectation of the estate has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and from resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoils beforehand." See also §§ 835, 836.

It is laid down as a rule that "it will be sufficient to make the purchase unimpeachable if a fair price or the fair market price be given therefor at the time of the dealing." § 836.

In treating of this subject Pomeroy, in his work on Equity Jurisprudence, vol. 2, pp. 473, 474, § 953, says: "Equity, therefore, treats such dealings with expectant interests as a possible fraud upon the heirs and reversioners, who are immediate parties to the transaction, and as a virtual fraud upon their ancestors, life tenants and other present owners;" and it is further said: "But in every such conveyance or contract with an heir, reversioner or expectant, a presumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract, to show affirmatively

its perfect fairness, and that a full and adequate consideration was paid,—that is, the fair market value of the property, and not necessarily the value as shown by the life tables."

The same rule is applied to this class of cases whether the grantor be an infant or an adult.

From the rule as laid down by Story and Pomeroy, and which we have quoted, it will be seen that such contracts are looked upon with suspicion, and that they are presumed fraudulent and will not be enforced except it be clearly made to appear to be a perfectly fair transaction, and that the actual, full and fair market value was paid for the property; and, indeed, before such a sale will be enforced, we think it also within the rule and necessary to the enforcement of such a contract to allege and prove that such contract and sale were made known to the ancestor or person from whom the estate is expected, and he put in full possession of the facts concerning such transaction, and his consent obtained to such contract, sale or conveyance; that if not made known to him it operates as a fraud upon him. We regard such contracts and conveyances against public policy. The grantor at the time has no property or interest in the property of his father or ancestor which he can sell or convey, and none which the grantee can purchase. It is a mere gambling contract. It is wagering that the son or heir will survive the father or ancestor, and that the latter will not dispose of the property and will die intestate, whereby the grantor will at some time in the future inherit an interest which he can then convey. It operates as a fraud upon the ancestor and diverts his bounty from the kin to a stranger. It encourages extravagance, prodigality and vice on behalf of the heir, and in some instances might create an anxiety on the part of an avaricious or vicious purchaser for the death of the ancestor.

We are not prepared to say that some case might not arise in which it would be inequitable to not enforce a contract made with an heir for his future prospective inheritance in the estate of his ancestor, but we do not think the facts alleged in the cross-complaint present a case entitling the cross-complainant to relief. It must at least be necessary in such a pleading to allege the facts showing the amount and value of the estate purchased and the amount of the purchase money paid, and that such purchase money was the full and fair market value of the property at the time of the purchase. The cross-complaint is defective in that respect.

We think it further necessary to the validity of such conveyance that it was made known to and that the ancestor acquiesced in such sale and conveyance.

Judgment reversed, at costs of appellee, with instructions to sustain the demurrer to the cross-complaint and for further proceedings in accordance with this opinion.

Elliott, J.:

I concur in the conclusion that the cross-complaint is bad, but I do not fully assent to some of the propositions stated by the court, nor to all of the reasoning of the opinion. In my judgment an heir apparent may convey an estate in expectancy, but, in order to enforce the conveyance, the purchaser must show good faith and that he paid the fair value of the

property conveyed. It is not enough to show that he paid the value of the estate considered as an estate in expectancy, but he must show that he paid the value of the property without reference to the uncertainty of the estate's ever vesting. In other words, he must show that he paid the full value of the property estimated as if the estate were absolute and fully vested, and without regard to any hazard resulting from the uncertain nature of the expectant estate. It is the value of the property, and not the value of the expectant estate, which the purchaser must pay. I think, too, that this rule applies where there is a warranty deed or where the estate conveyed is specifically described, but that it does not apply where there is nothing more than a mere quitclaim deed.

It seems to me that the requirement of the law that the full value of the property shall be paid, is a check so full and strong as to prevent fraud, and that an heir who secures the full worth of the property, valued as an absolute and vested estate, cannot avoid his conveyance, made when he was an heir presumptive.

Susannah BALLEW, *Appt.*,

v.
Lewis B. ROLER *et al.*

(....Ind....)

1. A widow who is made a party to a suit in which a mortgage upon her deceased husband's land is foreclosed, cannot in a subsequent suit set up any title to the land which she acquired before the foreclosure decree was rendered, although she did not appear or answer in the foreclosure suit.
2. The rights of a surety for purchase money of real estate, who is compelled to pay the same, are, in reference to such estate, superior to those of the widow of the purchaser.

(June 7, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Tipton County in favor of defendants in an action to recover possession of certain real estate. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. W. R. Oglebay for appellant.

Messrs. Waugh & Kemp for appellees.

Elliott, J., delivered the opinion of the court:

The appellant in her complaint asserts title

NOTE.—Priority of Liens.

A mortgage executed to a third person to secure the purchase money for the premises mortgaged is entitled to priority over other liens prior in point of time, the same as if such mortgage had been given directly to the vendor. *Kaiser v. Lembeck*, 55 Iowa, 244; *Carey v. Boyle*, 53 Wis. 581; *Adams v. Hill*, 29 N. H. 202; *Haywood v. Nooney*, 3 Barb. 645; *Curtis v. Root*, 20 Ill. 53; *Jackson v. Austin*, 15 Johns. 477.

Where a husband received a conveyance of land in fee and at the same time mortgaged it to a third person, who furnished the consideration for the deed, the widow of the grantee in the deed had no right to dower as against the mortgage. *Clark v. Munroe*, 14 Mass. 851. See also *Kittle v. Van Dyck*, 1 Sandf. Ch. 76, 7 N. Y. Ch. L. ed. 248; *Adams v. Hill*, 29 N. H. 202; 4 Kent, Comm. 32.

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to the real estate therein described. The second paragraph of the answer of the appellees alleges that, in 1868, John H. Reeder, since deceased, was the owner of the land in controversy; that he mortgaged it to William Jackman to secure and indemnify him against loss by reason of his undertaking as surety for Reeder; that Reeder died in April, 1875; that after the death of Reeder, the mortgagor, Jackman, the mortgagee, instituted a suit to foreclose the mortgage executed to him, making the heirs of the mortgagor parties; that the plaintiff was the widow of Reeder and that she has since married Lindsey Ballew; that in such suit a decree was entered foreclosing the mortgage, and barring the equity of redemption of the appellant as well as of all the other parties to the suit. It is further alleged that a sale was made on the decree; that the land was bought by Jackman and that a deed was executed to him by the sheriff in due season.

It is also alleged that the complaint in the foreclosure suit averred that the note which Jackman executed as surety was given by the appellant's husband to secure the purchase money of the land in controversy to the person from whom the land was bought.

It is quite clear that this answer is good as a plea of former adjudication. The appellant was brought into court to answer as to her interest in the mortgaged premises, and she was thus afforded an opportunity to assert her claim, and, having failed to do so, she is concluded by the decree. There would be little reason for making persons parties to a foreclosure suit if the decree rendered was not effective to defeat their claim and bar their equity of redemption. Our decisions, extending over many years, uniformly hold that a decree of foreclosure estops a party from setting up any title acquired before the decree was rendered. *Lawrence v. Beecher*, 116 Ind. 812; *Adair v. Mergenthelm*, 114 Ind. 103, 18 West. Rep. 852; *Bundy v. Cunningham*, 107 Ind. 860, 5 West. Rep. 540; *Craighead v. Dalton*, 105 Ind. 72, 2 West. Rep. 677; *Randall v. Lower*, 98 Ind. 263; *Woodworth v. Zimmerman*, 92 Ind. 849, and cases cited; *Ulrich v. Drischell*, 88 Ind. 354, and cases cited.

In *McCaffrey v. Carrigan*, 49 Ind. 175, the rule we have stated was applied in a case very like the present.

Whether a judgment or decree is or is not erroneous cannot be inquired into in a collateral proceeding; all investigation ends as soon as it is ascertained that there was jurisdiction of the

The extension of this equity to a third person is strictly confined to those who furnish or advance the purchase money to the purchaser for his benefit, and to this extent they become parties to the transaction; but it must not be a general loan. *Carey v. Boyle*, *supra*; *Austin v. Underwood*, 37 Ill. 438; *Eyster v. Hathaway*, 50 Ill. 521; *Magee v. Magee*, 51 Ill. 500; *Johns v. Sewell*, 33 Ind. 1; *Hamilton v. Gilbert*, 2 Helsk. 660; *Whetsel v. Roberts*, 31 Ohio St. 508.

In Ohio and Maryland a contrary rule is adopted, but the decisions of those States are based upon statutes which are held to limit the right of a purchase-money mortgage to a preference to those executed to the vendor only. See *Stanell v. Roberts*, 13 Ohio, 148; *Heuveler v. Nickum*, 38 Md. 270; *Carey v. Boyle*, *supra*.

subject and of the parties. It is therefore without success that the appellant's counsel press upon our attention reasons supporting their contention that the decree mentioned in the answer is erroneous, for, grant that the record in the suit in which the decree was rendered abounds in errors, and still it would profit the appellant nothing.

The third paragraph of the answer is not materially different from the second, and what we have said shows its sufficiency.

The material allegations of the second paragraph of the appellant's reply are these: That the mortgage was executed to Jackman on the 4th day of December, 1888, to indemnify him against any loss he might sustain as the surety of John R. Reeder; that the appellant did not appear and defend the suit brought to foreclose the mortgage because of the false and fraudulent representations of Jackman that the land was bought of Eli Reed by Reeder, and that the mortgage he was seeking to foreclose was given for the purchase money, and that she relied upon such representations and did not appear and defend the foreclosure suit.

If it were conceded that the appellant could impeach the decree rendered in the foreclosure suit in this collateral action, the reply cannot be upheld. The statement of the plaintiff in the foreclosure suit is not shown to be false, much less fraudulent. As Jackman was surety for the purchase money and was compelled to pay it he was subrogated to the rights of the original vendor, and his mortgage became, in

equity, a mortgage for the purchase money paid by him. *Smith v. Schneider*, 28 Mo. 447.

It is quite clear upon the whole record that the appellant cannot maintain this action. This would be true even if there had been no decree foreclosing the lien of Jackman, for, as Jackman paid the purchase money his right is superior to that of the appellant, and if she could by any possibility be awarded relief, it could only be upon a bill to redeem. This is expressly decided in *Keith v. Hudson*, 74 Ind. 838, and the decision is fully supported by the cases of *M'Mahan v. Kimball*, 8 Blackf. 1; *Fisher v. Johnson*, 5 Ind. 492; *Talbot v. Armstrong*, 14 Ind. 254; *Patton v. Stewart*, 19 Ind. 233; *Alexander v. Herbert*, 60 Ind. 184.

If the fact that there was a decree of foreclosure should be entirely eliminated, still, this action could not be maintained, because the plaintiff has, at the utmost, no more than a right to redeem, for even if Jackman acquired no rights under his indemnifying mortgage paramount to those of the plaintiff, he had, nevertheless, a right, by subrogation, to the vendor's lien held by the person to whom the purchase money was paid. As against a lien for purchase money the rights of a widow are subordinate, for, until the purchase money is paid, she has nothing more than a right to redeem.

Judgment affirmed.

Petition for rehearing overruled September 17, 1890.

CALIFORNIA SUPREME COURT.

Re J. C. KUBACH, Petitioner.

(....Cal.....)

A municipal ordinance making it a misdemeanor for any person when having labor performed for the purpose of carrying out a contract with the city, to demand, receive or contract for more than eight hours' labor in one day from any person, is void.

(August 4, 1890.)

PETITION for a writ of habeas corpus to relieve petitioner from confinement under a sentence of the Police Court of the City of Los Angeles, the cause of confinement being an alleged breach of the provisions of a city ordinance. *Petitioner discharged.*

The case sufficiently appears in the opinion.

Mr. George M. Holton, for petitioner:

The ordinance is contrary to and in conflict with the Constitution of the United States and the Constitution of the State of California. It discriminates against a certain class of persons.

See Cal. Const. art. 1, § 10.

Said section abridges the privileges and immunities of citizens of this State and of the United States, and is an undue restriction upon the privilege of men to acquire property.

See Cal. Const. art. 1, § 1; U. S. Const. art. 14, § 1; art. 4, § 2; *Van Valkenburg v. Brown*, 9 L. R. A.

48 Cal. 48; *Stevens v. State*, 2 Ark. 201, 35 Am. Dec. 77.

The only authority under which the city council could claim the right to enact such an ordinance as the one in question would be under the general police power of the city, and the authorities all agree that that police power only extends so far as to enable them to enact such by-laws and ordinances as are necessary for the enforcement of the General Laws, and for the general health and prosperity of the city or community.

Cooley, Const. Lim. 5th ed. p. 745.

Messrs. C. H. McFarland and Albert Crutcher, for the People:

It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its acts to be considered as void.

Fletcher v. Peck, 10 U. S. 6 Cranch, 87, 128, 3 L. ed. 162, 175; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; Cooley, Const. Lim. 5th ed. p. 218; *Baughner v. Nelson*, 9 Gill, 299, 52 Am. Dec. 694.

A statute must be manifestly unconstitutional to warrant the court in declaring it void.

Williamson v. Williamson, 8 Smedes & M. 686, 41 Am. Dec. 636; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Lycoming v. Union*, 15 Pa. 166, 53 Am. Dec. 575.

Laws intended to regulate the enjoyment of natural rights of persons do not impair, but

foster and promote, those rights; and to provide such laws is the essential object and purpose of government.

Ex parte Smith, 38 Cal. 702.

The clause in the Constitution guaranteeing the right of "acquiring property" does not deprive the Legislature of the power of prescribing the mode of acquisition, or of regulating the conduct and relations of the members of society in respect to property rights.

Ex parte Andrews, 18 Cal. 679. See also *Ex parte Koser*, 80 Cal. 177; *Dixon v. Merritt*, 21 Minn. 200; *Ex parte McClain*, 61 Cal. 487; *Ex parte Moynier*, 65 Cal. 38; *Ex parte White*, 67 Cal. 102; *Ex parte Lichtenstein*, Id. 359; *Re Linehan*, 72 Cal. 114; *State v. Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44.

A statute of Massachusetts prohibiting the employment of all persons under eighteen years of age, and of all women over that age, for more than sixty hours per week in any manufacturing establishment, has been held constitutional.

Com. v. Hamilton Mfg. Co. 120 Mass. 383.

Per Curiam:

This is an application for a writ of habeas corpus. The petitioner was tried and convicted of a misdemeanor under the following ordinance of the City of Los Angeles: "The mayor and the council of the City of Los Angeles do ordain as follows: 'Sec. 1. Eight hours' labor constitutes a legal day's work in all cases where the same is performed under the authority of any ordinance, resolution or contract of the city, or under the direction, control or by the authority of any officer of the city acting in his official capacity; and a stipulation to that effect must be made a part of all contracts to which the city, as a municipal corporation, is a party. Sec. 2. It shall be unlawful for any contractor, by himself or through another, when having labor performed under any contract with the city, to demand, receive or contract for more than eight hours' labor in one day from any person in his employ or under his control, with the promise or understanding that such persons, so laboring over eight hours, shall receive a sum for said day's work more than that paid for a legal day's work. Sec. 3. It shall be unlawful for any contractor, by himself or through another, when having labor performed under any contract with the city, to employ Chinese labor thereon. Sec. 4. Any person or persons violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than \$10 nor more than \$50 for every such offense.'"

It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance

might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day.

Mr. Cooley, in his work on Constitutional Limitations, says: "The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly and ought always to be regulated. And some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable." 5th ed. p. 745.

For these reasons we hold the ordinance, so far as it attempts to create a criminal offense, to be void, and that the petitioner should be discharged.

It is so ordered.

ALPERS, *Appt.*,

v.

John HUNT, *Exr.*, etc., of George F. Sharp,
Deceased, *Reapt.*

(....Cal.....)

1. The sufficiency of the complaint, and that alone, can be considered on appeal from an order granting a motion for new trial because of error in overruling a motion for nonsuit on the ground that the contract sued on and set out in the complaint was void.

2. A contract between an attorney-at-law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by a third person for the prosecution of a claim, in consideration of a share of the fee which the attorney shall receive for his services, is void as against public policy in a State where the statutes provide for disbarring attorneys who lend their names to be used in legal proceedings by persons who are not attorneys.

(September 27, 1890.)

APPEAL by plaintiff from an order of the Superior Court for the City and County of San Francisco granting defendant's motion for a new trial after verdict for plaintiff in an action to recover the amount alleged to be due under a contract. *Affirmed.*

The facts are fully stated in the opinion.
Mr. R. Percy Wright for appellant.
Messrs. Sullivan & Sullivan for respondent.

Thornton, J., delivered the opinion of the court:

This is an action brought by the plaintiff, as assignee of William L. Bolte, against John Hunt, executor of the last will and testament of George F. Sharp, to recover a sum of money claimed to be due on a contract alleged to have been made by Sharp and L. C. McCeney with plaintiff's assignor. On the trial verdict and judgment passed for plaintiff. Defendant moved for a new trial, which was granted, and, from the order granting the motion, plaintiff appealed.

The main question to be determined herein arises on the complaint. The averments of the complaint set forth that, prior to the 1st day of August, 1878, George F. Sharp and Julius C. McCeney were attorneys-at-law, practicing their profession in the City and County of San Francisco; that, in August, 1878, Mrs. Volina E. Harrigan was the owner of, and claimed an interest in, the estate of Eliza Haskell, deceased, which claim was contested by other persons, and required the services of attorneys-at-law for its enforcement; that about the time last mentioned, Sharp & McCeney agreed with one William L. Bolte that, if he, Bolte, would procure Mrs. Harrigan to employ them as attorneys-at-law in the matter of her interest and claim, above mentioned, he, Bolte, should be entitled to and should have one-third part of whatever should be received by them, or either of them, by reason of and under such employment; that thereupon Bolte procured Mrs. Harrigan to employ them as attorneys-at-law in the matter of her interest and claim; that, in pursuance of the arrangement thus brought about by Bolte, Mrs. Harrigan entered into a contract with Sharp & McCeney, whereby, in consideration of their professional services to be rendered in and about her said interest and claim, she agreed to give them one-third part of whatever share of the estate of Mrs. Haskell she might become entitled to or receive by way of compromise, or otherwise; that Sharp & McCeney duly performed all the conditions of their said contract, and by such services she became entitled to a large amount of property, a part of the estate aforesaid; that Mrs. Harrigan thereupon agreed upon a certain sum of money to be paid Sharp & McCeney in satisfaction of their claim against her under the contract above stated, which they agreed to accept; that in pursuance of this agreement, Mrs. Harrigan executed to them a promissory note for the sum of \$14,400, bearing date the 31st day of January, 1880, payable two years after its date, with interest, at the rate of 7 per cent per annum; that, to secure the payment of this note, Mrs. Harrigan, with others, executed to Sharp & McCeney a mortgage upon certain real property; that afterwards McCeney assigned all his interest in the note and mortgage to Sharp; that the note and mortgage were subsequently sold by Sharp for the sum of \$17,964.18, which was paid to him; that no part of said sum of money was ever paid to plaintiff or his assignor, Bolte.

9 L. R. A.

Other averments are made in the complaint, setting forth the relations of the parties, and material to show plaintiff's right to maintain this action, but, as they have no bearing on the question necessary to be determined herein, need not be stated.

On the trial, the plaintiff having put in his evidence and rested, the defendant moved for a nonsuit, on the ground, among others, (1) that the alleged contract between McCeney & Sharp and Mrs. Harrigan is against good morals and public policy; and (2) that the alleged contract between Sharp & McCeney and William L. Bolte is against good morals and public policy. The motion was denied, and the defendant excepted. A verdict having been rendered for plaintiff, defendant moved for a new trial on a statement. In it he assigns as an error of law occurring at the trial, and excepted to by him, the denial of his motion for a nonsuit. On the hearing of the motion for a new trial, the court granted it "on the sole ground [as appears from the transcript] that the contract sued upon is contrary to public policy."

As above stated, the motion for a nonsuit has reference only to the contract alleged, and the error of law set out in the statement is of the same import. The contract is alleged in the complaint alone. The motion for a nonsuit must then be determined on the allegations of that pleading. The court must have granted the new trial for the reason that the contract set forth in the complaint was contrary to public policy, for from the complaint only can we ascertain the contract sued on. And here we may remark that, according to the well-settled practice, the court below could not, in passing on the motion for a new trial, go beyond the grounds on which the new trial was asked; and, in holding the action of the court to have reference only to the contract set forth in the complaint, we confine the course pursued by the court to the contract alleged therein, and to the grounds on which the defendant asked for a nonsuit. From the foregoing it is clear that, in passing on the question as to the character of the contract, the court is limited to what is stated by the plaintiff in setting forth his cause of action, and that the evidence introduced on the trial cannot be considered.

But it is argued by counsel for appellant (plaintiff below) that on an appeal, as this is, from an order granting a new trial, the sufficiency of the complaint cannot be considered. To support this contention counsel make reference to several cases decided by this court, viz.: *Spanagel v. Dellinger*, 38 Cal. 288; *People v. Turner*, 39 Cal. 372; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Onderdonk v. San Francisco*, 75 Cal. 534, and *Wheeler v. Kasabavum*, 76 Cal. 90.

In the cases cited the question presented is entirely unlike the one presented here. In this case the defendant moved for a nonsuit on grounds that challenged the sufficiency of the complaint, in that it set forth a contract on which an action could not be maintained. The nonsuit was denied, and an exception was regularly reserved. The defendant then found himself in a position where he had a right to have the ruling of the court on his motion re-

viewed on a motion for a new trial. The ruling of the court on defendant's motion for a nonsuit, and his exception thereto, could be set forth in a statement or bill of exceptions as an error of law occurring at the trial, and there excepted to by him that it might be reviewed as above set forth. This right was assured to him by the provisions of the Statute. Code Civil Proc. § 657, subd. 7; Id. §§ 658, 659.

On the hearing of the motion for a new trial, the court *a quo* had an opportunity of reversing its former action. If it approved its previous ruling, the motion for a new trial would be denied. If its previous ruling was, in its judgment, erroneous, it was empowered to recall it, and grant a new trial. On such hearing it was in the line of the regular procedure to confirm its former action, or disapprove and recall it. Such course the law sanctions as applicable to all errors of law. An error committed in passing on a motion for a nonsuit constituted no exception to the rule. Whether the court denied or granted a new trial, its action was subject to be reversed on appeal. The plaintiff had a right to appeal from the order granting a new trial, and his appeal would bring before the court the action of the court below, as to every question germane to the inquiry whether the lower court's action was in accordance with law or not. If the court below had on the trial committed an error for which it was proper, on its being regularly brought before it, to grant a new trial, this court would approve and affirm the action of such court in granting such relief. If, on the contrary, no such error had been committed, if the court below had on the trial before it ruled correctly, this court would, in accordance with such view, hold the order granting a new trial erroneous, and reverse it. This is the usual course of practice in the courts of this State, and we see nothing in it foreign to the procedure prescribed by law. It has been a practice, not unusual in our courts, to ask a trial court to instruct the jury, when the complaint did not state facts sufficient to constitute a cause of action, to find a verdict for defendant. Whether given or refused such ruling could be reviewed on motion for a new trial; and, on the hearing of this latter motion, whether favorable or adverse to the motion, an appeal could be prosecuted from the order granting or refusing the new trial, and the action of the trial court passed on in this court, and either approved or set aside. We see nothing irregular here in having the question made on the motion for a nonsuit considered and passed on in this court, though it does go to the sufficiency or insufficiency of the complaint.

The question comes before us in the regular course of procedure, and the legal exigencies of the case demand that it be considered and determined. If this court failed to pass on the point, it would in effect hold that there was error of law occurring at the trial, and there excepted to, which could not be reviewed on a motion for a new trial, and that, too, when the Statute regulating the procedure in our courts had provided that all such errors should be so reviewed. There is nothing in the cases cited by counsel for appellant in conflict with what is stated above. In our judgment the question is regularly presented here for de-

cision, and the respondent is entitled to have it determined.

Is the contract set forth in the complaint contrary to public policy or good morals? Such is the question presented to us for determination. That contract is in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counselor at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed one-third part of whatever remuneration the attorney received for his services from the litigant. Is such a contract void as contended? is the point presented for consideration and decision. Courts are justified in declaring a contract void as against public policy, when it is expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. As said by Chase, *Ch. J.*, in the *License Tax Cases*, 73 U. S. 5 Wall. 469 [18 L. ed. 500]: "This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision." The policy of the State "can be ascertained only by reference to the Constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the Constitution and laws." *Luz v. Haggin*, 69 Cal. 808.

Though public policy is a doctrine on which courts and judges should proceed with caution, still there are many cases to be found in the books of reports in which the doctrine has been applied. Marriage brokerage bonds, contracts in restraint of trade, contracts by expectant heirs, or in consideration of illicit cohabitation, or such contracts as may injuriously affect the administration of justice, or to procure a contract for a public officer, or to pay for an appointment to office, or aiding in procuring an appointment, or to pay for obtaining a pardon, or injuriously affecting the public interest as to the location of the terminus of a railroad,—afford instances of the application of the doctrine. See 5 Rob. Pr. chap. 42, pp. 407, 493, where many cases are cited and commented on.

In considering this question, our attention must necessarily be given to the Statutes of this State in regard to attorneys and counselors at law. They are to be found in the Code of Civil Procedure, and in the section to which reference will be herein specially made. The following provisions will be found in the Statute: Any citizen or person resident of this State, who has bona fide declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to be admitted as an attorney and counselor-at-law in all the courts of this State. Code Civil Proc. § 275.

Every applicant for such admission must produce satisfactory testimonials of good moral character, and undergo a strict examination as to his qualifications in open court. Id. § 276.

If, upon examination, he is found qualified, he shall be by the court admitted as such attorney and counselor, by an order entered to

that effect upon its records, and a certificate of such record shall be given to him by the clerk of the court, which certificate shall be his license. Id. § 277.

On his admission, he must take an oath to support the Constitution of the United States and the Constitution of this State, and faithfully to discharge the duties of an attorney and counselor to the best of his knowledge and ability. Id. § 278.

A roll of attorneys is to be kept by a prescribed public officer, which the applicant, on his admission, is required to sign. Id. § 280.

Any person practicing law in any court, except a justice's court or a police court, without having received a license as attorney or counselor, is declared to be guilty of a contempt of court. Id. § 281.

Section 283 of the same Code prescribes the duty of an attorney and counselor, by the provisions of which he is required, *inter alia*, to support the Constitution and laws of the United States and this State, and to maintain the respect due to the courts of justice and judicial officers. Rules of duty are further prescribed in this section, which are intended to regulate and control the conduct of an attorney and counselor with regard to the public, and to those in whose behalf they appear in court, and exercise their appropriate functions. Authority is conferred on him in the discharge of his duties and functions, peculiar to his character as such. Id. § 283.

He is subject to the authority of the courts, and may be, for cause shown, suspended or removed, and deprived of the right to pursue his profession by the supreme court, or either department thereof, or by a superior court. Id. § 287.

One of the causes for which he may be removed or suspended is the following: "Lending his name to be used as attorney and counselor by another person, who is not an attorney and counselor." Id. § 287, subd. 4.

The foregoing provisions taken from a Public Statute are enacted, not only in the interest of those who employ the services of attorneys, but in the interest of the community or public at large. They concern the administration of justice, always a subject of public concernment, and relate to a class of officers of courts in which the people of the State have an abiding interest. Bolte was never an attorney and counselor-at-law. He had never been admitted to the privileges, or authorized to exercise the rights, of an attorney and counselor. He had never assumed or been authorized to assume any of the functions of an attorney and counselor, nor was he bound by the obligations of such a position. Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted from section 287 of the Code of Civil Procedure, for which he would have been liable to be removed or suspended from the practice of his profession. Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors-at-law for his benefit, 9 L. R. A.

and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled through their agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor-at-law, under the circumstances disclosed by the complaint in this case. Of what avail is such prohibition, if it can be by such indirection as is practiced in this case evaded? We are of opinion that the facts here disclose a case of indirect violation of the clause referred to, which is as much forbidden as a direct violation. If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person.

We have examined *Bunn v. Guy*, 4 East, 190, and *Candler v. Candler*, Jac. 225, cited by counsel for appellant to sustain the validity of the contract sued on. We do not consider them applicable to the case before us. The office of attorney in England is entirely different from that of an attorney and counselor in this State. In England the fees of an attorney are fixed by statute, or rules of court, or orders in council, and his bill of costs and charges for disbursements are subject to be taxed by a taxing officer, and the taxation reconsidered by such officer. The decision of the taxing officer can also be revised by the judge on appeal. *Weeks*, Attys. §§ 324, 325, *et seq.*

We cannot suppose that the fact that the attorney has to share the amount of his bill with an outsider would at all affect the amount allowed him. That amount would be the same regardless of the circumstance that he was bound by his agreement to divide it with another. The laws of England regulating the appointments, duties and conduct of attorneys have not been brought to our notice, and therefore we cannot determine how far the laws there prevailing permit or recognize as legal a contract made by an attorney to share his fees with a third person. Under such circumstances this court could not, with any confidence, pronounce any judgment how such a contract would be affected by English statutes or rules of court.

In *Bunn v. Guy* the validity of a contract between attorneys was called in question. A practicing attorney (Carpenter) agreed for a valuable consideration to relinquish his business and recommend his clients to two other

attorneys (Bunn and Guy), and that he would not himself practice within certain limits, and would permit them to make use of his name in their firm for a certain time, without any interference on his part. The question arose in chancery concerning the marshaling of assets, and a case stating the above contract was sent by the Lord Chancellor to the Court of King's Bench for its opinion. The court certified their opinion to the Court of Chancery that the contract above stated was good in law.

In *Candler v. Candler*, Jac. 236, an agreement by an attorney to pay a share of the profits of his business to the widow of his deceased father, who had been an attorney, was held valid. The agreement was made by deed between the widow of Henry Candler, the deceased father, and their son Henry Candler. It was recited in the deed that the agreement was entered into under a due sense of the influence which his mother and family could retain with his father's clients and connections, and the widow (Mary Candler) covenanted to use her utmost endeavors and influence to induce her friends and connections to employ him. The Lord Chancellor (Eldon), in delivering his judgment, said: "I have thought that, consistently with the policy of the law, agreements could not be made by which they [referring to attorneys] contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion, though I never could entirely reconcile myself to their doctrine." The opinion in *Bunn v. Guy*, *supra*, was here referred to by Lord Eldon.

In our judgment the remarks of Lord Eldon, quoted above, may well create a strong doubt as to the correctness of the conclusion reached in *Bunn v. Guy*. However, for the reasons above given, we cannot follow the rulings in the cases just noticed. It is clear that the right of the plaintiff to recover herein is the same as that of his assignor, Bolte. If the latter cannot recover, neither can the plaintiff, his assignee. The considerations expressed herein have led this court to the conclusion that the contract sued on, and alleged in the complaint, is forbidden by the policy of the law, and void, and that the court below erred in denying the defendant's motion for a nonsuit. The motion for a new trial was therefore properly granted, and the order appealed from must be affirmed. The view taken herein disposes of the case, and it becomes unnecessary to pass on the other questions raised by counsel for appellant.

Order affirmed.

We concur: McFarland, J.; Sharpstein, J.

Mary H. WALDRON, *Respt.*,

v.

David V. WALDRON, *Appt.*

(.....Cal.....)

1. The infliction of grievous mental suffering is not a ground for divorce
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unless its actual or reasonably apprehended effect is injurious to the body or health of the complaining party, even under Civ. Code, § 94, defining the extreme cruelty which will justify a divorce as *inter alia* the infliction of grievous mental suffering upon the other, by one party to the marriage.

2. The existence of extreme cruelty on the part of a husband towards his wife is not a necessary inference from a finding that he inflicted grievous mental suffering on her, since the suffering may be excusable, or even justifiable, while the cruelty never is so.

(Beatty, Ch. J., McFarland and Patterson, JJ., dissent.)

3. A finding that a husband several times when intoxicated called his wife vile names in the presence of other people, and thereby inflicted on her grievous mental suffering, is not a sufficient ground for divorce where there is no finding of actual or reasonably apprehended injurious effect upon her body or health; at least where it also appears that her conduct towards him tended to provoke anger and harsh language, and that he was not aware that anyone overheard what he said, and in fact no one did overhear excepting relatives and servants of the family.

(August 4, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in an action brought to obtain a divorce on the ground of extreme cruelty. *Reversed.*

The facts are fully stated in the commissioner's opinion.

Messrs. Smith, Winder & Smith, for appellant:

"Grievous mental suffering," to entitle the sufferer to a divorce under section 94, must be such as to react upon the body and endanger health at least; and its extent is to be measured by the nature of the act causing it and the effects naturally and reasonably to follow from it.

Poor v. Poor, 8 N. H. 807, 29 Am. Dec. 664; *Pierce v. Pierce*, 8 Pick. 299, 15 Am. Dec. 218; *Powelson v. Powelson*, 23 Cal. 358.

Messrs. Wells, Guthrie & Lee, for respondent:

The public aspersion of a virtuous wife by her husband, charging her with unchastity, constitutes such cruelty as will entitle her to a divorce.

Jones v. Jones, 60 Tex. 451; *Bahn v. Bahn*, 62 Tex. 518; *Williams v. Williams*, 67 Tex. 198; *Kelly v. Kelly*, 18 Nev. 49; *Wheeler v. Wheeler*, 58 Iowa, 511; *Allen v. Allen*, 81 Mo. 479; *Goodman v. Goodman*, 26 Mich. 417; *Lewis v. Lewis*, 5 Mo. 278.

Profane, obscene and insulting language habitually indulged toward a wife, a person of a sensitive nature and refined feelings, amounts to extreme cruelty.

Bennett v. Bennett, 24 Mich. 488; *Goodman v. Goodman*, *Wheeler v. Wheeler* and *Allen v. Allen*, *supra*; *Whitmore v. Whitmore*, 49 Mich. 417.

It is cruelty for a husband to call a sensitive and refined wife a bitch.

Warner v. Warner, 54 Mich. 492.

Unjustifiable conduct on the part of the husband, which so grievously wounds the mental feelings of the wife, or so utterly destroys her

peace of mind, as to impair her health, or endanger her life, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.

Wachholz v. Wachholz, 75 Wis. 377; *Avery v. Avery*, 38 Kan. 1; *Carpenter v. Carpenter*, 30 Kan. 712.

Section 94 of the Civil Code of California defines what is extreme cruelty: "Extreme cruelty is the infliction of grievous bodily injury, or grievous mental suffering upon the other by one party to the marriage."

In *Forney v. Forney*, 80 Cal. 528, a divorce was granted where the evidence showed that intemperance produced great mental anguish.

Where the intent and meaning of a statute are expressly declared by a provision therein, to carry out that intent, all other parts of the Act must yield, and all other parts of the Act are controlled in construction by it.

Formers Bank of Fayetteville v. Hale, 59 N. Y. 53; *Endlich*, Interpretation of Statutes, §§ 41, 295; *Rhodes v. Weldy*, 48 Ohio St. 284; *Raymond v. Cleveland*, 42 Ohio St. 529; *Den v. Du Bois*, 16 N. J. L. 293; *Spencer v. Metr. Board of Works*, L. R. 22 Ch. Div. 162; *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 530; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627, 7 L. ed. 542.

Vancielief, C., delivered the following opinion:

This is an action for divorce on the ground of extreme cruelty, by the use of vile and offensive language, without any physical force or violence applied to the person of the plaintiff. The answer of the defendant denies the cruelty and the use of the language alleged. The court found for the plaintiff and decreed a divorce and permanent alimony of \$100 per month while she shall remain unmarried, and \$1,000 for her attorneys' fees; and defendant appeals from the judgment and from an order denying his motion for a new trial.

The material substance of the findings as to extreme cruelty is as follows: That, upon occasions when the defendant was intoxicated, he wrongfully and unjustly, and without sufficient provocation to justify him in so doing, called the plaintiff vile names, once called her a "whore," and on several different occasions called her a "damned bitch," and a "damned witch from hell," in the presence and hearing of other people, thereby inflicting upon her grievous mental suffering, but without injury to her health; that when he called her such vile names she was not without fault, and that she was not uniformly kind to him; that there is reasonable apprehension to believe that such cruel treatment will be continued if a divorce is not granted. The defendant contends: *first*, that these findings as to cruelty do not support the judgment; and, *second*, that they are not justified by the evidence.

1. As to the sufficiency of the finding, it is to be observed that the degree of cruelty which the law recognizes as a cause of divorce never has been exactly defined. Perhaps as near an approach to an exact definition as is practicable is made by Mr. Bishop, who, admitting the great difficulty of formulating such a definition, thinks the task not impossible, and gives 9 L. R. A.

as his definition the following: "Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom." 1 Bishop, Mar. and Div. 6th ed. § 717.

Yet this expression of the degree of cruelty which may justify a withdrawal from cohabitation seems to leave it quite as indefinite as was the degree which will justify a divorce, without aid from this definition; and the learned author seems to admit as much further on (§ 740), where, referring to this definition, he says: "By our definition of cruelty, the apprehension of physical danger to the complaining party must, to justify a divorce, have proceeded 'to a degree justifying a withdrawal from cohabitation.' Now, if this seems indefinite, so is the law. There is no possibility of measuring the depth of woe or danger thus required, except by the understandings of the men who occupy the bench and the jury box, enlightened and strengthened by what has been heretofore deemed or adjudged."

Certainly, where the fact upon which the law is to operate is indefinite, the law is necessarily indefinite and uncertain to the same degree; and generally, uncertainty of the law proceeds from uncertainty as to the ultimate matter of fact which forms a part of, and a term in, every proposition of law. True, it is sometimes uncertain whether a law is mandatory or merely directory or permissive; but much oftener the "uncertainties of the law" arise from uncertainties as to the facts or things commanded, permitted or prohibited; and so it is with the fact of cruelty prohibited by the law governing the marriage relation. Since all degrees of cruelty are not prohibited, and the requisite degree to bring it within the prohibition being uncertain, the law prohibiting it must be correspondingly uncertain. But, although the degree of cruelty constituting a ground for divorce may not have been exactly defined, it has been so described by the decisions of courts that it may be sufficiently identified for practical purposes; and although the judicial descriptions of what is and what is not a sufficient degree of cruelty do not reduce the distinction to a line clearly separating the sufficient from the insufficient degrees of cruelty in all possible cases, they reduce it to a very narrow zone, within which the true line of distinction is to be judicially ascertained or sufficiently approximated by means of the peculiar circumstances of each case, viewed in the light of "what has been heretofore deemed or adjudged." A great majority of the cases, however, will be found to fall within the authoritative descriptions of either the requisite or the insufficient degree of cruelty. It is contended, however, by counsel for respondent, that extreme cruelty is defined by section 94 of the Civil Code, and that the finding in this case, being in the language of that section, must be sufficient. That section is as follows: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." If this section is to be considered a proper legal definition of the words "extreme cruelty," as used in section 92 of the same Code, it certainly deprives those words

of an essential part of their meaning as used in the books to express a cause of divorce, since it entirely omits the attribute of wrong or injustice. "The infliction of grievous bodily injury or grievous mental suffering" does not imply wrong or injustice, and it may be justifiable; whereas the word "cruelty," alone, is always understood as implying wrong or injustice; and the "extreme cruelty" which is a cause of divorce is necessarily wrong, and never justifiable. Therefore, to say that section 94 of the Civil Code was intended as a complete definition of the words "extreme cruelty," as used in section 92, would be to affirm that the mere "infliction of grievous mental suffering," though excusable or justifiable, is a cause of divorce, — an absurdity not to be attributed to the Legislature. The probable object of the Legislature in enacting section 94 of the Civil Code was to affirm the previous decisions of the Supreme Court of this State in the cases of *Morris v. Morris*, 14 Cal. 78, and *Powelson v. Powelson*, 23 Cal. 380, to the effect that extreme cruelty may be effected without, as well as with, physical violence, and thus to settle the law on a point as to which there was thought to be some contrariety of judicial opinion in other States and in England. Surely it was not intended to disturb those decisions; for, although they limit the rule that extreme cruelty may be the result of treatment other than that of physical violence to such treatment and conduct as produce bodily harm or ill health, or furnish reasonable apprehension that further cohabitation would endanger the life or physical health of the complaining party, yet they extend the rule quite as far as it has gone elsewhere in the United States or in England. Although the character of the ill treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party. 1 Bishop, Mar. and Div. 6th ed. §§ 732, 733b; *Morris v. Morris*, 14 Cal. 80; *Powelson v. Powelson*, 23 Cal. 362.

This is the only practically safe rule. The grave remedy of divorce is disproportioned to the petty marital wrongs and annoyances whose injurious effect upon the body or health cannot be shown and sensibly appreciated, and is not to be administered on the ground of cruelty, except in conservation of life or health. Many of such wrongs and annoyances productive of more or less unhappiness must be borne, if they cannot be justly remedied or avoided by the parties themselves. The following passage from Lord Stowell's opinion in *Evans v. Evans*, 4 Eng. Eccl. Rep. 810, delivered one hundred years ago, has ever since been regarded and cited as sound law both in England and the United States: "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent surely in any state of life but still they are not

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that cruelty against which the law can relieve. Under such misconduct of either of the parties — for it may exist on one side as well as on the other — the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation, and if this cannot be done both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings, arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the *quantum* of injury done and felt, and therefore, though the court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed."

Speaking of this passage, and of cruelty inflicted by other means than physical violence, Mr. Bishop says (§ 725): "And though the court may not, as Lord Stowell said, have 'any scale of sensibilities by which it can gauge the *quantum* of injury done and felt,' it may sometimes perceive that it is greater than can be practically endured, as well when falling on the mind as on the body. Equally, whether of the one sort or the other, the court must be made affirmatively to perceive that cruelty exists in fact, and is sufficient in degree, before it can grant the remedy."

Yet the practical view of the law is that a degree of cruelty which cannot be perceived to injure the body or the health of the body "can be practically endured," and must be endured, if there is no other remedy than by divorce, because no "scale" by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their perceptible effects upon the physical organization of the body.

From the foregoing considerations it follows that the findings of fact are not sufficient to sustain the judgment. "Extreme cruelty" is not expressly found in any sense; nor does it, in the legal sense above described, follow as a necessary inference from the facts found. The finding of "grievous mental suffering" is, and purports to be, only an inference or conclusion from the opprobrious language found to have been used by the defendant.

In the case of *Smith v. Smith*, 63 Cal. 466, in which the only issue was as to the fact of extreme cruelty, it appeared that the trial court, after finding the facts claimed to have constituted extreme cruelty, concluded as follows: "That the repeated acts of cruelty, as established by the evidence, upon the part of said defendant towards her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering."

Held, that this finding "is but a conclusion of law, and does not find any fact in issue in the case."

Now, whether this finding is a conclusion of law or a conclusion of fact, the decision that it is not a finding of any fact in issue is correct, though the fact of extreme cruelty was in issue; because, as we have seen, the infliction of grievous mental suffering is not the equivalent of extreme cruelty in a legal sense, nor is extreme cruelty a necessary inference from the infliction of grievous mental suffering, since the latter may be excusable, and even justifiable, while the former never is so. Although the evidence is conflicting as to the finding that the defendant, when intoxicated, unjustly, and without sufficient provocation, once called the plaintiff a whore, and several times a bitch, and a witch from hell, in the presence of other people, yet this finding is justifiable by the rule applicable to findings upon conflicting evidence; but, qualified as it is by the further findings that the plaintiff was not uniformly kind to the defendant, that at the times when he called her those vile names she was not without fault and that her health was not injured thereby, it does not stand the final test of its sufficiency, as it does not affirmatively show any actual or reasonably apprehended injurious effect of the language used upon the body or health of the plaintiff, and therefore it could not have been affirmatively perceived by the court that the cruelty was sufficient in degree. Upon the findings of fact, I think the judgment should have been for the defendant; and as the case appears to have been thoroughly tried as to the facts, it appears very improbable that a new trial would result more favorably to the plaintiff. *Ford v. Chambers*, 28 Cal. 13.

A careful examination of the evidence will show that it is barely sufficient to justify even the insufficient findings, and that there are many circumstances tending to qualify the facts found in favor of the defendant, and to mitigate their effect upon the plaintiff's mind. Both parties had been married before. The plaintiff had three children by her former marriage, aged, respectively, seven, nine and eleven years, but the defendant had no children by his former marriage. The plaintiff had about \$2,500, and defendant had property worth about \$100,000, at the time of their marriage. The intemperate habits of the defendant, such as they were after marriage, were known to plaintiff before marriage, and she testified that she once broke off her engagement to marry him on that account; and, as a condition of renewing it, she required him to sign a written pledge to her, not that he would not drink, but only that he would not drink to excess, and that his hand trembled from the effect of drink at the time he signed the pledge. Soon after the marriage plaintiff's niece, then a young unmarried lady, came to live with them and remained until she was married, on July 25, 1888, nearly three months after the commencement of this suit; for it appears that the plaintiff continued to reside in defendant's house up to the time of trial, as before, except that he occupied a separate room from hers. The defendant kept his pledge until about two months after marriage. The niece, Mrs. Albee, testified as to the first time he became intoxicated

after marriage, as follows: "When I first came down I was very much pleased with my aunt's choice. He was apparently a gentleman, and acted the gentleman for quite a while, until probably six weeks afterward. We came home and found him in a state of intoxication in the hall, and my aunt remonstrated with him after he got into the room, and he became very angry and swore a great deal. . . . She remonstrated with him, and said to him: 'Do you remember the promise you made to me?' He said: 'My promise outside of a business transaction does not amount to anything.'" As to how often after this first scene he became intoxicated, or called her vile names, the evidence is indefinite. The plaintiff testified that it may have been two or three times a month, but probably oftener. She could not tell how often, but that the first time he called her a whore or bitch was during the holidays, when he came home intoxicated late at night, upon which occasion the principal quarrel seems to have occurred, and as to which the plaintiff in part testified as follows: "I would not let him in the room at night. . . . That was the first occasion that happened, and he was going to kick in the door. . . . I never have seen him quite so mad as that before. Then I was nervous. I did not know. I was all alone in the house. My little girl was in the room with me. My niece was at the theater with Mr. Albee. My little girl heard a noise in the house, and asked me if she could come in my room. I told her she could come until Mr. Waldron came. I says: 'If he comes home sober, you will have to go to your own room. If he comes home drunk, you can stay.' . . . We heard something in the hall, as if somebody fell. He came to my door, and demanded to come in. I told him he could not come in. . . . He said he wanted some quilts. I said I had no quilts only what was on my bed. I told him if he had come home sober he could have come in. He says, 'Open this door,' and went on damning and cursing and swearing, and I thought I would scare him, and call a policeman. I raised the window. There was no policeman around there. When I called the policeman he says, 'You damn bitch, you damn whore, you damn tramp,' or something like tramp. I says: 'I will not stand that in the world.' I was paralyzed. I never thought Mr. Waldron would call me any such names as that. When he called me these names first it almost paralyzed me. Then the colored girl heard him down stairs, and she came up, and tried to get him down stairs. He went down and sat in the parlor by the fire. . . . It was about the holidays, either the last part of December or a little after New Year's. I cannot exactly tell when the next time was. Of course I did not feel very kindly toward him after he called me those names, and when I got him sober I gave him a piece of my mind about it. He was sitting at the head of the table, and I says to him: 'You have called me the very worst kind of names the other night, and remember I will never stand that.' I says: 'I have not done anything to deserve any such names as that, and you can't do that.' I says: 'Probably you are calling me after the women that you have been used to associate with all your life. It comes natural; but remember you cannot call me any such names as that.' He spoke of his property at

Washington Gardens, and says: 'Look at the wealth ahead of you.' I says: 'The wealth ahead of me don't license you to call me any such names.' He says: 'If you leave me you will go to the poor-house.' It was no use for me to talk to him at all about it. He behaved himself for a little while. About a week or so he behaved himself; kind of stayed sober; did not drink much. He kind of thought I would do something, I guess. Then I guess he thought I would not. I don't know what it was. In the hall upstairs, anyhow, he says: 'You are a damn whore, anyhow.' Just then I leaned over the banister, and saw my niece on the stairs, and I says: 'Jennie, did you hear what he called me?' She says, 'Yes, I did.' He says: 'Oh, well, I will take it back.' . . . When he thought she heard him, he says: 'I will take it back.' I says: 'You better take it back.'" It appears that there was no spare bed in the house at the time she barred him out of her room, their spare bed-room not being fully furnished at that time. On cross-examination plaintiff said: "The time there was a fuss about the quilts was the first time he called me names. . . . When I told him he could not come in he says: 'I want some quilts.' I says: 'I have none in here only what is on my bed, and if you had come home sober, sir, you could come in, and have quilts where you belong.'" Being asked by her counsel if she ever did anything to provoke him or seek quarrels with him, she answered: "He would come home drunk, you know. I would say: 'Now, Dave Waldron, now you are drunk again.' I would go on, and I said: 'Now you know very well the promise you made me, and the condition upon which I married you, and you have broken that promise, and you know you took an oath to me, and you kept sober before you married me for months.' . . . If he would come home drunk, and fall in the door-way, and lay in the hall, so we could not get him up, when my niece invited company, we had to send over to Mansfield to take him off the floor. He has fallen in the front door so the whole house shook. When he would come home so, I was a little bit provoked, you know. Then I would think it was my time to talk to him, and tell him what he was doing. He could not enjoy his money, and when he would get to drinking he would kill himself. I would tell him about his soul, and the hereafter. Then he would answer me in the most terrible blasphemous remarks when I would begin anything about religious subjects. . . . At one time I don't know as he had much liquor. . . . I made the most solemn appeal to him in the dining-room. When I got through he knew I was right. . . . When I made this eloquent appeal to him, he picked up his head, and said: 'You are a d— fool.' My appeal was all right, but it was foolish to apply it to him. . . . All I would do I would talk to him, you know, and sometimes I would scold him. . . . I says: 'Didn't your first wife ever scold you about your actions generally, and try to make you do what was right? Didn't she scold like I do?' He said: 'She scolded louder and faster than you do, but she did not spread it on quite so thick,' meaning it was not to the point as mine was."

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Mrs. Albee, the niece, testified: "I think it was after Christmas that his language and conduct was most vile,—well, almost up to the time, and after, she applied for a divorce."

So it seems that the plaintiff and her niece remained in the house with him, and that the quarreling was kept up after the suit for divorce had been commenced, the niece remaining until she was married, nearly three months after the suit was commenced. Being asked how often she heard him call plaintiff vile names before the divorce suit was commenced, Mrs. Albee answered: "I never heard him call her out of her name except this once. I heard him call her a whore but once. I never heard him call her a bitch. . . . I remonstrated with him. I was very indignant, and I spoke to him about his conduct."

Plaintiff admitted that the defendant was an honest man in all his business transactions, and that he liberally supplied her and her children and niece. She complained of no unkindness when he was sober, and feared no physical violence from him when he was drunk. In their quarrels she appears to have been more than his match, though she could not descend to answer his profanity and obscenity in kind. While drunkenness was no excuse for calling her vile names under any circumstances, yet the injurious effect thereof upon her mind should not have been, and probably was not, so bad as if he had deliberately called her by those names when he was sober. No mental suffering produced by his drunkenness merely can be considered, because not complained of. *Haskell v. Haskell*, 54 Cal. 262.

The mental suffering caused by his words alone can be considered in this case.

The finding that defendant called the plaintiff a whore and a bitch in the presence and hearing of other people should be qualified by the admitted facts that none but the niece and her caller and the colored servant heard him call her out of her name; and that he was not aware that even they heard what he said, or that the caller upon the niece was in the house at the time. This seems material, as tending both to modify the otherwise apparent motive of the defendant, and to mitigate the alleged painful effect upon the mind of the plaintiff; as without this qualification it would appear that the defendant intended to defame the plaintiff in public estimation, which would indicate a worse motive on his part, and produce a more painful effect upon her mind, than would the mere intention privately to annoy her, or to revenge himself for the fancied wrongs of having been barred out of her room and threatened with the police. While the defamatory, obscene and profane language of the defendant was wholly unjustified, inexcusable and unmanly, it may be said that the conduct of the plaintiff was at least unkind and censorious, and tended to provoke anger and harsh language on the part of the defendant. It probably resulted from her ill temper, bad judgment and a mistaken view of the duty of a wife under the circumstances. She probably deemed it her duty, by means of censure, reproach and scolding, to make her husband "do what was right," and it seems that she faithfully, in season and out of season, applied such means. In this I think she was mistaken.

Intemperate husbands are seldom, if ever, reformed by such treatment, whereas uniform kindness may often prove effectual, and never harmful; but should kindness fail, and the intemperance of the husband become habitual, the wife will be entitled to a divorce on that ground alone. I think the judgment should be reversed, and the court below directed to render judgment for the defendant on the findings, without costs, and that the appellant pay his own costs of the appeal.

We concur: **Belcher, C. C.; Foote, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to render judgment for the defendant on the findings, without costs, and that the appellant pay his own costs of the appeal.

I dissent: **Paterson, J.**

McFarland, J., dissenting:

I dissent. It is possible that the judgment in this case might be reversed for want of sufficient proof of facts, but I dissent *in toto* from the views expressed in the opinion adopted by the majority of the court on the subject of extreme cruelty. The opinion goes back to the old cases of *Morris v. Morris*, 14 Cal. 80, and *Povelson v. Povelson*, 22 Cal. 862, and adopts their doctrine that no conduct of a husband towards a wife constitutes extreme cruelty unless it injures bodily health or endangers physical safety. It treats a woman as having only a bodily structure and physical organs like one of the lower animals, and utterly ignores her mental, moral and emotional nature. Those cases, following musty decisions in the past, when women had few civil immunities which man was bound to respect, were determined before the present Statutory Law of California upon the subject, and at a time when human rights, as human rights, were but dimly recognized, even in these free United States, and when extreme, and in some cases wholesale, violation of personal liberty was common against all except one class, viz., white male citizens. The theory of those cases is that a husband may heap all sorts of wrongs upon a wife short of beating or threats of personal violence; that his conduct towards her may be a continuous series of acts of insult and contumely; that he may continuously call her vile names, and unjustly and falsely charge her in the presence of others with indecent acts and base practices, so that she is ashamed to look her neighbors in the face, and unable to find aught in life but misery,—so that the common voice of mankind would call him cruel beyond all patience; and yet, as long as her physical constitution can bear up under the strain, she can get no redress. She must be a wreck before she can be rescued. This doctrine makes legal cruelty depend, not on the misconduct of the husband, but on the endurance of the wife, not on the guilt of the wrong-doer, but on the vitality of the victim. The anguish of the mind must have eaten through the flesh, and exhibited itself in bodily disease, before there can be any legal evidence of cruelty. But some women, like some men, have inherited from sturdy ancestors physical constitutions so robust, with bone and blood, and muscle and

nerve, and heart and lungs so charged with vitality that the woes of a Lear would not wear out the machinery or obstruct the currents of healthy physical life. Must such a woman suffer on forever, and only the weak, who faint at a gentle reproach, be relieved? There is not, in my opinion, any necessity whatever to follow *Morris v. Morris* and *Povelson v. Povelson* as authorities; for since they were decided the Statute Law has been changed, and changed, I think, for the express purpose of obliterating those decisions. At that time the Statute merely made "extreme cruelty in either party" a cause of divorce, without any attempt to define or describe it. *Hitt. Gen. Laws*, par. 2416. But the Code has added the following: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." Civil Code, § 94. Here "bodily injury" and "mental suffering" are mentioned as two entirely distinct things, and each by itself as constituting extreme cruelty. If the Legislature had merely meant bodily injury caused by mental suffering, there would have been no occasion for the legislation at all, because that was included clearly in the decisions in the *Morris* and *Povelson* Cases. It is entirely evident, therefore, to my mind, that both in a philologic and historical view the language of section 94 means that the infliction of grievous mental anguish alone constitutes legal cruelty. It is said that the definition of extreme cruelty in section 94 is defective. Of course there cannot be a perfect definition of such a thing. The qualities of human actions cannot be designated by accurate lines, as fields can be by fences. Can grievous bodily injury be accurately defined? It is said that the infliction of grievous suffering does not imply wrong or injustice. But section 94 is dealing with extreme cruelty, and uses that phrase. And does not "extreme cruelty" itself imply wrong and injustice? And while extreme cruelty of either kind cannot, in the very nature of things, be accurately defined, there is often misconduct so far outside of and beyond that produced by the ordinary weaknesses and passions of men that the common judgment of mankind pronounces it extremely cruel. Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend, as most cases depend, upon the sound sense and judgment of juries and courts. Some divorces are no doubt obtained upon insufficient proof; but it must be remembered that one reason why more divorces are granted than formerly is because formerly wives had no remedy for many outrageous wrongs.

A petition for rehearing was subsequently filed, and on September 1, 1890, **Works, J.**, on behalf of the court, delivered the following response thereto:

A rehearing is denied. The petition in this case is discourteous and disrespectful in some of its language. However individual members of the court may regard such conduct on the part of attorneys as affecting them, personally, it is an offense against the court that cannot be allowed to pass without rebuke. An attorney who has a sufficient understanding of his high

calling, and the respect due to the court, as well as the respect due to his profession, should not so far forget himself as to use such language. Because of the important question presented we have carefully considered the points made, notwithstanding the manner in which they were presented in the petition. But, having done this, out of consideration for the better feelings of counsel who filed it, as well as to prevent a recurrence of a like offense, the objectionable language should not be perpetuated as a part of the records of the court. It is therefore ordered that the petition for a rehearing be and the same is hereby stricken from the files.

We concur: **Thornton, J.; Fox, J.; Sharpstein, J.**

Beatty, Ch. J., dissenting:

I did not participate in the decision of this case, owing to want of opportunity to examine it within the time allowed for a decision. Since the petition for rehearing, I have considered it carefully, and I am unable to concur in the judgment or the order refusing a rehearing. I think section 94 of the Civil Code defines extreme cruelty, and that by such definition it consists of either: *first*, the infliction of grievous bodily injury; or, *second*, the infliction of grievous mental suffering. This definition was, I think, intended by the Legislature to be complete, and this conclusion is not invalidated by what must be conceded to be true, viz.: that the acts or words causing

the mental suffering or bodily injury must be not only intended but unjustifiable. These qualities of the acts of cruelty are sufficiently implied in the word "infliction." In this view the finding of the superior court comes up to the law, and nothing more can be required. The testimony, in my opinion, is sufficient to support the finding. It is possible that the application of the epithets testified to by a man to his wife in the presence of third parties might not cause his grievous mental suffering, but, on the other hand, they probably would; and in this case the superior court has found that they did, in fact, cause such suffering, unless this conclusion is negated by the other fact found that her bodily health was not affected. But this, in my opinion, was not essential as a test of the degree of suffering contemplated by the Statute. While dissenting from the judgment of the court and the order refusing a rehearing, upon the grounds thus briefly indicated, I concur in the view that some of the language employed by counsel in their petition for rehearing was intemperate, and improper to go upon the records of the court.

McFarland, J.:

I dissent from the order denying a rehearing, and adhere to the views expressed in my former dissenting opinion. I concur in the views of the majority of the court as to the objectionable language used in the petition for rehearing.

NEW YORK COURT OF APPEALS.

Re George W. McLEAN, Receiver of Taxes, *Resp't.*,

John H. JEPHSON, *Appt.*

(....N. Y.....)

1. To authorize an assessment of taxes against a nonresident doing business in this State, as provided for by Laws 1855, chap. 87, §1, it is indispensable that the person assessed shall in fact have money invested in a business carried on by him in this State, either as a principal or partner.
2. Assessors cannot acquire jurisdiction to make assessments by determining that they have it; their authority to act must

always depend upon the existence of the jurisdictional facts described in the Statute by which their authority is conferred and if they act without jurisdiction their assessment is void and open to attack in any proceeding taken to enforce payment of it.

3. The question whether or not persons or property are assessable under the statutes of a State is jurisdictional, and is always open to investigation when the authority to make an assessment is assailed.
4. A nonresident coming into a State for business purposes and having no property in the locality where he stops, and no just reason to suppose that he will be taxed there, is under no obligation to examine the assessment lists of that locality, and cannot be held liable for

NOTE.—Assessors of taxes; jurisdiction of, depends on statute.

The decision of assessors upon the question of residence, and consequently of jurisdiction, is not conclusive, but is open to review, and becomes a question of fact for the jury. *Dorn v. Fox*, 61 N. Y. 285; *Dorn v. Backer*, 61 N. Y. 261; *Re New York Catholic Protectors*, 77 N. Y. 842.

If they have jurisdiction of the person and the property of the individual assessed their acts are final, and if they have not their acts are void. *National Bank of Chemung v. Elmira*, 58 N. Y. 49; *Herman v. Ulster County*, 71 N. Y. 485.

Their jurisdiction depends on the law defining their powers, and the facts of cases which bring

them within its terms. *Preston v. Boston*, 12 Pick. 7; *Freeman v. Kenney*, 15 Pick. 44; *Lyman v. Fiske*, 17 Pick. 231; *Hebrew Free School Assn. v. New York City*, 4 Hun. 446; *Hays v. Pacific M. S. Co.* 58 U. S. 17 How. 598, 15 L. ed. 254; *Dorwin v. Strickland*, 57 N. Y. 486; *Bell v. Pierce*, 51 N. Y. 12; *Huribut v. Green*, 42 Vt. 318; *Gregory v. Bugbee*, Id. 480.

They cannot confer jurisdiction on themselves by wrongfully deciding that they have it. *National Bank of Chemung v. Elmira*, 58 N. Y. 53; *Weaver v. Devendorf*, 8 Denio, 116; *Prosser v. Seacor*, 5 Barb. 608.

If the jurisdictional fact does not exist, their determination that it does exist does not establish their jurisdiction. *Re New York Catholic Protectors*, 77 N. Y. 842. See 1 *Desty*, Taxn. 422.

an erroneous assessment if he neglects to examine the roll and obtain a correction of the error therein.

(October 7, 1890.)

APPEAL by defendant from an order of the General Term of the Supreme Court, First Department, affirming an order of the Special Term, committing him to the county jail until payment by him of certain taxes assessed against him for personal property. *Reversed.*

The facts are fully stated in the opinion.

Mr. F. L. Minton, of the firm of **Douglas & Minton**, for appellant:

If the assessors were without jurisdiction, the assessment was void and the appellant has the right to resist this proceeding to collect the tax without his having taken any proceedings to review the assessment.

Cooley, Taxn. 2d ed. p. 751; *Mygatt v. Washburn*, 15 N. Y. 316; *Whitney v. Thomas*, 23 N. Y. 281; *National Bank of Chemung v. Elmira*, 53 N. Y. 49; *Dorwin v. Strickland*, 57 N. Y. 492; *Dorn v. Backer*, 61 N. Y. 261; *Stewart v. Chrysler*, 1 Cent. Rep. 549, 100 N. Y. 378; *McCoy v. Anderson*, 47 Mich. 502; *Zink v. McManus*, 49 Hun, 583.

If the jurisdictional facts do not exist, the determination of the assessors that those facts do exist does not establish jurisdiction in them.

Re New York Catholic Protectory, 77 N. Y. 342; *Dorn v. Backer*, 61 N. Y. 261.

There should be no obligation on his part to examine the assessment rolls to determine whether the assessors think the facts conferring the jurisdiction exist in his case, when he himself knows the facts do not exist.

Re Douglas, 48 Hun, 318; *St. Paul v. Merritt*, 7 Minn. 253.

The constitutional provision that no person shall be deprived of life, liberty or property without due process of law applies to proceedings for the assessment and collection of taxes.

Stuart v. Palmer, 74 N. Y. 183; *Rensen v. Wheeler*, 7 Cent. Rep. 691, 105 N. Y. 573.

Mr. John G. H. Meyers, for respondent:

If jurisdiction to impose the tax existed, it is too late now to reduce the amount of the tax, or inquire into its fairness.

Re McMahon, 67 How. Pr. 113, affirmed, 34 Hun, 634; *People v. Wall Street Bank*, 39 Hun, 525; *McMahon v. Palmer*, 3 Cent. Rep. 183, 102 N. Y. 176-190.

Jurisdiction existed to impose the tax.

Laws 1855, chap. 87, § 1, and general term opinion in this case, 41 Hun, 470.

Ruger, Ch. J., delivered the opinion of the court:

This was an application to the Supreme Court by the Receiver of Taxes in the City of New York, under section 857 of the City Charter (chap. 410, Laws 1882), for a warrant to enforce a payment of a tax upon personal property by a nonresident. The section authorizing the proceeding reads as follows: "In case of the refusal or neglect of any person to pay any tax imposed on him for personal property, if there be no goods or chattels in his possession upon which the same may be levied by distress and sale according to law, and if the property assessed shall exceed the sum of \$1,000, the said receiver, if he has reason to

believe that the person taxed has debts, credits, choses in action or other personal property, not taxed elsewhere in this State, and upon which levy cannot be made according to law, may thereupon in his discretion make application, within one year, to the court of common pleas of the county, or the supreme court, to enforce the payment of such tax."

The application was based upon a petition, alleging the imposition of the tax upon the defendant in the year 1883, as a nonresident doing business, and having capital invested therein, in the City of New York. An order to show cause why the relief asked should not be granted was issued and served upon the defendant, and upon the return day thereof he appeared and showed that he was at the time the alleged assessment was made, and, for a long time previous thereto had been, a resident of the State of New Jersey, and had never transacted business in the City of New York, except as the agent of a corporation organized and doing business in the State of New Jersey, as a manufacturer of carriages; that the company had a wareroom in the City of New York for the exhibition and sale of its own manufactures, and that defendant had charge of such wareroom as its agent. These facts were undisputed, and must be considered as conclusively established in the further consideration of the case.

The authority of the assessors to make the assessment in question is claimed to have been derived from section 1, chapter 87, of the Laws of 1855, which reads as follows: "All persons and associations doing business in the State of New York as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and not residents of this State, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this State, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong."

This Statute clearly defines the limits of the power possessed by the assessment officers, and their jurisdiction depends upon the existence of the facts stated in the Statute. To authorize an assessment under this Statute, it is indispensable that the person assessed shall, in fact, have money invested in a business, carried on by him in this State, either as a principal or partner. Assessors cannot acquire jurisdiction to make assessments by determining that they have it, and their authority to act must always depend upon the existence of the jurisdictional facts described in the Statute. The facts stated conclusively show that the defendant was not doing such business in the City of New York, either as a principal or a partner, and that he did not have any money invested in the business there carried on. That business was carried on by the corporation of which the defendant was agent, and the money invested in it was the property of that corporation. The court below conceded that if the facts stated had been known to the tax commissioners they could not lawfully have made an assessment against the defendant; but it was claimed that the act of the commissioners in making it was judicial and could not be assailed collaterally, and that the defendant should have adopted

some means, either by appearing before the tax commissioners, when they sat to review assessments, and urged his non-liability to taxation, or, by certiorari from the determination of the assessors, raised the question of his liability.

There is no prerogative of the government which is more liable to abuse than that which authorizes it to seize and appropriate the property of the citizen for public purposes, and none which is regarded with more jealous scrutiny by the courts. The authority of its officers to exercise the powers of taxation has uniformly been carefully scrutinized and limited to the express warrant of the Statute, and cannot be extended by implication or construction. This is especially the case where its demands may be enforced by fine and imprisonment, and it would be contrary to the traditions of our people, as well as to principles of justice and law, to permit the liberty of the citizen to be jeopardized by a strained and doubtful construction of a statute. The defendant has, confessedly, been assessed upon property which he did not own, and is now threatened with imprisonment, unless he pays the illegal exaction. The only authority the tax commissioners had to assess the personal property of a nonresident was in the event that he employed it in carrying on a business in this State, as principal or partner. But the defendant has been taxed upon an investment which he never made, and upon a business carried on by other parties. This has been done upon the theory, not that he had property and was carrying on such business, but because he was negligent in failing to examine the assessment lists, and by omitting to do so, and obtaining a correction of them, has been rendered liable to the payment of a tax on property which he did not own. The property assessed could not have been taken for the payment of this tax, as it did not belong to the person against whom it was levied, and the strange anomaly is presented of an assessment against a person for property which he did not own, under an Act which authorizes an assessment only upon his property invested in business and in respect to property which could not be taken in payment for the tax, although such property alone is pointed out by the Act as the fund from which the tax is to be collected. Upon such a foundation is built up a personal claim against the alleged taxpayer, which is sought to be enforced by imprisonment. The ground upon which it is claimed to be sustainable is that the tax commissioners have decided that he was a taxpayer, and, in so doing, acted judicially, and therefore their determination cannot be attacked collaterally. It is argued that, public notice by publication having been given that the assessment rolls of New York City had been completed and would be open for inspection and review at a certain time and place in that city, and the defendant having failed to examine them and to procure a correction of the erroneous assessment, was precluded from questioning the validity of such assessment in this proceeding.

We are of the opinion that the defendant was under no obligation to examine the assessment lists of the City of New York. It is not claimed that the notices published by the assess-

ors contained any intimation that an assessment had been made against the defendant, or that he had personal notice in any other form of the making of such assessment. There was no law making the defendant liable to taxation in New York, and no foundation for a claim that he knew, or had any reason to suppose, that an assessment had been made against him. He was under no greater obligation to examine the assessment lists of New York City than any other of the thousands of citizens of other States who visited that city during the year 1888. A person subject to taxation in a particular place may well be held liable for an erroneous assessment, if he neglects to examine the rolls and obtain correction of errors therein; but a nonresident having no taxable property in such locality, and no just reason to suppose he has been taxed, is under no such obligation. He may safely rely upon his immunity from taxation in any place where he does not reside, and is not compelled to anticipate and thwart the act of public officers proceeding without authority of law in such places. The published notices of the completion of assessment rolls, required by the Statute, are intended for the information of taxpayers within the jurisdiction of the particular assessment officers, and can have no operation upon non-residents of such locality, who have no property liable to taxation therein.

We think the authorities are clearly adverse to the decision of the court below. It is conceded that the question depends upon the fact whether the assessors had jurisdiction to make the assessment. If they had not then the assessment is, confessedly, void. Assessors are ministerial officers and do not generally act judicially in the performance of their duties. Having, however, acquired jurisdiction of the person and subject matter liable to be taxed, certain questions may arise which are necessarily judicial in character, and in respect to such questions their action is necessarily final, unless their determinations be directly assailed. Instances of such questions are the fixing of the value of property assessed, and determining the extent of a claim to exemption where the person assessed is liable to be taxed. *Weaver v. Descendorf*, 8 Denio, 118.

The authorities in this State seem to be quite uniform to the effect that the question whether persons or property are assessable under the Statutes, is a jurisdictional question and is always open to inquiry when the authority to make an assessment is assailed.

The case of *Dorn v. Backer*, 61 N. Y. 261, cannot, we think, on principle, be distinguished from this case. That was an action against the assessor to recover damages for wrongfully assessing the plaintiff's farm in the Town of Ava. The farm lay partly in Ava and partly in Boonville. It was assessable in the township where he resided. He had formerly occupied a house upon that part of his farm lying in the Town of Ava. Subsequently he removed into a small house built on the land in Boonville and had apparently resided there some years. It was there declared: "It may be said now to be settled that assessors cannot acquire jurisdiction by deciding that they have it. Before assessing the plaintiff for taxation in the Town of Ava, it was essential that he

should be a resident of that town, and if not they had no jurisdiction." It was held that the action was sustainable.

In *National Bank of Chemung v. Elmira*, 58 N. Y. 49, the action was to recover damages for the conversion of plaintiff's property. The defendant justified under an allegation that the property was taken by its collector to satisfy a tax duly imposed upon the capital of the bank by the assessors of the city. Under the law (chap. 761, Laws 1866), the capital of a bank was not assessable. The late *Chief Judge* Church, writing the opinion of the court, says: "It is claimed that the assessors had jurisdiction to make the assessment; that their act was judicial and, although erroneous, is conclusive until reversed by a direct proceeding instituted for that purpose. This proposition cannot be predicated of this case, either in fact or in law. Some of the duties of assessors are judicial in their nature, and as to them, while acting within the scope of their authority, they are protected from attack, collaterally, to the same extent as other judicial officers; but they are subordinate officers, possessing no authority, except such as is conferred upon them by statute, and it is a well settled and salutary rule that such officers must see that they act within the authority committed to them. . . . So when their right to act depends upon the existence of some fact, which they erroneously determine to exist, their acts are void. . . . This court held in 15 N. Y. 816, that if the assessors erred in determining whether a person was a taxable inhabitant of a town, they did so at their peril and were liable to an action by the party aggrieved. This was upon the principle that the fact, although judicial in its nature, and requiring the exercise of judgment, was nevertheless necessary to confer jurisdiction, which could not be conferred by an erroneous decision."

The case of *Mygatt v. Washburn*, 15 N. Y. 816, referred to, was an action by the taxpayer against the assessor for an illegal assessment. The plaintiff had been a resident of the Town of Oxford until the last of May, when he removed to the County of Oswego. The time for making assessments in Oxford covered the months of May and June, and the plaintiff's name was entered on the assessment lists in May. It was held that the status of the taxpayer as to residence did not become irrevocably fixed until after July 1. *Judge* Denio says: "The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property, they acted without authority. They are therefore responsible to the plaintiff for the damages which ensued. It was not, in the view of the law, an error of judgment."

9 L. R. A.

In view of the fact that the authorities on this point are all uniform, we will only refer to *Re New York Catholic Protectory*, 77 N. Y. 842, because it recognizes as an established principle that the determination by assessors that a person or his property is taxable, is jurisdictional, and that an error made by them in such determination against the taxpayer is fatal to the validity of the assessment. *Judge* Rapallo, writing the opinion of the court, says: "By the Act amending their charter, section 3, chap. 647, Laws of 1866, it is provided that 'the real and personal estate belonging to and used for the charitable purposes of said association shall be exempt from taxation.' That the land upon which the tax in question was imposed belonged to the petitioners, and was used for such charitable purposes, is alleged in the petition and not controverted in any manner. The assessors consequently had no jurisdiction to assess that land; and even if they be deemed to have determined as a fact that the land was not so used as to bring it within the exception, their determination was not conclusive, the fact being one upon which their jurisdiction depended. If the jurisdictional fact did not exist, the determination of the assessors could not establish jurisdiction in them."

The assessment officers in this case had authority to assess the property of a nonresident, doing business in this State as a principal or partner having money invested in the business, and in such case only. Their authority to assess depended upon the fact that he was engaged in business, and not upon appearances which might be deceptive and uncertain. The defendant, concededly, was not a principal or partner in any business conducted in this State, and had no money invested in such business. His principal might have been engaged in such business, and might have been liable to taxation; but even as to that there is some question. *People v. Commissioners of Taxes*, 23 N. Y. 242.

But the defendant was not only not liable to be assessed, but the case does not show that there were any reasonable grounds for supposing that he was engaged in a business making him liable to taxation. He was a nonresident, and did not own the property assessed, and did not appear to be carrying on business in any capacity except as the agent of a responsible principal located in another State. Without discussing other questions in the case, which might possibly be reviewed upon the record, we are, for the reasons stated, of the opinion that the orders of the courts below should be reversed.

The orders of the General and Special Terms should be reversed, and the application of the petitioner denied, with costs in all courts.

All concur.

ALABAMA SUPREME COURT.

ALLEN *et al.*, *Appts.*,
v.
INTENDANT, etc., OF LA FAYETTE *et al.*

(....Al....)

1. Power to purchase and hold property for the benefit of the town, and to maintain public schools, and to this end to levy an annual tax, will authorize town authorities to purchase a school-house.
2. Municipal corporations may create debts in the accomplishment of any object clearly within their power and reasonably essential to the attainment of their charter purposes; and such debts may be evidenced by the drawing of warrants therefor upon disbursing officers in favor of the creditors.
3. The power to borrow money is not incident to municipal corporations, and to exist it must be granted by express legislation or it must be supported by a legislative investment of power coupled with the imposition of duties which are incapable of exercise and performance without the borrowing of money.
4. Warrants drawn by municipal authorities for the repayment of money borrowed by the corporation without authority are not enforceable obligations, although the money was expended for an object for which the corporation had power to contract a debt.
5. A municipality which has received money borrowed by its officers without authority, and applied it to the purchase of property which it was authorized to buy and hold, and which was reasonably necessary to the exercise of expressly granted functions, is liable to the lender for money had and received where the want of power to borrow the money arose simply from a failure to grant it, and not from a prohibition to exercise it.

(May 20, 1890.)

APPEAL by complainants from a decree of the Chancery Court for Chambers County dissolving a preliminary injunction restraining the payment of certain warrants drawn upon the town treasurer. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. N. D. Denson and Tompkins & Troy for appellants.

Messrs. Samford & Chilton for appellees.

McClellan, J., delivered the opinion of the court:

1. The Intendant and Councilmen of the

Town of La Fayette, on or soon after March 18, 1839, purchased from one Schuessler a brick college building and grounds, situate in La Fayette, and took a quitclaim deed of the property to themselves, the said Intendant and Councilmen. Only a small part of the purchase money was paid out of the funds of the Town, and the balance, about \$1,800, was borrowed from Mrs. S. A. Frederick by the town authorities and paid to Schuessler. For the repayment of this loan, warrants were regularly drawn against the treasury of the Town for the sums of \$659.40, payable January 1, 1890, and \$667.72, payable March 1, 1890, respectively, and delivered to Mrs. Frederick. The present bill is exhibited by resident property owners and taxpayers of the Town of La Fayette, and seeks to enjoin the payment of said warrants on the grounds (1) that the municipality of La Fayette was without authority to purchase the school-house or college building, and that the money was loaned by Mrs. Frederick with full knowledge that it was to be used in that behalf, and warrants taken by her with full knowledge that it had been so applied; and (2) that the Intendant and Councilmen of the Town of La Fayette had no power under its charter to borrow money for any purpose.

2. Assuming that the theory of the bill as to the powers of the municipality, and as to the character of the transaction between the Intendant and Councilmen on the one hand and Mrs. Frederick on the other, is sound, the right of these complainants to maintain the suit is, as a general proposition, fully supported by the authorities, and not seriously controverted by the appellees. 2 High, *Inf.* § 1237, *et seq.*; 2 Dillon, *Mun. Corp.* § 914 *et seq.*; 1 Pom. *Eq. Jur.* §§ 258-260, 270, 273; 10 *Am. & Eng. Encyclop. Law*, 963.

3. The first ground upon which the prayer for relief is based is in our opinion untenable. The charter of La Fayette empowers the municipal authorities to purchase and hold, or dispose of, for the benefit of the Town, real, personal and mixed property, to the value of \$15,000. Power is also conferred to maintain public schools within the Town; and to this end, as well as to defray the ordinary expenses of municipal government, the corporate authorities may levy an annual tax not exceeding one half of 1 per cent on the assessed value of the property thereof. Acts 1880-81, p. 420; Acts 1888-89, p. 1081.

We do not doubt that under these grants of power the municipality of La Fayette was

NOTE.—*Municipal corporations; power to borrow money.*

The power to borrow money or to create a debt is not a necessary incident of the power to buy grounds and build school-houses, and hence should not be implied against the spirit and policy clearly manifested by contemporaneous legislation as well as by the Organic Law in force when the legislation giving such power was enacted. *Waxahachie v. Brown*, 67 Tex. 519.

Under power conferred upon a city by a general provision "to borrow money for any purpose within its discretion," without reference to any limit in amount, it cannot borrow for a school-house more than a certain sum named as the limit in a § L. R. A.

statute specially conferring power to borrow for that purpose. *Read v. Plattsburgh*, 107 U. S. 568, 27 L. ed. 414.

When a municipality had power to borrow money if certain facts existed, and the Legislature had manifested an intention to invest certain officers with authority to determine the existence of such facts, and they have solemnly asserted their existence, then the corporation has been held to be estopped from contesting its obligations. *State v. Atlantic City*, 8 Cent. Rep. 605, 49 N. J. L. 558; *Mutual Ben. L. Ins. Co. v. Elizabeth*, 42 N. J. L. 236.

Constitutional restriction of the power of municipal corporations to borrow money. See note to *Wells v. Salina* (N. Y.) 7 L. R. A. 759.

fully authorized to purchase and hold a school-house, such as the present bill alleges to have been purchased by the Intendant and Councilmen of the Town. 3 Dillon, Mun. Corp. § 561 *et seq.*

4. The taxing power is conferred on municipal corporations, of course, for the purpose of providing means with which to meet their current expenses, incurred in the performance of the duties resting on them as governmental agencies; and it may ordinarily be assumed the means thus provided are adequate to the ends in view. Yet, in the nature of things, it is impracticable, if not indeed impossible, for the powers of such, or any, corporations to be exercised without incurring liabilities beyond the funds immediately in hand, and thus anticipating corporate revenues. In recognition of a necessity of this kind, it may be said that the law has come to be well settled to the effect that municipal corporations may create debts in the accomplishment of any object clearly within their powers, and reasonably essential to the attainment of their charter purposes. Custom of long standing and universal adoption, if not express law, has sanctioned the evidencing of such debts by the drawing of warrants therefor on disbursing officers in favor of creditors. Applying these principles to the exigencies which presented themselves to the Intendant and Councilmen of La Fayette, when, in their judgment, the good of the Town demanded the purchase of a school-house, we do not question that it was competent for them to buy the property which they did buy on a credit, and thus incur a debt to the extent of the price they were to pay, the value of the property as measured by the price not being in excess, when added to the value of other property already owned by the corporation, of \$15,000, and the property being of a class and character appropriate to corporate uses in the discharge of legitimate municipal functions. Nor do we doubt that, for a debt thus created, warrants might legally have been drawn on the town treasury, payable at stated dates to the vendor. Had this been done, these evidences of the indebtedness might have been sold and transferred by the vendor to Mrs. Frederick, and she thereby subrogated to all the rights of the first holder. The case alleged by the bill, and admitted in the answers, differs from the case hypothetically stated in this, and only in this, in substance and effect: that Mrs. Frederick, instead of paying the money to the town creditor, paid it to the Town itself, and the latter immediately, and as upon prearrangement known to all parties, paid it to Schuessler and in consideration thereof received a conveyance of the college building. Slight as the difference appears on its face to be, it has, in our opinion, the important operation of converting the transaction into a loan of money by Mrs. Frederick to the corporation, and left in her hands a contract for its repayment which, as such, she cannot enforce for the reason that this contract is *ultra vires* the Town of La Fayette. Its charter nowhere expressly confers power on the corporate authorities to borrow money for any purpose or under any circumstances. And whatever may be the decisions of other courts, and however variant may be the judicial opinion in other jurisdic-

tions on the point, the doctrine is thoroughly well settled in Alabama that the power to borrow money is not incident to municipal corporations, and that, if it exists in any instance, it must be by the force of express legislative grant, or at least by force of legislative investment of power coupled with the imposition of duties which are incapable of exercise and performance without the borrowing of money. We need not enter upon a discussion of the reasons which underlie this doctrine. They are many and cogent, and most clearly stated by Judge Dillon, Justice Bradley and in former adjudications of this court which establish the proposition. 1 Dillon, Mun. Corp. §§ 117, 126; *Nashville v. Ray*, 86 U. S. 19 Wall. 475 [22 L. ed. 164]; *Simpson v. Lauderdale County*, 56 Ala. 64; *Wetumpka v. Wetumpka Wharf Co.* 68 Ala. 611.

5. The Intendant and Councilmen of La Fayette had no authority, therefore, to borrow this money, nor had they any authority to draw the warrants which were drawn and delivered to Mrs. Frederick. They were the trustees for the inhabitants of the Town. Their action in excess of the power with which the trust relation clothed them, and in violation of the duties they owed to their *cestuis que trustent*, the present complainants, among others, was of no manner of efficacy in fixing a liability on those for whom they thus usurped the power of acting. The warrants in the hands of Mrs. Frederick are as if they were not and had never been. Neither the municipality of La Fayette nor any of its officers or agents is under any obligation, legal, equitable or moral, to pay those warrants or to fulfill the contract out of which they sprung. But back of that contract, and back of those warrants, there is, on the facts presented by the bill and accentuated by the answers, not only a moral but a legal liability resting on the municipality of La Fayette, and on its officers, to repay the money which came from Mrs. Frederick and has been used by the corporation for authorized corporate purposes. In other words, the Town of La Fayette is liable as upon an implied assumpsit, not under, but wholly apart from, the unauthorized contract, and not for the amount its officers borrowed from Mrs. Frederick, but for the amount of her money which they received and applied to the purchase of a house which the charter authorized them to buy and the Town to hold, which was reasonably necessary to the exercise and performance of expressly granted and imposed functions and duties, and which the use of her funds had enabled the corporation to acquire and devote to its legitimate purposes.

The authorities are not uniform to this proposition. It is, however, believed to be eminently sound in principle, and has the support of some of the most distinguished law-writers, and of courts of marked ability and learning. It is thus formulated by Mr. Brice, with general reference to both public and private corporations: "Persons who have in any way advanced money to a corporation, which money has been devoted to the necessities of the corporation, are considered in chancery [and also, it would seem to follow, in the equitable action for money had and received at law] as creditors of the corporation to the extent the loan

has been expended;" and, in support of the doctrine thus stated, he cites many cases in which corporations, without any authority, expressed or implied, to that end had borrowed money and been holden, although the contract itself was wholly void, to account for so much of it as had been expended in furthering the legitimate objects of the concern. *Green's Brice, Ultra Vires, 724 et seq.*

And in this connection the American editor of the work cited observes: "In the United States the defense of *ultra vires*, interposed against a contract wholly or in part executed, has very generally been looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defense; in others, the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases the doctrine of estoppel *in pais* has been applied to exclude the defense." And many American cases are cited which support one or the other of the positions stated as being taken by the courts of this country in respect to private corporations. In regard to municipal corporations, the opinion of *Judge Dillon* manifestly is in line with the position we have taken. We believe this to be a correct formulation of his view of the law on the point under consideration, as gathered from his inestimable work on *Municipal Corporations*: That municipal corporations are liable to action of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects, through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters or some other law bearing upon them, or are *malum in se*, or violative of public policy. 1 *Dillon, Mun. Corp.* §§ 126, 132, 133, 459-465; 2 *Dillon, Mun. Corp.* §§ 936-938. Thus in a note to section 126 it is said: "If money is improperly borrowed in advance of liabilities actually created, and reaches the municipal treasury and is expended by direction of the governing body for authorized municipal objects, the municipality may then . . . be liable in a proper action or suit; but the action should be, we think, for money had and received, or by suit in equity, and not upon the invalid bonds." And under section 935 it is said that "where the corporation receives and retains the consideration of an *ultra vires* contract, it may be liable upon an implied assumpsit in respect to such consideration." And the opinion of *Chief Justice Field*, in a case where the subject underwent very thorough examination, is quoted approvingly to the effect that "the doctrine of implied municipal liability applies to cases where money or property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to

restore it, or if used by her, to render an equivalent to the true owner from the like general obligation; the law, which always intends justice, implies a promise." *Argenti v. San Francisco*, 16 Cal. 255.

Justice Miller, speaking of cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*, observes: "But even in this class of cases, the courts have gone a long way to enable parties who have parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money, specifically, or as money had and received to plaintiff's use." *Salt Lake City v. Hollister*, 118 U. S. 256 [80 L. ed. 176]. To a like effect are the following cases: *Primerica v. San Francisco*, 21 Cal. 862; *Clark v. Saline County*, 9 Neb. 516; *Marsh v. Fulton County*, 77 U. S. 10 Wall. 676 [19 L. ed. 1040]; *Louisiana v. Wood*, 103 U. S. 294 [26 L. ed. 158]; *Chapman v. Douglas County*, 107 U. S. 348 [27 L. ed. 878].

The case of *Read v. Plattsmouth*, 107 U. S. 568 [27 L. ed. 414], involved the constitutionality of a Statute of Nebraska which undertook to impart legality and vitality to certain previously issued bonds of the City of Plattsmouth, upon which money had been raised by the city, and applied to the acquisition of a lot, and the building thereon of a school-house, but which were void for the lack of charter power to issue them. The question of the constitutionality of the Statute turned upon a consideration of whether, granting the utter invalidity of the bonds as such, the city was nevertheless not bound for the money thus received and used for corporate purposes; and to this point *Justice Matthews* delivered the opinion of the Supreme Court of the United States as follows: "In the present case, the Statute does not impose upon the City of Plattsmouth, by an arbitrary Act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess of \$15,000, were void because unauthorized, the City of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a school-house on property, the title to which is confirmed to it by the very Statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement."

The case of *Gause v. Clarksville* involved the power of a municipality, invested with the ordinary corporate powers, to borrow money. The power was denied, and the bonds on which the money was borrowed were held to be void. After announcing this conclusion, *Dillon, Circuit Judge*, proceeds: "It will not validate these bonds so as to make them the basis of a recovery, even if it be shown that the money borrowed was in each instance used for the purpose for which they are recited in the deed to have been borrowed. But the plaintiff may amend and add, in respect to these bonds, counts in the nature of counts for money had and received. Adhering to the decisions of this court,—*Treat, J.*, in *Louisiana v. Wood* [affirmed on appeal, and reported in 103 U. S.

294 [26 L. ed. 158].—the present holder of the bonds will then be treated as the assignee of the original holder or payee, in respect of the money actually lent to the city; and if, after the city obtained it, the same was in fact expended for the erection and repair of wharves, or the improvement of the streets, or possibly if expended for other authorized municipal purposes under the authority of the city council, the amount advanced, with lawful interest, less payments thereon, may be recovered." *Gause v. Clarksville*, 5 Dill. 180.

We find no adjudication in Alabama irreconcilable with the doctrine of the foregoing authorities. There are indeed cases which hold that recovery cannot be had upon the *ultra vires* contract of borrowing. Such was the case of *Simpson v. Lauderdale County*. The gravamen of that action was that the county had agreed to pay a certain sum of money, and that this sum had been loaned to the county to pay for building a bridge. It was not sought to charge the county for that it had received plaintiff's money and actually used it for a legitimate county purpose. No question arose or was discussed in that case involving the implied liability of the county because of the advantage which had accrued to it and all its inhabitants from the expenditure of the plaintiff's money in a structure which the law authorized it to erect. It was not even shown what became of the money, further than that it was borrowed for the purpose of being so expended. And a right of recovery was denied because it was rested upon and involved the assumption of the validity of an undertaking which the county was without power to enter into. We do not understand the opinion to go further than this; the matter decided certainly does not, and to this extent it is in perfect accord with the position we have taken. The same view may be taken of the case of *Wetumpka v. Wetumpka Wharf Co.*, *supra*, supported by the further consideration that the uses to which the borrowed money was put in that case were themselves *ultra vires*, and not only was the contract without authority and void, but there was a misappropriation of the fund, accomplished or contemplated, so as to preclude the implication of corporate liability from corporate benefits received.

The cases of *Montgomery v. Montgomery & W. Pl. R. Co.*, 81 Ala. 76, and *Grand Lodge v. Waddell*, 86 Ala. 813, were suits by the corporations themselves on *ultra vires* contracts, and no position was taken in either which militates against the liability of a corporation at the suit of an individual for money or property which it has received upon a void contract, and used in the furtherance of its charter objects. So, too, the decision in *Eufaula v. McNab*, 87 Ala. 588, proceeds on lines wholly distinct from those upon which the case at bar must be determined, and reaches conclusions not at all in conflict with the doctrine which we think must obtain here. Nor is there anything to the contrary in the case of *New Orleans, M. & O. R. Co. v. Dunn*, 51 Ala. 128, cited to the point by appellant's counsel. The benefit there relied on to support the loan or gift of the city's credit was such only as would result, not from the use of funds or property received by the city in accomplishing author-

ized municipal ends, but from, and as merely incident to, the reclamation for private purposes of certain swamp land whereby the drainage, etc., of the city would be improved; and the refusal of the court to accord to this fact the effect claimed for it was made to rest upon the proposition that this mode of improving the drainage, etc., was not authorized or contemplated by the charter. It would be a fair inference from the opinion on the point that if the city had in fact gotten money on its unauthorized bond issue, and applied it to the improvement of its streets and sewers as directed by its charter, it would have been liable therefor.

So much for the adjudications of this court. We repeat that nothing decided in them is opposed to the view we have taken. There are some cases in other States which assert the contrary doctrine. One of them is *Hackettstown v. Swackhamer*, 37 N. J. L. 191, decided by the Supreme Court of New Jersey, which ranks among the ablest in the country. The opinion denies a right of recovery for money had and received and appropriated to corporate purposes, when it has been obtained on an *ultra vires* borrowing contract, *Beasley, Ch. J.*, intimating that the only remedy, if any, was in equity, to be subrogated to the claims of creditors whose debts had been paid with the borrowed money. Judge Dillon says of this proposition: "No necessity is perceived for so strict a doctrine." 1 Dillon, Mun. Corp. § 126, *note*.

No other cases are cited by counsel to this point than those we have referred to. Two or three others, tending in greater or less degree to support the view taken by the New Jersey court, have come under our observation in the somewhat exhaustive examination we have given this question, but our conclusion is that the weight of authority is in favor of the implied liability of municipal corporations, under the facts disclosed in this record.

We cannot perceive that the doctrine is open to objection on the ground of its supposed evil tendencies and consequences. It is shorn of all perilous possibilities by the limitations which hedge it about. It cannot obtain where the charter, or other statute operating in the premises, contains a prohibition of the power to borrow money, since a promise cannot be implied in the face of express law, but only in cases where, as in this one, there is merely a defect of power. 1 Dillon, Mun. Corp. § 461.

It involves no danger of the municipality being charged with moneys which have been appropriated by its officers to their own use, or even to the use of the corporation, except in the manner, to the extent and for the purposes authorized by the charter, as in either case the implication will not arise, and corporate liability will not attach. None of the evils which are justly supposed to result from the power to borrow money, which are not also attendant upon the capacity to incur debts, and which therefore have led to a denial of the former power unless expressly or by necessary intentment conferred, while the latter is admitted as incident to ordinary municipal functions, can possibly supervene where the money which has been borrowed has also been honestly devoted to expenditures for which the corporate au-

thorities might have incurred debt. And, to declare liability in the one instance, and deny it in the other, on the ground of evils which pertain alike to both, would be an anomaly to which we cannot subscribe. Indeed, we apprehend that the power to create debts may be productive of more evils in municipal government than could, in the nature of things, result from the doctrine we are considering, when would-be lenders of money come to understand that the return of their proverbially timid capital depends, not upon the contracts they make, but on the faithful application of the loan to certain specific objects, by persons over whom they have no control.

From every point of view, therefore, we feel safe in affirming that, under the case presented by the bill and answer,—there really being no dispute about the facts in this regard,—Mrs. Frederick has a valid demand against the Town

of La Fayette for the amount of money advanced by her, not because the corporate authorities agreed to repay it to her, but because they have legitimately used it for the benefit of the Town, in a way and to an end fully authorized by its charter. The warrants she holds are not enforceable as such, yet they truly represent the amount of her claim, and in the payment of that amount the corporate authorities would do no more than equity and justice require of them. It would be an idle and useless thing, therefore, to enjoin their payment, and exercising that discretion which may always be indulged with reference to the grant or refusal of an injunction, when substantial equity does not demand the issuance of the writ, we decline to reinstate it in this case. *McClyde v. Sayre*, 86 Ala. 458.

The decree of the Chancellor dissolving the injunction is affirmed.

INDIANA SUPREME COURT.

SUPREME COUNCIL OF THE ORDER OF CHOSEN FRIENDS, *Appt.*,

v.

FORSINGER.

(....Ind....)

1. A plaintiff in an action upon a mutual benefit certificate insuring against disability need not, in order to be entitled to recover, allege that his proofs of disability were such as satisfied the officers of the association. It is sufficient for him to show that they were such as were required by his contract and the laws of the land.

2. A by-law of a mutual insurance association requiring the presentation of claims to certain designated officers of the society, and in case their decision is adverse to the claimant that an appeal be taken to the governing body whose decision shall be final and conclusive, is valid so far as the provision for the appeal is concerned, and void so far as it attempts to oust the jurisdiction of the courts; hence a claimant may seek the aid of the courts to enforce his claim, but before doing so he must have taken the required appeal to the governing body or he must show some excuse for his failure to do so.

(September 16, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Marion County in favor of plaintiff in an action brought to recover the amount alleged to be due under a mutual benefit certificate. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Finch & Finch for appellant.

Messrs. Carter & Binford for appellee.

Elliott, J., delivered the opinion of the court:

The appellee's complaint is founded upon a certificate of membership issued to him by the appellant. The by-laws of the corporation contain, among others, this provision: "Should a member become totally and permanently disabled from following his or her usual or other

vocation, by reason of disease or accident, such member, upon the receipt and approval of satisfactory proofs, as hereinafter provided, shall be entitled to a benefit not exceeding one half of the relief fund certificate held by him or her." The certificate issued to the appellee is a contract of insurance, and his right to recover upon it does not depend upon the action of the officers of the society, for if he has performed his part of the contract, and is totally disabled by disease or accident, he has a complete cause of action. A refusal by the officers of the society to allow the claim will not defeat a recovery. The appellee was of course bound to comply with the terms of his contract, and with the lawful by-laws of the society. The valid provisions of the by-laws do indeed form part of his contract, and are of controlling force. *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489-496, 8 L. R. A. 409; *Pfister v. Gervig*, 122 Ind. 567.

But while it was necessary for the appellee to comply with the requirements of the valid by-laws of the association, it was not in the power of the officers to defeat his claim by arbitrarily rejecting his proofs as unsatisfactory, or by wrongfully declaring that he had not done what his contract and the by-laws of the association required of him. It was not necessary, therefore, for the appellee to do more than appropriately show, by his complaint, the contract with the corporation, performance of the conditions on his part, that he was totally disabled, and that he had made proper proof of his disability. He was not bound to go further and allege that his proofs were such as satisfied the corporate officers. It was enough for him to show that they were such as his contract and the laws of the land require. He was not bound to anticipate and avoid defenses. It was sufficient for him to make a *prima facie* case.

The appellant, by way of answer in abatement, sets forth the following by-law: "Sec. 6. On receipt of the proper notice of disease or accident disability under section 4 of this article, the supreme councilor shall proceed to

investigate the same. If at any time he deems the facts to warrant it he may appoint one or more physicians, whose duty it shall be to make a careful examination of the member's condition, and report as to the character and permanence of the disability. If such report shows a disability of an unquestionably total and permanently disabling character, the supreme councilor, supreme recorder and supreme medical director may approve the same, and order the benefit paid. If, however, in the opinion of said officers, there is any doubt concerning the permanence of the disability, they shall postpone the matter for any period they may determine upon, not exceeding one year, and shall then order a new examination, either by the same or other physicians. If the result of the second examination be also uncertain, said officers may, in like manner, provide for a third, upon the result of which they shall either pay or refuse to pay the benefit claimed. This decision shall be final and conclusive upon the parties affected thereby, unless reversed upon appeal by the supreme council in regular session. Any claimant feeling aggrieved may take such an appeal by serving notice thereof upon the supreme recorder within thirty days after receipt of notice of the decision by the claimant, his or her personal representatives. The supreme council shall accord the appellant a hearing at its next regular session, and dispose of the matter." The answer sets out other provisions concerning appeals, and regulating the mode of procedure. Both the complaint and the answer show that the claim was presented to the officers named in the by-laws, that action upon it was postponed as the by-laws provide and that it was finally rejected. The trial court held the answer bad, and that ruling is questioned by the assignment of errors.

Our decisions declare that it is not competent for parties, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of persons named in the contract shall be final and conclusive. *Louisville, E. & St. L. R. Co. v. Donnegan*, 111 Ind. 179, 9 West. Rep. 641; *Supreme Council O. of C. F. v. Garrigus*, 104 Ind. 188, 1 West. Rep. 861; *Bauer v. Samson Lodge K. of P.* 103 Ind. 262; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460.

There is some diversity of opinion upon this question, but the weight of authority sustains the doctrine declared by our own decisions. An author who has given the question full consideration says: "It is a settled principle of law that parties cannot, by contract, oust the courts of their jurisdiction, and agreements to refer to future arbitration will not be enforced in equity, and will not be sustained as a bar to an action at law or a suit in equity." Bacon, Ben. Societies, § 450.

This principle is asserted by the Supreme Court of the United States, by the English courts and by other tribunals. *Horne Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445 [22 L. ed. 865]; *Scott v. Avery*, 5 H. L. Cas. 811; *Thompson v. Charnock*, 8 T. R. 189; *Reed v. Washington Ins. Co.* 138 Mass. 575; *Stephenson v. Precataqua F. & M. Ins. Co.* 54 Me. 70.

The logical conclusion from this long-settled doctrine is that parties cannot, by contract,

provide for the conclusive settlement of questions before such questions arise by designating persons to adjudicate upon them; and this conclusion has often been given effect in cases such as this by other courts as well as by our own. *Menta v. Armenia F. Ins. Co.* 79 Pa. 478; *Lauman v. Young*, 81 Pa. 810; *Gray v. Wilson*, 4 Watts. 41; *Wood v. Humphrey*, 114 Mass. 185; *Roux v. Williams*, 97 Mass. 163; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 782.

It is obvious that there is a distinction between cases where the agreement that the decision of designated persons shall be conclusive is made after a dispute has actually arisen and cases where it is made prior to the existence of any controversy. One reason for this distinction is that parties may revoke an agreement to submit to arbitration, and appeal to the courts for redress, and this right is one which cannot be abridged by an agreement made before either party can know what the nature of the controversy will be. The rule which we approve commends itself by its fairness and justice, for there is nothing unjust in declaring that parties may appeal to the courts of the country for redress, while there is something of unfairness in a provision which makes the decision of interested corporate officers final, and excludes resort to the judicial tribunals of the land. The rule we favor is both expedient and just. As the provision declaring that the decision of the officers named shall be final is ineffective, the answer would not be good as a plea in bar, but, if good at all, it is good as a plea in abatement, so that if there is a valid defense the appellant rightly pleaded it in abatement. The question, therefore, is this: Does the failure of the appellee to appeal to the Supreme Council constitute matter in abatement, and preclude him from maintaining this action? It is competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws. This much is clear. *Harrington v. Workmen's Ben. Assn.* 70 Ga. 840; *Anacosta Tribe No. 12 v. Murbach*, 18 Md. 91.

If it has this right, then, it seems equally clear that it may prescribe a mode of procedure provided that the mode of procedure prescribed is not such as to deprive parties of property rights. As we have in effect already declared, property rights cannot be destroyed by what some of the courts denominate "these self-constituted judicatories." *Lamphere v. Grand Lodge*, 47 Mich. 429; *Cullen v. Duke of Queensberry*, 1 Bro. Ch. 101; *Austin v. Searing*, 16 N. Y. 113, 69 Am. Dec. 665, and note.

But requiring claims for benefits to be presented to the officers of the association is not in any just sense an invasion of the property rights of the member, nor is a by-law requiring its presentation unreasonable. The authorities are well agreed upon this question. *Van Poucke v. Netherland St. V. De P. Soc.* 63 Mich. 878, 6 West. Rep. 182; *Bauer v. Samson Lodge K. of P.*, *supra*; Bacon, Ben. Societies, § 94.

It is not unreasonable to provide that the member claiming benefits shall appeal to the governing body of the association. The member voluntarily enters the association, with knowledge of its by-laws, and agrees to be

bound by such as are not in violation of law; and certainly no principle of law is violated in making provision for the submission of claims of a member to the highest body of the association with which he voluntarily unites himself. It is but just to the association that its chief officers should have an opportunity to investigate the claim asserted by the member before it is harassed by litigation, and, indeed, the provision is presumptively for the benefit of the member, for the fair inference is that the governing officers will do their duty and allow all rightful claims. At all events, there is no principle of law violated by a by-law requiring an appeal to the governing body. By-laws similar to that under consideration have often been upheld. There is, indeed, no contrariety of opinion upon the question. We have no doubt that a by-law requiring the presentation of claims to subordinate officers, and requiring, in case of a decision adverse to the claimant, an appeal to the governing body of the society, is reasonable and valid. The by-laws of the appellant do require an appeal to the governing body, and, in so far as this requirement is concerned, they are effective, although the attempt to make the decision of the subordinate officers conclusive is abortive. The provision which assumes to make the decision of the supreme councilor, supreme recorder and supreme medical examiner final and conclusive is so distinct and different from the provisions concerning appeals that its invalidity does not destroy their force. It is well settled that part of a by-law may be valid although other parts may be void. The language of the by-law is plain and explicit upon the subject of appeals to the Supreme Council. It is not, as counsel for appellee argue, a mere privilege that is conferred upon claimants by the provisions concerning appeals, but, on the contrary, a duty is imposed upon him. The provision is that the decision of the officers named shall be final unless reversed on appeal by the Supreme Council; and this of itself implies that the claimant must appeal to that body. But there are other provisions which make it quite clear that the claimant must appeal or accept the decision of the officers designated as a conclusive adjudication upon the merits of his claim. The clear implication from all the provisions of the by-laws is that the member must, at least, exhaust the remedies provided by the contract before seeking aid from the courts, or show some excuse for his failure to do so. We do not doubt that if the officers of the society should refuse an appeal, or do any act hindering or delaying an appeal, that the member might at once invoke the assistance of the courts. *Suprema Sitting O. of I. H. v. Stein*, 120 Ind. 270.

But it cannot be presumed, in the absence of averments to the contrary, that the officers have been guilty of a breach of duty, so that it is incumbent upon a party who relies upon the wrong of the corporate officers to show by affirmative allegations their wrongful conduct. The authorities, as we have said, are agreed upon the proposition that mutual benefit societies may require an appeal to the governing body as a condition precedent to a right of action, so that upon that question there can be no doubt. Indeed, the only doubt is whether

they may not go further, and make the decisions of the officers designated in their contracts with their members final and conclusive. In this instance the by-laws provide that the decision of the subordinate officers designated shall be final unless reversed on appeal by the Supreme Council, so that the only infirmity is that created by the attempt to substitute tribunals chosen by the parties themselves for those established by the law of the land.

It was competent to provide that the decision of the officers should be sought, and it is also competent to provide that a member dissatisfied with their decision should, before resorting to the courts, appeal to the governing body of the association, although it was not competent to make the decision final and conclusive. It is well settled that the decisions of arbitrators, engineers, architects or others named in a contract as persons to whom controversies may be referred, are deemed to be prima facie right, and it is nothing more than an application of an old principle to a new instance to hold that where the contract of a member with a mutual benefit society provides that designated officers shall pass upon the validity of his claim, that their decision shall be deemed prima facie valid. Even if the decision is merely prima facie right, the only mode of first questioning it must, upon principle and authority, be that provided by the contract. Until the claimant has done what his contract requires, or has shown some valid excuse for not doing it, he cannot have any standing in court. It is going quite as far as authority or principle will justify to hold that, although the parties have contracted that the decision of designated persons shall be final, the decision can only be deemed prima facie correct, and we cannot go further and hold that, although a party refuses to appeal to the governing body of an association of which he is a member, he may, notwithstanding the provisions of his contract declaring the decisions of such officers final unless appealed from, bring an action against the association. It is certainly imposing no hardship upon the member to require him to pursue the mode pointed out by his contract. The rule we declare is, indeed, favorable to him, for it enables him to appeal to the courts after he has exhausted the remedies designated by the by-laws, notwithstanding the provisions of his contract. The member who asks to be relieved from the duty of appealing to the governing body in such a case as this asks what equity and justice deny.

Judgment reversed.

CINCINNATI, INDIANAPOLIS, ST.
LOUIS & CHICAGO R. CO., *Appl.*,

v.

James R. DAVIS.

(....Ind....)

A physician and surgeon who, at the request of the general superintendent of a railroad, renders professional services to persons injured by the company's trains, in ignorance of the fact that the superintendent has no authority to contract for such services,

may recover therefor from the company, and the facts that the right to employ physicians and surgeons in such cases is vested in another officer, and that the company is not liable for the injuries which he was summoned to attend, are immaterial since no inquiry was necessary in regard to such matters.

(November 19, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Decatur County in favor of plaintiff in an action brought to recover the value of certain professional services alleged to have been rendered to defendant at the request of its general superintendent. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. James K. Ewing, Cortes Ewing and John G. Dye* for appellant. *Mr. John S. Scobey* for appellee.

Elliott, J., delivered the opinion of the court:

The appellee, at the time he was employed to render the professional services which he seeks to recover the value of in this action, was a physician and surgeon in regular practice at Morris, in this State. He was employed directly by one of the appellant's conductors, by whom he was informed that a telegram had been received from the appellant's general superintendent, authorizing his employment to give professional attention to a man who had been injured by one of the appellant's trains. The telegram of the superintendent was addressed to the conductor, and reads thus: "Stop at Morris and see if you can get Dr. Davis to go to Newpoint to attend to a man that got hurt there this P. M. If you can get him, carry him to Newpoint." Under this employment the services for which compensation is sought were rendered by the appellee.

The appellant offered to prove that it had in its employment a chief physician and surgeon, whose duty it was to employ surgeons to give professional attention to persons injured by its trains; but the evidence was excluded. There was no error in excluding this evidence. It was immaterial whether the appellant had or had not a chief surgeon in its service, charged with the duty of employing subordinate surgeons, for there is no pretense that the appellee had notice of that fact. He was not bound to look beyond the general superintendent as the source of authority warranting his employment. It is quite well settled that a general superintendent has authority to employ surgeons to give attention to persons injured by the trains of the company he represents; and it is rightly so held, for it would be unreasonable to require a surgeon to give professional assistance to a person injured by the company's trains, and then deny him compensation upon the ground that the superintendent had no authority to employ him because that authority was lodged in a chief surgeon. Nor are we

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willing to sanction a rule imposing upon the surgeon whose services are requested by the superintendent the duty of making specific inquiry as to the scope of the superintendent's authority. Such a rule would operate harshly in many cases, for, if the surgeon must stop to make inquiries before leaving his home or office, the injured man might perish. Better railroad companies should be held responsible for the acts of such a high officer as a general superintendent, although as between him and his principal that officer may usurp authority that is vested in a subordinate agent, than that a surgeon who obeys the summons of the superintendent should be compelled to go unpaid. It is the company that selects the superintendent, places him in a position of power and invests him with ostensible authority; and if he betrays his trust, the principal by whom he was put in a position of that character should bear the loss, and not the surgeon who in good faith acts upon the appearances created by the company. It is a familiar rule that instructions to a general agent do not bind one who deals with the agent in ignorance of such instructions, and acts upon the apparent authority with which the principal has clothed his representative; and there is no conceivable reason why the rule should not apply in all its force to such a case as this. But the question of the authority of a general superintendent to employ a surgeon is settled by the adjudged cases, and requires no extended discussion. *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 853; *Terre Haute & I. R. Co. v. Stockwell*, 113 Ind. 98; *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 836, 5 West. Rep. 640; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358; *Louisville, E. & St. L. R. Co. v. McVay*, Id. 391.

The principle which rules our later decisions was declared in the early case of *New Albany & S. R. Co. v. Haskell*, 11 Ind. 801, and those cases do no more than extend a settled principle to new instances. The principle declared by these decisions is that an officer of such a high rank as general superintendent is presumed to possess authority to employ surgeons and nurses to render service to persons injured by the trains of the company.

Having adjudged that the appellant's general superintendent has authority to employ a surgeon to minister to a person injured by its trains, we have effectually disposed of the case and little more need be said, for, if he had such authority, the surgeon employed by that officer was not bound to institute an inquiry for the purpose of determining whether the injured man was hurt under such circumstances as rendered the Company liable. It was enough for the surgeon to know that he was employed by a superior officer of general and extensive authority, without inquiring whether the Company was bound to respond in damages to the injured man.

Judgment affirmed.

MINNESOTA SUPREME COURT.

LEWIS, *Appt.*,

v.

LEWIS, *Resp.*

(....Minn.....)

*1. The courts are not authorized to decree a marriage contract void on the ground of the insanity of one of the parties, except for such want of understanding in such party as to render him or her incapable of assenting thereto. And though such person may be subject to some vice or uncontrollable impulse or propensity, yet, if otherwise sane, and able to understand the nature and obligations of the marriage contract, a decree of nullity will not be granted.

*2. A contract of marriage may be avoided when brought about by artifice or fraudulent practices, but, as a general rule, concealment by one of the parties of personal traits or defects of character, or habits, reputation, bodily health or other peculiar in-

*Head notes by VANDERBURGH, J.

NOTE.—Incapacity to contract marriage.

According to the civil law, the marriage of a person of unsound mind was, like other verbal agreements, void; and such, too, is the modern doctrine of the common law. *Wightman v. Wightman*, 4 Johns. Ch. 343, 1 N. Y. Ch. L. ed. 861; *Jenkins v. Jenkins*, 2 Dana, 104, 26 Am. Dec. 430.

Idiots and lunatics are incapable of entering into the matrimonial contract, and such marriages are *ipso facto* void. *Beaumont's Case*, 1 Whart. 56, 29 Am. Dec. 38; *Osmond v. Fitzroy*, 3 P. Wms. 130, 181; *Griffin v. Deveauille*, 3 Woodd. Lec. App. 334.

Marriage is not, as once was supposed, an exception, by force of the canon law, to the principle of the common law, which makes contracts invalid for the want of mental capacity. *Crump v. Morgan*, 8 Ired. Eq. 92.

What marriages are void ab initio.

Marriages between persons in the direct lineal line of consanguinity, and between brothers and sisters in the collateral line, are incestuous and void as against the law of nature. *Campbell v. Cramp-ton*, 8 Abb. N. C. 373, 18 Blatchf. 159, 2 Fed. Rep. 426; *Button v. Warren*, 10 Met. 451; *Hiram v. Pierce*, 45 Me. 367; *Horne v. Horner*, 1 Hag. Const. 853; *Reg. v. Brighton*, 1 Best & S. 447; *People v. Jenness*, 5 Mich. 318.

Marriage procured by an atrocious fraud is also void. *Burtis v. Burtis*, Hopk. Ch. 567, 3 N. Y. Ch. L. ed. 525.

A marriage between a man and woman related within the degrees prohibited by law is not void, but voidable, and until dissolved by a court of competent jurisdiction must, in all collateral proceedings, be treated as valid. *Boylan v. Deinzer*, 45 N. J. Eq. 485.

A man lawfully arrested for seduction, and who marries the woman to procure his discharge, cannot have the marriage avoided on the ground of duress, even if he could not have been convicted under the process for the seduction. *Marvin v. Marvin*, 52 Ark. 425. See *Schwartz v. Schwartz*, 29 Ill. App. 516.

To sustain the defense of a marriage illegal because induced by duress of imprisonment, it must appear that the defendant's action was influenced by the restraint. *Schwartz v. Schwartz*, *supra*.

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firmities, is not sufficient ground for avoiding a marriage.

(July 18, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Hennepin County in favor of defendant in an action for a divorce. *Affirmed*.

The case sufficiently appears in the opinion. *Messrs. J. R. Corrigan and J. M. Shaw* for appellant.

Vanderburgh, J., delivered the opinion of the court:

The Statute in relation to divorces (Gen. Stat. chap. 63, § 2) provides that "when either of the parties . . . for want of age or understanding is incapable of assenting thereto, . . . the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by sections 4 and 5, as follows: "Nor shall the marriage of any insane person be adjudged void after his restoration to reason, if it appears

Jurisdiction of court of equity to annul marriage.

A court of equity will entertain jurisdiction to declare a marriage a nullity (*Waymire v. Jetmore*, 22 Ohio St. 274), on the ground of lunacy of one of the parties. *Erkenbrach v. Erkenbrach*, 96 N. Y. 463; *Ferlat v. Gojon*, Hopk. Ch. 495, 2 N. Y. Ch. L. ed. 500; *Perry v. Perry*, 3 Paige, 505, 3 N. Y. Ch. L. ed. 1008; *Griffin v. Griffin*, 47 N. Y. 139.

The power of declaring marriages void for fraud or force vested in the court of chancery. *McClurg v. Terry*, 21 N. J. Eq. 229; *Aymar v. Roff*, 8 Johns. Ch. 49, 1 N. Y. Ch. L. ed. 538; *Ferlat v. Gojon*, 1 Hopk. 478, 2 N. Y. Ch. L. ed. 478.

In South Carolina authority to declare a marriage null and void has never been conferred by the Legislature upon the court of equity, or any other court, nor has the Legislature itself ever exercised that authority. *Mattison v. Mattison*, 1 Strobb. Eq. 382.

Where an old man, who had lost his eyesight, more or less deaf and otherwise broken, was induced, by putting him under the influence of liquor and probably of drugs, to marry a woman of half his age, having a young child, and for whom he never entertained any attachment, and but slight acquaintance, and just after he became assured that he would receive a liberal pension and large arrears, the marriage was properly annulled. *Gillett v. Gillett*, 78 Mich. 184.

Decree annulling marriage.

A decree of nullity is not a decree of divorce at all; it is a judicial declaration that no marriage exists; it does not make the alleged marriage void, but declares that it was void *ab initio*. Such nullity decree settles the validity or invalidity of the marriage, and, as between themselves, fixes the status of the parties, though, as to the third persons, who have been misled by the holding out of the relation of husband and wife, such decree may not be conclusive. *Boykin v. Bain*, 28 Ala. 532, 65 Am. Dec. 355; *Rawdon v. Rawdon*, 28 Ala. 565; *Brown v. Westbrook*, 27 Ga. 103; *Powell v. Powell*, 18 Kan. 871; *Succession of Minvielle*, 15 La. Ann. 342; *Chase v. Chase*, 55 Me. 21; *Lincoln v. Lincoln*, 6 Robt. 525; *Smith v. Morehead*, 6 Jones, Eq. 360; *Clews v. Bathurst*, 2 Str. 990; *Dacosta v. Villa Real*, Id. 361; *Perry v. Meddowcroft*, 10 Beav. 122; *Harrison v. Southampton*, 17 Eng. L. & Eq. 364.

that the parties freely cohabited together as husband and wife after such insane person was restored to a sound mind. Sec. 5. No marriage shall be adjudged a nullity at the suit of the party capable of contracting, on the ground that the other party was . . . insane, if such . . . insanity was known to the party capable of contracting at the time of such marriage." There are no other provisions on the subject of insanity, and no form of insanity or insane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce. The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage. The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion or propensity be attributed to disease, and be considered a species of insanity or not, yet, as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses. *Anonymous*, 4 Pick. 32; *St. George v. Biddeford*, 76 Me. 593; *Durham v. Durham*, L. R. 10 Prob. Div. 80.

For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Whart. & S. Med. Jur. (4th ed.), §§ 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions. *Re Blakeley's Will*, 48 Wis. 294; *Jenkins v. Morris*, L. R. 14 Ch. Div. 674; 11 Am. & Eng. Encyclop. Law, 111, and cases.

2. The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground. Where one is induced, by deception or stratagem, to marry a person who is under legal disability, physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to

the identity of a person, artful practices and devices, used to entrap young, inexperienced or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not subsequently ratified, are proper cases for the consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general. *Reynolds v. Reynolds*, 8 Allen, 607, 608; *Leavitt v. Leavitt*, 18 Mich. 456; 1 Cooley, Bl. 459, and notes.

The facts found do not present a case warranting the relief asked.

Judgment affirmed.

ANHEUSER-BUSCH BREWING ASSOCIATION, *Appt.*,

v.

MASON, *Respt.*

(....Minn.....)

***Plaintiff, a corporation, by its agent, sold and furnished bottled beer to**

***Head note by COLLINS, J.**

NOTE.—Contract promotive of illegal transaction; when party may enforce.

The seller's knowledge of the illegal purpose to which the article is to be devoted will not, of itself, defeat an action for the purchase price; it must be shown that he was a sharer in the illegal transaction, or aided in its execution or did something in furtherance of it. *Cheney v. Duke*, 10 Gill & J. 11; *Holman v. Johnson*, Cowp. 341; *Hodgson v. Temple*, 5 Taunt. 181.

It must be shown that the party made the contract with the purpose on his part to furnish money to enable the borrowers to do the illegal act. *Mogavock v. Puryear*, 6 Coldw. 35; *Green v. Collins*, 3 Cliff. 494.

The mere reasonable cause for belief, without actual knowledge of the unlawful intent, will not defeat the action. *Adams v. Couillard*, 103 Mass. 167.

It is no defense to an action for the price of an article put to an illegal use, unless it was sold under a contract that it was to be put to such use. *Brunswick v. Valleau*, 50 Iowa, 120; to the same effect, *Hubbard v. Moore*, 24 La. Ann. 571; *Mahood v. Tealza*, 26 La. Ann. 108; *Michael v. Bacon*, 40 Mo. 474; *Armfield v. Tate*, 7 Ired. L. 258; *Hill v. Spear*, 50 N. H. 253; *Onondaga Co. Bd. of Excise Comrs. v. Backus*, 29 How. Fr. 40; *DeGroot v. American Linen Thread Co.* 21 N. Y. 123.

One of the parties to an illegal contract may maintain a suit against a third person to recover money which the latter has received under the contract. *Thomson v. Thomson*, 7 Ves. Jr. 470; *Sharp v. Taylor*, 2 Phill. 801; *Tenant v. Elliott*, 1 Bos. & P. 8; *Joy v. Campbell*, 1 Sch. & Lef. 323; *Worthington v. Curtis*, L. R. 1 Ch. Div. 419; *Williams v. Bayley*, L. R. 1 H. L. 200; *Osbaldiston v. Simpson*, 13 Sim. 513; *Es parte Pyke*, L. R. 8 Ch. Div. 764; *Powell v. Knowler*, 2 Atk. 224; *Davies v. London & P. M. Ins. Co. L. R.* 8 Ch. Div. 469; 1 Pom. Eq. Jur. § 403.

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the defendant, the keeper of a house of prostitution, as the agent well knew. While he had no knowledge of just what was to be done with the beer, the agent supposed at the time it was furnished that it was to be used or sold in the brothel. No other facts appearing, it is held that plaintiff can recover a balance claimed to be due from defendant for and on account of said sale.

(September 23, 1890.)

APPEAL by plaintiff from an order of the Municipal Court of the City of St. Paul dismissing the complaint in an action brought to recover the contract price of certain beer alleged to have been sold and delivered to defendant. *Reversed.*

The case sufficiently appears in the opinion.

Mr. John L. Townley for appellant.

Messrs. Johns, Michael & Johns for respondent.

Collins, J., delivered the opinion of the court:

This action was brought to recover a balance claimed to be due plaintiff (a corporation) for and on account of bottled beer sold to the defendant. The answer alleged that at the time of the sale defendant, as plaintiff well knew, was the keeper of a house of prostitution; that plaintiff sold the beer expressly for use and dispensation in and for carrying on and maintaining said house; and that when sold and delivered it was agreed between plaintiff and defendant that the beer was to be paid for out of the profits accruing to the latter from her unlawful occupation. On the trial, defendant made no attempt to establish the defense as pleaded, but relied wholly upon admissions made by plaintiff's agent, when testifying, that he did not know just what was done with the beer, but that, when selling it to defendant, he supposed she would sell or use it in her brothel. On this admission, as we understand the record, the case was dismissed by the trial court.

While it would seem quite unnecessary so to do, it may be well to call attention at the outset to the fact that this case should not be confounded with one wherein the vendor in selling his goods has violated a statute requiring him to first procure a license, as was that of *Solomon v. Dreschler*, 4 Minn. 378 (Gil. 197). Nor is it one in which the vendor has sold a proper article of merchandise in a legitimate way, but with the knowledge that it is to be disposed of by the vendee in direct violation of the law; for illustration, a sale of spirituous liquors by a qualified wholesale dealer, with full knowledge that the purchaser intended to retail the same in defiance of a prohibitory law, or without first obtaining the required license to sell, or a sale of poison by a druggist, knowing that it was intended for use in committing murder. The illegality of the transaction now under discussion occurs, if at all, in a matter collateral to the sale, incidentally implicated with it, and out of considerations of public policy solely. It has been well said that the consideration essential to a valid contract must not only be valuable, but it must be lawful, not repugnant to law or sound policy or good morals. *Ex turpi contractu actio*

non oritur. The reports, both English and American, are replete with cases in which contracts of all descriptions have been held invalid on account of an illegality of consideration, illustrations of the acknowledged rule that contracts are unlawful and non-enforceable when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of positive provisions of a statute. The utmost difficulty has been experienced by the courts in applying the general rule, however, and an examination of the authorities wherein an application has been necessary will convince the reader that the conclusions reached and announced in the English tribunals are beyond reasonable reconciliation. This want of harmony, and that more uniform and consistent results have obtained in this country, is thoroughly demonstrated in two cases with us (*Tracy v. Talmage*,—first opinion by Judge Selden, and the second, on motion for rehearing, by Judge Comstock,—14 N. Y. 162, and *Hill v. Spear*, 50 N. H. 258), in each of which the principal cases in both countries are ably and carefully reviewed, and the law applicable to the question involved in this action stated in accordance with the great weight of authority in the United States as well as in England. These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale, yet, if, in any way, the former aids the latter in his unlawful design to violate a law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight. While it is certain that a contract is void when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes. The American text-writers generally admit this to be the prevailing rule of law in the States upon this point. 1 Wharton, Cont. § 848; Hil. Sales, 490, 492; 1 Parsons, Cont. 456; Story, Cont. 5th ed. § 671; Story, Conf. L. § 268; Greenhood, Pub. Pol. 589.

However, it has been suggested that this statement is subject to the modification that the unlawful use, of which the vendor is advised, must not be a felony or crime involving great moral turpitude. See *Hanauer v. Doane*, 79 U. S. 13 Wall. 842 [20 L. ed. 489]; *Tatum v. Kelley*, 25 Ark. 209; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 288; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana, 381.

Without expressly indorsing the result in some of the cases, or all that has been said by the courts in their opinions when making an application to the facts then in hand, of the rule so exhaustively examined and approved in *Tracy v. Talmage* and *Hill v. Spear*, *supra*, we cite, in support of the propositions therein contended for, and upon which we rest a reversal of the order of dismissal made by the

court below, *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 [6 L. ed. 463]; *Green v. Collins*, 8 Cliff. 494; *Dater v. Earl*, 8 Gray, 482; *Armfield v. Tate*, 7 Ired. L. 259; *Read v. Taft*, 8 R. I. 175; *Cheney v. Duke*, 10 Gill & J. 11; *Kreiss v. Seligman*, 8 Barb. 459; *Michael v. Bacon*, 49 Mo. 474; *Brunswick v. Valteau*, 50 Iowa, 120; *Webber v. Donnelly*, 33 Mich. 489; *Bishop v. Honey*, 34 Tex. 245; *Wright v. Hughes*, 119 Ind. 324; *Feineman v. Sachs*, 38 Kan. 621; *Rose v. Mitchell*, 6 Colo. 102; *Bancher v. Mansel*, 47 Me. 58; *Henderson v. Waggoner*, 2 Lea, 153; *Gaylord v. Soragen*, 32 Vt. 110; *Mahood v. Tealza*, 26 La. Ann. 108; *Delavina v. Hill*, 65 N. H. 94.

The agent who made the sales, upon whose testimony the defendant saw fit to rest her case, knew that she was engaged in the unlawful business of keeping a house of ill fame, and

admits, also that he supposed the beer would be used or sold in her place of business. Nothing further was shown which connected the plaintiff or its agent with any violation of the law. The burden was upon the defendant to show that an enforcement of the contract would be in violation of the settled policy of the State, or injurious to the morals of its people, and no court should declare a contract illegal on doubtful or uncertain grounds. And it may be difficult to distinguish between the cases in which the vendor, with knowledge of the vendee's unlawful purpose, does not become a confederate, and those wherein he aids and assists to an extent sufficient to vitiate the sale; but this difficulty is not apparent in the case at bar.

Order reversed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Louis E. JACOBSON

v.

Timothy J. SULLIVAN *et al.*

(....Mass....)

The insertion in a contract, by which one agrees to buy out at a future date a certain business, and to buy all goods that the seller has on hand at that date at their invoice price, provided their entire value is not above a certain amount, of a clause to the effect that the buyer shall be bound to take only such goods as he himself shall select, will not relieve him of the obligation to take goods to the amount agreed upon, but simply gives him the right to choose the goods he will take to make up the quantity which he agreed to buy.

(November 25, 1890.)

EXCEPTIONS by defendant to rulings of the Superior Court for Hampshire County placing a certain construction upon a contract to purchase goods, in an action brought to recover damages for its alleged breach, in which a verdict was returned for plaintiff. *Overruled.*

The case sufficiently appears in the opinion.

Messrs. Bond & Mason for defendants.
Mr. John B. O'Donnell for plaintiff.

Knowlton, J., delivered the opinion of the court:

The plaintiff was the proprietor of a clothing store, and on May 15, 1888, he entered into a contract in writing with the defendants, whereby he agreed to sell, and they agreed to buy, for a specified price, his lease, the good will of his store and the store fixtures and other articles which were used in conducting his business; and he also agreed for the same considerations not to engage in the clothing business in Northampton while the defendants were carrying on business there. The contract was to take effect on September 1, 1888, and in the meantime the plaintiff was to continue selling goods on his own account. This part of the contract apparently covered everything pertaining to the business except the goods which were kept for sale in the store. As to them the

parties made a separate provision. How large the stock then on hand was does not appear by the bill of exceptions, but it is said in argument that it was of the value of \$10,000. The parties appear to have expected that there would be, or at least might be, more than \$1,000 worth left unsold by the plaintiff on September 1. In regard to these they stipulated that the plaintiff should sell to the defendants, on "the first day of September, so much of the general stock, goods and merchandise of said Jacobson, to the value of \$1,000," as should then "remain and be unsold by said Jacobson," and that the defendants should "buy, purchase and accept so much of the general clothing stock, furnishing goods, hats, caps, etc., of said Jacobson, not exceeding \$1,000 in value," as Jacobson should "have on hand and unsold on said September first." The price was to be the actual cost to Jacobson, to be determined by the invoices; and in estimating the quantity to make up the \$1,000 the value was to be determined in the same way. These provisions definitely fixed the quantity to be sold. It was to be all that remained unsold if the whole did not exceed \$1,000 in value, but it was not to exceed that amount. The contract was incomplete without another provision; for it is evident that, while some of the goods might be worth more than the cash price, many of them would be likely to be worth considerably less than that, and if, as the parties contemplated, the quantity left unsold on September 1 should exceed \$1,000 in value, it would be important to know which part of the goods should be transferred under the contract. To provide for this condition the contract contains the following clause, which was interlined: "Provided that they (the defendants) shall be bound to take only such goods as they themselves shall select."

The defendants contend that the effect of this clause is to relieve them from all obligation under this part of the contract, and to leave it optional with them whether to take any goods, or any more than a single article of small value. To adopt their construction would leave an important provision of the contract without binding force in favor of the plaintiff,

for whose benefit it was evidently inserted. It would render meaningless the following provision found in the contract: "In said goods so to be purchased there shall be no single vests and no single coats;" and "the coats and vests purchased shall be coats and vests to match." This stipulation was for the benefit of the defendants, and relieved them from the obligation to take single vests, with no coats to match them, or single coats with no vests to match them, if the whole stock should be less than \$1,000 in value. If the defendants' contention was correct there would be no occasion for such a stipulation.

In view of the situation of the parties, and the subject matter and the purpose of their agreement, we are of opinion that the clause in regard to selection was not intended to contradict the otherwise clear and definite provisions of the contract as to the quantity to be sold, and to nullify that part of the contract, but only to give the defendants the right to determine by selection what goods they would take to make up the quantity which they agreed to buy.

Exceptions overruled.

Joseph S. KENDALL *et al.*, Trustees under the Will of Benjamin W. Gleason, Deceased,

v.

Charles W. GLEASON *et al.*

(.....Mass.....)

1. Where a will, which devises manufacturing property to trustees with directions to permit testator's three sons to occupy and improve it for their joint benefit so long as they can agree and make the business profitable, and when they fail to do so to sell the same, invest the proceeds and pay over to each son one third of the accumulated fund upon his arriving at the age of fifty years, contains a clause which requires the property to be appraised and sold if one of the sons so desires to either two if they will buy it at the appraised value, otherwise to strangers, a sale to two of the sons under the latter clause will not terminate the trust, but it will continue as to the proceeds the same as if the sale had been made under the other provision of the will.
2. Where a will which creates a trust in real estate and provides that the legal heirs of each beneficiary shall succeed to his share in case of his death, contemplates a change of the real estate to personal property in the hands of the trustees, and that it shall go to the heirs in its changed form, the words "legal heirs" will mean those who would take personal property under the statute of Distributions.

(November 25, 1890.)

PRESERVATION from the Supreme Judicial Court for Middlesex County (Devens, J.) for the opinion of the full court of an action brought by the trustees under the will of Benjamin W. Gleason, deceased, for instructions as to the proper execution of the provisions of such will.

The case sufficiently appears in the opinion. Mr. Henry H. Sprague for the trustees.
9 L. R. A.

Mr. James T. Joslin, for Charles W. Gleason and Alfred D. Gleason:

Only in case of a sale to strangers were the proceeds to be held in trust till the sons arrived at the age of fifty years.

Smith v. Harrington, 4 Allen, 566; *Bowditch v. Andrews*, 8 Allen, 839; *Inches v. Hill*, 106 Mass. 575.

Messrs. Gaston & Whitney for A. L. Jewell, guardian of Benjamin W. Gleason, son of Stillman A. Gleason, deceased.

Mr. C. R. Elder for Mary E. Gleason, widow of Stillman A. Gleason, deceased.

Knowlton, J., delivered the opinion of the court:

By the seventh clause of the will of Benjamin W. Gleason the trustees to whom all his real estate was devised were to permit his three sons, Charles W., Stillman A. and Alfred D., to occupy and improve his manufacturing property, machinery and water-power for their joint benefit so long as they might desire, upon certain conditions therein stated, one of which was that they should be subject to no charge for rent. The last part of the clause is as follows: "It is my request that my said sons shall occupy and improve the factory property and real estate of which I may die seised and possessed (except the homestead) jointly so long as they agree, remain steady and respectable men, and can make the business profitable; when they cannot do so, then I direct my trustees to sell and convey in fee simple the whole of my said factory property and real estate, and to safely invest the proceeds of such sale, and to pay over to each son, as they shall respectively arrive at the age of fifty years, one third of said trust fund with its accumulations so remaining in their hands. If either of my said sons shall die before arriving at the age of fifty years, I direct his share to be paid by my said trustees to his legal heirs."

It was evidently the desire of the testator that his three sons should jointly succeed him in carrying on the business of manufacturing, and he offered them an inducement to do so by providing that they might use the property without charge for rent so long as they should agree in occupying it together and should make the business profitable. It is equally clear that upon their failure to agree or to carry on the business profitably it became the duty of the trustees to sell the estate, and invest the proceeds, and pay one third to each when he should arrive at the age of fifty years, unless on account of his death his share had previously become payable to his heirs. In this same clause there is a preceding provision allowing either of the three sons of the testator to express in writing to the trustees a desire that the property should be sold, and requiring in such a case that it should be appraised by three discreet men, and sold by the trustees at the appraised value to either two of the sons who should wish to purchase it at that price, and, if no two of them should wish to take it in that way, requiring the trustees to sell it either at public auction or private sale as they should think best.

Under this provision, at the request in writing of one of the *cestui que trust*, the property was sold to the other two; and the principal

question in the case is whether the trust was thereby terminated, or the property merely changed in form and made subject to investment by the trustees until the sons should respectively die or arrive at the age of fifty years.

There can be no doubt that the proceeds of the sale in the present case must be treated in the same way as if the property had been disposed of at public auction or private sale, after an appraisal under this provision and a failure of any two of the sons to take it at the appraised value. A sale of the kind last mentioned does not differ in character from a sale made under the last part of the clause without a request in writing. It is necessarily the result of a failure of the three sons to agree to carry on the business jointly in the manner contemplated. So long as they agree there can be no request, and if they fail to agree the last part of the clause is applicable. The special provision for a sale which gives any two of the sons an opportunity to have the price fixed by a previous appraisal is within the general language of the last part of the clause, both in regard to the causes which produce the sale and in the fact that the trustees "sell and convey in fee simple" as required by that language.

Unless the proceeds are to be disposed of under this clause the will makes no provision in regard to them, and they are left to fall into the residue. But it is to be presumed that the testator intended to express his purpose fully in reference to this part of his property. The language which we have quoted indicates his intention as to the proceeds of the property after a sale, and naturally covers the case at bar.

To hold that a sale after a request in writing would terminate the trust would render futile the testator's provisions in regard to this part of his estate. He has said that when there is a failure of his three sons to agree in carrying on the business the property shall be sold and the proceeds held by the trustees until the beneficiaries respectively arrive at the age of fifty years. Under the construction contended for by Charles W. Gleason and Alfred D. Gleason, either of the three sons, by a simple request in writing, might terminate the trust and require that the trust property be turned into the residue of the estate, as soon as the trustees have entered upon the performance of their duties. It cannot be supposed that the testator intended to leave the existence of a trust for which he had made elaborate provisions to depend on the unanimity of his residuary legatees in desiring the continuance of it. In the opinion of a majority of the court the trust continued after the sale of the real estate to Charles W. Gleason and Alfred D. Gleason, and as to their share of the proceeds it still continues.

On the death of Stillman A. Gleason the trust terminated as to his share, which then immediately became payable "to his legal heirs." The will contemplated a change of the real estate to personal property in the hands of the trustees, and that it should go to the heirs in the form of personal property. The words "legal heirs" must therefore be construed to mean those who would take personal property under the Statute of Distributions. *White v.* 9 L. R. A.

Stanfield, 146 Mass. 424, 6 New Eng. Rep. 56; *Sweet v. Dutton*, 109 Mass. 589.

One third of the fund held by the trustees should be paid to the heirs of Stillman A. Gleason, in the proportions of one third to his widow, Mary E. Gleason, and two thirds to his minor son, Benjamin W. Gleason, whose share will be held by his guardian, Albert L. Jewell.

Decree accordingly.

ATTORNEY-GENERAL, *ex rel.*, William R. MANN *et al.*,

v.

REVERE COPPER CO.

(....Mass....)

1. The title to a great pond which had been granted to a town previously to the passage of the Code of 1847, but which had not at that time passed to a private person, could not thereafter be transferred to any private person or persons, and any deed attempting to make such transfer is void.
2. Private rights in great ponds could be acquired by prescription during the interval between the passage of Rev. Stat. 1833, chap. 119, § 12, making the Statute of Limitations of real actions applicable to suits brought by or on behalf of the Commonwealth, and Stat. 1867, chap. 273, providing that such Statute should not apply "to any property, right, title or interest of the Commonwealth below high-water mark or in the great ponds.
3. Although a grant from the State will never be presumed in cases where it could not legally have been made, yet the existence of a statute which simply creates public rights in certain property will not forbid a presumption of a grant of such property to an individual, since it is not inconsistent with the right of the Legislature to make such grant at any time it chooses to do so.
4. A law taking a certain class of cases out of the operation of the Statute of Limitations, which had previously been within its provisions, can have no effect on rights acquired under the Statute previously to the passage of such Law.
5. The rule that no length of time will legalize a nuisance is not applicable to a case where the nuisance is a public one consisting simply of an invasion, by adverse use, of the rights of the public in regard to the enjoyment of property in the way in which a private owner would ordinarily enjoy it, there being a statute which permits the acquisition by disclaim of a complete title against the State.

(November 3, 1890.)

INFORMATION to compel defendant to refrain from drawing water from the Massapoag Pond in the Town of Sharon. *Dismissed.*

The case sufficiently appears in the opinion.

NOTE.—Ordinance of 1847 construed. See note to *Henry v. Newburyport* (Mass.) 5 L. R. A. 179.

Licenses, from State, of right to use waters of great ponds, protected. Proprietors of Mills v. Braintree Water Supply Co. 4 L. R. A. 372, 149 Mass. 478.

Messrs. Robert M. Morse, Jr., Thomas E. Grover and Marcus Morton, Jr., for plaintiff:

The act of the defendants in lowering the waters of the pond is, in and of itself, an unreasonable use of the pond and an interference with the reasonable use of it by the public, and therefore a proper matter for an information.

Potter v. Howe, 2 New Eng. Rep. 167, 141 Mass. 357, 360; *Attorney-General v. Jamaica Pond Aqueduct Corp.* 183 Mass. 861, 864; *Fernald v. Knox Woollen Co.* 7 L. R. A. 459, 83 Me. 48.

The defendant can have no rights superior to the rights of the public by a grant from the Commonwealth, unless the grant excludes a reservation of these paramount rights.

Watuppa Reservoir Co. v. Fall River, 1 L. R. A. 466, 147 Mass. 548.

Neither the Colony nor the proprietors had, prior to 1641, granted the pond to a private person. The Ordinance of 1641, 1647, therefore, affected the pond and established the rights of the public in it.

West Roxbury v. Stoddard, 7 Allen, 158; *Barry v. Raddin*, 11 Allen, 577, 580.

The grant of April 17, 1779, by the Commonwealth of the powder-mill site, upon the stream running from Massapoag Pond and about four miles from the pond "with the appurtenances, privileges and commodities thereof," cannot be so construed as to include the rights of the public in Massapoag Pond.

Com. v. Roxbury, 9 Gray, 451, 493; *Martin v. Waddell*, 41 U. S. 16 Pet. 411, 10 L. ed. 1018.

The defendant has not obtained a right by prescription to enter upon the pond, to dig out the artificial channels, and to maintain its gate and dam so as to lower the water below the natural low-water mark.

Wheeler v. Stone, 1 Cush. 818, 822; *Lakeman v. Burnham*, 7 Gray, 487; *Com. v. Roxbury*, 9 Gray, 451, 470; *Tappan v. Burnham*, 8 Allen, 65; *Tuft v. Charlestown*, 117 Mass. 401; *Hittinger v. Eames*, 121 Mass. 589; *Eastern R. Co. v. Allen*, 185 Mass. 18; *Litchfield v. Ferguson*, 2 New Eng. Rep. 890, 141 Mass. 97.

Mr. Horatio G. Parker, for respondent: Individuals may acquire by prescription, against the Crown or the State, the right to the soil of public waters.

Gould, Waters, p. 65, § 87, note 4; Angell, Waters and Watercourses, p. 64, § 65; *Bullen v. Runnels*, 2 N. H. 257; *Storer v. Freeman*, 6 Mass. 488; *Com. v. Charlestown*, 1 Pick. 180, 182; *Kean v. Stetson*, 5 Pick. 492-495; *Com. v. Alger*, 7 Cush. 53, 77, 78, 79; *Piper v. Richardson*, 9 Met. 157, 158; *Com. v. Bailey*, 18 Allen, 548; *Nichols v. Boston*, 98 Mass. 41, 42, 43; *Boston v. Richardson*, 105 Mass. 357.

This doctrine has been directly applied to great ponds.

Covell v. Thayer, 5 Met. 253; *Cummings v. Barrett*, 10 Cush. 187; *West Roxbury v. Stoddard*, 7 Allen, 170, 171; *Hittinger v. Eames*, 121 Mass. 548-548.

The right to the exclusive use of water may undoubtedly be acquired by adverse possession and enjoyment, when it is real and actual.

Angell, Waters and Watercourses, p. 233, § 135; Gould, Waters, p. 404, § 227, p. 543, § 833; *Bullen v. Runnels*, 2 N. H. 257; *Cary v. Daniels*, 8 Met. 466, 467; *Thurber v. Martin*, 9 L. R. A.

2 Gray, 894, 895, 897; *Gould v. Boston Duck Co.* 18 Gray, 442; *Pratt v. Lamson*, 2 Allen, 275-288.

Entry under a deed duly acknowledged and recorded acquires a freehold, either by right or wrong; if by wrong it is an actual disseisin of all claiming the lands under a different title.

Higbee v. Rice, 5 Mass. 352; *Rahoboth v. Carpenter*, 23 Pick. 187; *Melvin v. Locks & Canals*, 5 Met. 15, 83.

Chapter 275 of the Laws of 1867 plainly shows, as was the case, and as has been held time and again, that individuals could, up to the date of that Act, obtain rights by prescription in great ponds in twenty years.

Gould, Waters, §§ 835, 856; Angell, Waters and Watercourses, §§ 217, 218; Washb. Easem. p. 84, § 24; Goddard, Easem. pp. 111-115; *Coolidge v. Learned*, 8 Pick. 507, 509; *Nichols v. Boston*, 98 Mass. 43; *Tyler v. Wilkinson*, 4 Mason, 897.

Knowlton, J., delivered the opinion of the court:

The defendant owns the land on both sides of the stream which flows from Massapoag Pond, and maintains a flume and gate at the outlet of the pond and regulates the flow of water by holding it back or letting it down to be used for power in running its mills on the stream below, and at times lowers the surface of the water in the pond to the depth of three feet and ten inches below the lowest point at which it would stand if left in its natural condition.

The defendant shows an unbroken chain of title running back to the grant from the Colony to the proprietors of Dorchester in 1637, and the first question in the case is whether it has a right by deed to lower the waters of the pond as it has been accustomed to do. We will assume, without deciding, that the title to the pond passed to the original proprietors of Dorchester in 1637. *West Roxbury v. Stoddard*, 7 Allen, 158; *Com. v. Roxbury*, 9 Gray, 451.

It had not been conveyed to any private person at the time of the adoption of the Body of Liberties in 1641, which secured to the public rights of fishing in great ponds, or at the time of the passage of the Code of 1647. By that Code, as appears by the Compilation of 1660, it was provided "that no town shall appropriate to any particular person or persons any great pond containing more than ten acres of land . . . and that, for great ponds lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and reposs on foot through any man's property for that end, so they trespass not upon any man's corn or meadow." Anc. Chart. 148; Colonial Laws 1660-1672; Boston Reprint of 1889, 87, 86, 170.

The effect of these provisions has often been considered by this court, and it is held that the title to great ponds which had not previously been granted is in the Commonwealth for the benefit of the public, and, if a pond had previously been granted to a town, and had not passed to a private person, the legal title remains in the town, but the beneficial right is in the public. *Com. v. Roxbury*, 9 Gray, 451; *West Roxbury v. Stoddard*, 7 Allen, 158; *Wa-*

tuppa Reservoir Co. v. Fall River, 147 Mass. 648, 1 L. R. A. 466.

The deed of the proprietors of Dorchester and Stoughton to Edmund Quincy, dated June 11, 1770, so far as it purported to convey the pond itself, was in violation of law and of no effect. Upon our assumption the title to the pond remained in the town to be held for the public; if it was not in the town, it was in the Commonwealth, and held in like manner for the public.

The deed of Samuel Briggs, Jr., to the Colony of Massachusetts Bay in February, 1776, and the deed from the Great and General Court of Massachusetts Bay in 1779, of the powder-mill site and privilege now owned by the defendant, conveyed only the ordinary rights of a riparian proprietor on a stream, together with such privileges as were specified in the deeds, and they gave no right to interfere at any time with the natural outflow of water from the pond. The defendant shows no title by deed under which it can lawfully control the water in the pond, or draw it below the lowest level which it would reach if affected only by natural causes.

The use on which the defendant relies to support its claim of a right by prescription falls far short of establishing a title to all the water of the pond, and a right to use it as the defendant may choose. There has been no such exclusive use of the entire pond and no such control of it by the defendant as is necessary to the acquisition of a title by disseisin. But the master finds "that since 1825 the defendant and its predecessors in title have, under a claim of right, continuously, peacefully, exclusively,—except as hereinafter stated,—and without lawful interruption up to the time of filing this information, possessed and controlled and regulated the water and the flow of water from this pond, have maintained the water at such height as they pleased, and have drawn it to a depth of three feet and ten inches below natural low-water mark when and as they pleased, and have entered the pond and dug and cleaned out the channels as hereinbefore stated whenever they pleased." He finds "that, in thus lowering the waters of the pond, the area of surface and quantity of water have been diminished, and thereby the limits of enjoyment by the public in the rights of bathing, boating, fishing and cutting ice, if any they had, have been abridged." He also finds "that, other than as aforesaid, the defendant has not excluded nor sought to exclude the public from bathing, boating, fishing, fowling or cutting ice on the pond, but that the public have to some extent at any and all times used and enjoyed these privileges without let or hindrance." It is also found that, in 1770, Edmund Quincy, who held a deed from the town, lowered the water in the pond by permanently digging down the outlet under a claim of right to a depth a little less than its depth at present, and that from that time to 1825, in order to get iron ore from the bed of the pond, the water was drawn off at will through that outlet. If the Commonwealth representing the public had no property or rights to be considered, these facts would show the acquisition by the defendant of a perfect prescriptive right to regulate and control the flow of water

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from the pond as it and its predecessors in title have been accustomed to do. *Cary v. Daniels*, 8 Met. 466, 479; *Pratt v. Lamson*, 2 Allen, 275, 278.

The question, therefore, arises whether such a right can be acquired against the public. The rule of the common law was expressed by the maxim *nullum tempus occurrit regi*. There was no Statute of Limitations against the sovereign power, and prescription did not run against the king. This rule has been generally recognized by the American States, and it has been held that Statutes of Limitations are not applicable to suits brought by a State, unless they are made applicable to them in terms. *Stoughton v. Baker*, 4 Mass. 528; *Com. v. Hutchinson*, 10 Pa. 466; *Bagley v. Wallace*, 16 Serg. & R. 245; *State v. Joiner*, 23 Miss. 500; *Brinsfield v. Carter*, 2 Ga. 143; *Des Moines v. Harker*, 84 Iowa, 84; *People v. Gilbert*, 18 Johns. 277; *Cincinnati v. Evans*, 5 Ohio St. 594.

The Statute of 9 Geo. III., chap. 16, changed the law in England, and extended the Statute of Limitations to real actions brought by the King. Since the passage of that Act prescription has been pleadable there against the sovereign. The rule of the common law prevailed in Massachusetts until the enactment of the Revised Statutes in 1835, when, by chap. 119, § 12, the Statute of Limitations of real actions was made applicable to suits brought by or in behalf of the Commonwealth. This section, with slight amendments, now appears in Pub. Stat., chap. 196, § 11. Under this Statute a title by disseisin may be acquired against the Commonwealth as readily as against a private person, and, by analogy, there seems to be no good reason why prescriptive rights in the real estate of the Commonwealth may not also be acquired. Although the adjudications on this subject are not numerous, there are many cases which seem to recognize the possibility of acquiring such rights. It has several times been held, not only that the title of a private owner of flats may be divested by disseisin, but that the rights of the public to use the water over the flats, for navigation, boating and fishing, may in like manner be divested by long-continued adverse use. *Tyfts v. Charlestown*, 117 Mass. 401; *Eastern R. Co. v. Allen*, 135 Mass. 18; *Nichols v. Boston*, 98 Mass. 89.

Other cases assume that this is so. *Lake-man v. Burnham*, 7 Gray, 487; *Tappan v. Burnham*, 8 Allen, 65.

It may be said that the cases in relation to the acquisition by prescription of public rights in flats do not show that similar rights can be acquired in great ponds, because the rights of the public in the waters over flats are subordinate to the right of the private owner reasonably to improve his land, by excluding the public and building upon it, while in great ponds there is no private ownership. But if prescription will run against the public, it may avail to cut off public rights in great ponds as well as anywhere else.

In *Nichols v. Boston*, *supra*, the rights acquired by prescription did not depend on the peculiarity of private ownership in flats. They extended below low-water mark, where the sole ownership and control were in the Commonwealth, for the benefit of the public.

In *Hittinger v. Eames*, 121 Mass. 589, the

plaintiff claimed by prescription the right to prevent the public from cutting ice on a great pond. Although it was decided that he did not show such a use as to establish his claim, the opinion assumed without question that rights in great ponds could be acquired against the public by prescription as well as by grant from the Legislature. Other cases in which the court seems to assume that rights adverse to the public may be acquired in great ponds by prescription are *Cowell v. Thayer*, 5 Met. 258; *Cummings v. Barrett*, 10 Cush. 187; *West Roadbury v. Stoddard*, 7 Allen, 158, 170, 171; *Tudor v. Cambridge Water Works*, 1 Allen, 164.

In the present case also the plaintiff's counsel assumes it, but contends that the facts are not sufficient to establish a prescriptive right.

In *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466, no question of this kind was presented by counsel or considered by the court.

It is sometimes said that prescription will not run against a statute; but this is not an accurate statement of the law. In England, where the laws are made by Parliament and grants of public property are made by the King, when there is an Act of Parliament forbidding grants of a particular kind a title cannot be founded on the presumption of such a grant. *Goodtitle v. Baldwin*, 11 East, 498; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Mil v. New Forrest Comr.* 18 C. B. 60, 69.

The same principle applies in any case where a grant could not legally have been made. *Brookline v. Mackintosh*, 188 Mass. 225; *Turner v. Fitchburg R. Co.* 145 Mass. 486, 5 New Eng. Rep. 423; *Mills v. Hall*, 9 Wend. 815.

In this Commonwealth a statute which creates public rights in property is not inconsistent with the existence of a right in the Legislature at any time to grant away all or any of such rights. There is a strong presumption that a State will not divest itself of sovereignty and governmental control over any part of its territory; but there is no presumption that it will not for a good reason part with property which it holds for public use. It may grant that at any time, subject to no greater limitations than those which would affect an individual owner of similar property. In the case at bar the uninterrupted adverse exercise of a power to lower the water of the pond, by the defendant and its predecessors in title, may well give a prescriptive right, whether the legal title was in the Commonwealth or in the Town. The grounds on which a grant may be presumed to have been made are not materially different from those in any other case of the acquisition of a right by prescription. *Scheuber v. Held*, 47 Wis. 840.

By the Statute of 1867, chap. 275, it was provided that the Statute of Limitations of real actions brought by the Commonwealth shall not apply "to any property, right, title or interest of the Commonwealth below high-water mark or in the great ponds." Pub. Stat. chap. 196, § 11.

Since this modification of the Statute of Limitations, it is manifest that the Statute cannot be set up in bar of a real action brought by the Commonwealth to recover a great pond, unless the defendant had acquired a title by disseisin before the passage of the Amendatory
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Act. But before the passage of this Act, the defendant and those under whom it claims had for more than forty years been exercising, to its full extent, the right which it now claims, and for fifty-five years more had exercised it to only a little less extent. Under the Revised Statutes it had acquired valuable rights of which, by the new enactment, it could not justly be deprived. After the passage of the Statute, possession could not avail for the acquisition of new rights, but those which were then perfect were not taken away by the enactment. *United States v. White*, 2 Hill, 59; *Battles v. Fobes*, 18 Pick. 532; *Wright v. Oakley*, 5 Met. 400; *United States v. Buford*, 28 U. S. 3 Pet. 12 [7 L. ed. 585]; *Davis v. Minor*, 1 How. (Miss.) 188; *Stipp v. Brown*, 2 Ind. 647; *Knox v. Cleveland*, 18 Wis. 245; *Wires v. Farr*, 25 Vt. 41; *Woart v. Winnick*, 8 N. H. 478.

We have not overlooked the cases in which it is said that no length of time will legalize a nuisance. See *Morton v. Moore*, 15 Gray, 578; *Com. v. Upton*, 6 Gray, 478; *New Salem v. Eagle Mill Co.* 188 Mass. 8.

The reason of the rule to which these cases refer is that criminality can gain no toleration in the law. The creation and maintenance of a public nuisance is punishable criminally; hence the element of criminality which characterizes the act of creating it should prevent the acquisition of a right to maintain it.

The rule as sometimes broadly stated is not of universal application. An adjacent land owner who erects and maintains a fence along a highway, in such a position as to include in his inclosure a part of the highway, may be indicted for maintaining a public nuisance. Yet by our statutes, if he so maintains it for forty years, he thereby acquires a prescriptive right against the public to have it remain there forever. The same rule applies if the fence is on a town way, private way, training field, burying place, landing place, or other land appropriated for the general use or convenience of the inhabitants of the Commonwealth or of a county, town or parish. Pub. Stat. chap. 54, § 1; *Cutter v. Cambridge*, 6 Allen, 20; *Winslow v. Noyson*, 113 Mass. 411, 421.

So under the Revised Statutes, chap. 119, § 12 (Pub. Stat. chap. 196, § 11), suppose an exclusive occupation by an individual of land held by the Commonwealth for a public use, and a maintenance by him of such a possession as constitutes a disseisin in some way other than by the erection of a fence or a building; such an interference with the rights of the public would be a public nuisance and subject him to an indictment; yet at the end of twenty years he would have a title by disseisin, and the Commonwealth could not dislodge him.

In the case at bar, the public rights secured by the Colonial Law are in the nature of ordinary rights of property, whereby the public may use and enjoy this great pond in the same way as a private owner would ordinarily use and enjoy it. The acts of the defendant and its predecessors in title have been injurious only as they have interfered with the public in the enjoyment of these rights of property. If they created what was technically a public nuisance, they were not criminal in the sense in which the word is popularly used, and if there was in them any element of criminality,

it was very small as compared with that involved in the maintenance of a nuisance that endangers the life or health of the people, which is the kind of nuisance on which the rule was founded.

Notwithstanding the general language which is used in some of the cases, we do not think that either principle or authority requires the application of this rule to a case where the invasion of the rights of the public is only in regard to their enjoyment of property in the way in which a private owner would ordinarily use it, and where there is a statute permitting the acquisition by disseisin of a complete title against the State, and where there is no other nuisance than an abridgement of the ordinary use of the property by the public by a long-continued use of some part of it by an individual under a claim of right.

The master does not find that the lowering of the pond has been detrimental to the public health, or in violation of public or private

rights otherwise than as it has for a short time in each year reduced the area and depth of the water and diminished the enjoyment of boating. This abridgement of public rights appears to have been of but little practical importance, and when we consider the great apparent value of the water for furnishing power to riparian proprietors upon the stream below, and the finding of the master that there are eleven mill-sites and privileges on the brook, in which there is an invested capital of about \$1,800,000, it does not seem strange that for nearly one hundred and twenty years the water has been used in this way without objection on the part of the Commonwealth.

A majority of the court are of opinion that the defendant has a right to draw the water at the outlet of the pond as it was accustomed to do for more than forty years prior to the change of the law by the enactment of chap. 275 of the Statutes of 1867.

Information dismissed.

INDIANA SUPREME COURT.

James RENIHAN *et al.*, *Appts.*,

v.

George W. WRIGHT *et al.*

(....Ind....)

1. A husband and wife may maintain a joint action for the breach of a contract made with them jointly by which a third person undertakes to take charge of and safely keep the remains of their deceased child until they are ready to inter the same.
2. The courts of Indiana possess the power to enforce the right of a father and mother to the body of their deceased child and to protect them in the exercise of the right of burial, and they also possess power to assess such damages as may accrue to the parents on account of being deprived of such rights.
3. The right to the custody of a corpse, and the right to superintend its burial, do not belong to the executor or administrator, but to the next of kin.
4. Procuring at one's own expense the return of a corpse which he had contracted with the next of kin to keep safely until a convenient time for burial, but which he had negligently permitted to go into the possession of a third person, will not prevent a recovery by the next of kin of such damages as they may have suffered by reason of such negligence unless they expressly agreed that such return would be accepted in full satisfaction of the cause of action arising therefrom.
5. Mental anguish suffered by the next of kin by reason of a breach by a third person of his contract with them to safely keep a corpse until they should desire to inter the same may be considered in the assessment of damages for such breach.

(October 30, 1890.)

APPEAL by defendants from a judgment of the Superior Court for Marion County in favor of plaintiffs in an action brought to recover damages for an alleged breach of a
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contract by which defendants undertook to safely keep the remains of plaintiffs' child until they should desire to inter the same. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Ben F. Davis for appellants.

Messrs. Charles E. Clark and H. J. Everett for appellees.

Coffey, J., delivered the opinion of the court:

In this case the complaint alleges that appellees, being husband and wife, on the 10th day of December, 1884, employed the appellants, who were undertakers and funeral directors in the City of Indianapolis, to take charge of and safely keep, in a secure vault, the body of the deceased daughter of the appellees until such time as they might be prepared and ready to inter the same; that appellants, in pursuance of such employment, took charge and possession of said remains and placed the same in a vault, and that the appellees compensated the appellants to safely keep the said remains therein until such time as they might be prepared and ready to inter the same; that the said appellants did not safely and securely keep said remains, but carelessly and negligently took or allowed the same to be taken and buried or otherwise disposed of, and wrongfully refused and still refuse to inform the appellees where said remains have been removed to, further than to say: "Your child is in Ohio;" that by reason thereof appellees have suffered great distress of mind and are damaged in the sum of \$500, etc.

The court overruled a demurrer to this complaint, whereupon the appellants filed an answer in three paragraphs. The court sustained a demurrer to the second paragraph of said answer, and a trial of the cause by a jury, upon issues formed, resulted in a verdict for the appellees, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of error calls in question the correctness of the ruling of the court in over-

ruling a demurrer to the complaint, in sustaining a demurrer to the second paragraph of the answer and in overruling the motion of the appellants for a new trial.

The appellants claim that the complaint is not sufficient: first, because it does not show a cause of action in favor of both of the appellees; second, because the right to control a corpse and superintend the burial thereof is in the executor or administrator, and not in the next of kin; and for this reason the complaint does not state a cause of action in favor of either of the appellees.

It is settled that where a complaint does not state a cause of action in favor of all the plaintiffs it is not sufficient to withstand a demurrer. *Nave v. Hadley*, 74 Ind. 155; *Faler v. State*, 58 Ind. 299; *Neal v. State*, 49 Ind. 51.

But if any cause of action exists in favor of the appellees in this case we think it is joint.

It is alleged, substantially, in the complaint, that both the appellees entered into the contract of bailment therein set out with the appellants, and that they jointly compensated the appellants for such bailment. It follows, we think, that they are entitled to maintain a joint action for a breach of such contract. The appellants are in error in assuming that the complaint sounds wholly in tort, and that there is no community of interest existing in the appellees.

While it may be true that the matters charged partake largely of the nature of a tort, yet they are so intimately connected with the contract of bailment alleged in the complaint as to be incapable of separation from it, and in this consists the unity of interest which gives the joint right to prosecute the action.

The second objection urged against this complaint presents a much more difficult question. The decided cases bearing upon the question are somewhat confused and are not free from conflict. This confusion and conflict arises, no doubt, in the attempt on the part of some of the courts in this country to follow the decisions of the courts in England, while other courts have asserted that the rule of decision in that country can have no application in the American courts. It is quite clear to us that but little light can be had upon the question now under consideration from the decisions found in the English Reports, for the reason that the jurisprudence of that country is peculiarly compounded, embracing largely the ecclesiastical element not found in our jurisprudence. In that country, the partition of judicial authority between the church and the state has materially narrowed the powers and actions of the common-law courts. This condition is peculiar to England, and for that reason their decision upon questions kindred to the one before us should not exert any controlling influence over the courts of this country, where no such partition exists. It is asserted, and, perhaps truthfully, that Cuthbert, Archbishop of Canterbury, first introduced burial in churchyards in England in the year 750. The exclusive power of the ecclesiastics, denominated "Ecclesiastical Cognizance," became both executive and judicial soon after the Norman Conquest. It was executive in taking the dead body into actual possession and guarding its repose in consecrated ground,

and it was judicial in deciding all controversies involving the possession or the use of holy places, as well as in adjudicating upon the question as to who should be allowed to lie in consecrated earth, and, in fact, who should be allowed to be interred at all. The clergy monopolized the judicial power over the subject of burial, while the secular courts, stripped of all authority over the dead, were confined to the protection of the monuments or other external emblems of grief erected by the living. The heir could maintain no action in the common-law courts for the disturbance of the remains of his buried ancestors, the remedy for such wrong belonging to the parson, in whom was vested the freehold of the soil in which the burial was made. Third Institute, p. 203.

The power exercised by the ecclesiastical tribunals of England is not spiritual, but temporal and judicial. It is a legal secular authority which they have gradually abstracted from the ancient civil courts to which it had originally belonged. It will thus be seen by this brief review of the law in England upon the subject now in hand that the decisions of the courts of that country upon the subject of the right of relatives to control the bodies of the dead are not authorized in this country. As we have no division of power between the church and the state in this country, it follows that much of the power exercised by ecclesiastical tribunals in England is vested, of necessity, in the secular courts here charged with the general administration of the law. The necessity for the existence and exercise of such power must be apparent to all. Without it the right to take the exclusive control of a corpse and care for and bury it could not be enforced. The father could not legally protect the remains of his children, or the husband of his wife, in the absence of such power. While the law might punish the body-snatcher who desecrated the grave, it would be powerless to restore the body to the relatives.

The courts of this State, in our opinion, possess the power to enforce the rights of the appellees in this case to the body of their deceased daughter, if the law gives them the right to its custody and the right to give it decent burial; and they also possess the power to assess such damages as may accrue to them on account of being deprived of such right.

It will not do to say that the custody of a corpse belongs to and it must be interred by the executor or administrator of the deceased, for under our law no letters of administration can be granted except to relatives for the period of twenty days after death. In the event of the inability of the relatives to give the bond required by law, no provision for the burial could legally be made during that period. Certainly our law-makers did not understand that no one except an executor or administrator had the legal right to the custody and burial of a corpse. Then in whom is the right vested? In the case reported in 4 Bradf. (N. Y.) 503, note, this question is fully considered and passed upon by the supreme court of New York. In that case, as appears by the report, in widening Beekman Street, in the City of New York, the commissioners, in estimating the assessments awarded to a corporation known as the Brick Presbyterian Church, \$23,000 as the

value of a certain piece of land taken for that purpose. The names of all the persons interested in the land not being known, the money was paid to the Chamberlain of the City of New York, to abide the order of the court. In the parcel of land so taken were embraced certain vaults for the burial of the dead, in which various individuals claimed rights of interment and the use thereof as vaults for the burial of the dead. The corporation, the Brick Presbyterian Church, was entitled to the whole of said sum, subject to the rights of said vault holders. The question of the rights of the respective parties in this fund was referred to the Hon. Samuel B. Ruggles, with directions to investigate the facts and report the amount due to each. During his investigation the remains of one Moses Sherwood were identified by his daughter, Maria Smith, who, acting for herself and her sister, and for the descendants of her brothers and sisters, five in all, who had died, claimed that such remains be re-interred, in a separate grave, in such suitable locality as she might select; that the existing monument be erected over such grave, and that the necessary expenses be defrayed out of the fund in court. It appeared that Moses Sherwood was buried on the strip of ground taken in widening the street in the year 1801; that the tombstone was erected, at the time, to mark his grave, and quietly stood there over his remains until they were thrust aside by the city corporation, to give place for the cart ways and foot walks of Beekman Street as widened.

Mr. Ruggles filed his report and the cause coming on for hearing at the special term of the supreme court in April, 1856, the report as to the law of the case was affirmed. The report contains a statement of the learned referee's investigation of the law of burial, and it is believed to be the most accurate and elaborate collection and statement of the law upon that subject yet published. In commenting upon the question now under consideration, Mr. Ruggles says: "It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic; but it is of the sacred and inherent right to its custody, in order to bury it and secure its undisturbed repose. The dogma of the English Ecclesiastical Law that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any judicial precedent. Our courts of justice should place it at once where it should fundamentally rest forever, on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection, by every consideration of feeling, decency and Christian duty. The world does not contain a tribunal that would punish a son who would resist, even unto death, any attempt to mutilate his father's corpse, or tear it from

the grave for sale or dissection; but where would he find the legal right to resist except in his peculiar and exclusive interest in the body?"

The final conclusions reached by Mr. Ruggles upon the subject of the legal aspect of the matters referred to him for his report were:

"1. That neither a corpse nor its burial is subject in any way to ecclesiastical cognizance nor to sacerdotal power of any kind.

"2. That the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect.

"3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

"4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture and to change it at pleasure."

Following the law as announced by Mr. Ruggles in the report above referred to, this court held in the case of *Bogert v. Indianapolis*, 13 Ind. 184, that the bodies of the dead belong to the surviving relatives in the order of inheritance as other property, and that they have the right to the custody and burial of the same.

Our conclusion is that the custody of a corpse and the right of burial do not belong to the executor or administrator, but to the next of kin; and that the courts of this State possess the power to protect such next of kin in the exercise of such right.

It follows that the court did not err in overruling the demurrer to the complaint in this cause.

The second paragraph of the answer avers that the appellants prepared the corpse named in the complaint for burial on or about the 10th day of December, 1884, and placed the same in a vault wherein were placed the corpses of other children of like age, and in all respects prepared in the same manner for interment; that in consideration therefor the appellees promised and agreed to pay the appellants a fair and reasonable price, which was \$20; that on or about the 29th day of April, 1885, the appellees notified the appellants that they desired to have their said child interred, when for the first time they discovered that said body and corpse had been by the appellants shipped, by mistake, to some point for interment, not then remembered by them; that they then and there so notified the appellees, and promised them to immediately find the place of the interment of said body, and without delay return the same to appellees, to which the appellees expressed their satisfaction; that on the 4th day of May, 1885, they learned that said corpse had been shipped to and interred at Ohio, in the State of Pennsylvania, and so notified the appellees and informed them that they would have said corpse returned by express at their expense, to wit, the sum of \$50, to which the appellees assented; that immediately thereafter, and before said corpse had time to arrive at the City of Indianapolis, to wit, on the 5th day of May, 1885, the appellees commenced this action; that afterwards, on or about the 10th day of May, 1885, the body of said child was returned to appellants and was taken by the appellees and interred; all of which was taken and received by the appellees in full

and perfect satisfaction of all wrongs and injuries incident to the mistake made by the appellants in sending said body to the Town of Ohio, in place of one of said other like corpses in their said vault; that appellees have failed to pay said sum of \$20 or any part thereof, although the same was past due at the time of the commencement of this suit.

We do not think the court erred in sustaining a demurrer to this answer. It is drawn and proceeds upon the theory that the appellees accepted the acts of the appellants in the matter of the return of the corpse in full accord and satisfaction of the cause of action set up in the complaint. The averment found in the answer, at its close, to the effect that a return of the corpse was taken and received by the appellees in full and perfect satisfaction of all wrongs and injuries incident to the mistake, etc., made by the appellants, is the statement of a mere conclusion, not warranted by any premises preceding it. It was the duty of the appellants to procure a return of the corpse; and there is no averment in the answer that the appellees agreed with the appellants that they would accept such return in satisfaction of the cause of action upon which the complaint is based.

The only matter urged under the assignment of error calling in question the action of the court in overruling the motion for a new trial relates to the instructions in the cause.

The court instructed the jury that in assessing the damages they might take into consideration the mental anguish of the appellees, if they suffered any mental anguish on account of the matters set up in the complaint.

In this instruction we do not think the court erred. The case is analogous in principle to the case of *Reese v. Western U. Teleg. Co.*, 123 Ind. 294, 7 L. R. A. 588. In that case it was held that the telegraph company was liable for the mental anguish occasioned by its failure to deliver a message in case of extreme illness. The doctrine announced in that case is fully supported by the cases of *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507; *Hays v. Houston & G. N. R. Co.*, 46 Tex. 272; *Wadsworth v. Western U. Teleg. Co.*, 86 Tenn. 695, and *Beasley v. Western U. Teleg. Co.*, 89 Fed. Rep. 181.

The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient

consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part.

The case of *Wadsworth v. Western U. Teleg. Co.*, *supra*, is in some of its features much like the case now before us. In that case the following telegram was sent to Mrs. Wadsworth, the sister of the deceased:

Memphis, October 8, 1887.

To Mrs. T. J. Wadsworth, Byhalia, Miss.

Mr. Howell died this morning. Advise us what to do. Will look for someone on morning train.

R. C. Walden.

The company negligently failed to deliver this telegram. In a suit by Mrs. Wadsworth against the telegraph company, in which she sought to recover damages on account of injury to her feelings in being deprived of the privilege of being present to take charge of the body and to superintend its burial, the learned judge who delivered the opinion of the court said: "To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegram altogether, and to violate the rule of law which authorizes the recovery of damages appropriate to the objects of the contract broken."

When the appellants contracted with the appellees to safely keep the body of their daughter until such time as they should desire to inter the same, they did so with a knowledge of the fact that a failure on their part to comply with the terms of such contract would result in injury to the feelings of the appellees; and they must therefore be held to have contracted with reference to damages of that character, in the event of a breach of the contract on their part.

After a careful examination of all the questions presented by the record in this cause, we find no error for which the judgment should be reversed.

Judgment affirmed.

VERMONT SUPREME COURT.

Athea COLEMAN, *Appt.*,

v.

Ralph WHITNEY *et al.*

(....Vt....)

1. A wife may enforce an agreement, made by a third person in consideration of money received from her husband at the time of a separation between husband and wife, by which such person undertakes to provide for and maintain her during her life without expense to the

husband, and to indemnify and save him harmless from any charges on her account, although she is not a party to the instrument.

2. Mere neglect for any length of time to take the benefit of a provision for a life support will not bar the right to enforce the obligation.

3. There is no breach of the condition of a mortgage given to secure performance of an agreement to furnish a life support until an application for such support and a failure to furnish it.

4. The neglect of one entitled to a life support under a contract the performance of which is secured by a mortgage, to assert his right until after the sale of the mortgaged property, the death of the mortgagor and the sub-

NOTE.—Agreement of separation, and bond to secure separate maintenance of wife. See note to *Winn v. Sanford (Mass.)* 1 L. R. A. 611.

9 L. R. A.

stantial settlement of his estate, will not prevent an enforcement of the mortgage where it does not appear that the grantees of the property have lost their remedy on the mortgagor's warranty.

5. The fact that the amount of money received as the consideration for an agreement to furnish a life support was included in a note given by the one owing the support to the one entitled thereto upon a settlement between them is not sufficient of itself to show that the matter of the life support was included in the settlement, and that the note was accepted in satisfaction of the claim.

(*Ross, J., dissents.*)

(August 7, 1890.)

APPEAL by oratrix from a decree of the Chancery Court dismissing *pro forma* a bill filed to enforce a mortgage which had been given to secure performance of an agreement for her support. *Reversed.*

The agreement was entered into in 1858 between her brother, Eliphalet Coleman, and her then husband, Martin M. Benedict.

The condition in the mortgage was as follows: "This grant is intended as a security for the fulfillment and performance on the part of the said party of the first part, his heirs and assigns, of an agreement this day made between him and the said party of the second part, by which the said party of the first part agrees to and with the said party of the second part to take the wife of the said party of the second part to the home of the said party of the first part, in Vermont, and to provide for, support and maintain her, separate from the said party of the second part, and without cost or expense to the said party of the second part, and to indemnify and save harmless the said party of the second part for all claims for support, maintenance or otherwise, from charges through the wife of the said party of the second part, Althea Benedict, she being the sister of the said party of the first part, and for and during her natural life; and to save harmless the said party of the second part, his heirs and assigns, from all claim of dower or thirds by the said Althea, according to the condition of a certain bond or writing obligatory, bearing even date herewith, executed by the said Eliphalet Coleman to the said party of the second part as a collateral security, which agreement, if duly kept and performed, will render this conveyance void. And if default shall be made in keeping or performing of the agreement above mentioned, then the party of the second part and his assigns are hereby authorized, pursuant to statute, to sell the premises above granted, or so much thereof as will be necessary to satisfy the amount of damage resulting therefrom, with the costs and expenses allowed by law, and to convey said premises to the purchaser or purchasers thereof, and to account to the said party of the first part for the overplus arising from such sale, if any should remain." The defendants insisted that if the oratrix ever had any claim against the said Eliphalet Coleman, or against the premises in question, it was extinguished by a settlement made between them on or about July 2, 1864. With reference to this settlement the master found: "I further find that on the 2d day of

July, 1864, the said oratrix procured the services of Judge Lynde, of Williamstown, to aid and assist her in a settlement with her brother, the said Eliphalet Coleman, and I find that they did settle, but it does not fully appear just what was settled. She had then been living with and working for her brother, and making her home with him, for about eleven years. Her son had lived with and worked for her brother more or less. She had received money from him to buy things for herself and for her son, but just how much all this was, or just what items went into that settlement, did not fully appear; but from all the circumstances and evidence, together with her acts and sayings afterwards, I find the fact that the settlement included all the balance due her at that time for her work, and for the money that had been received from the said Martin M. Benedict by the said Eliphalet Coleman at the time the said oratrix and the said Benedict agreed to live separate and apart. The amount found due her at the time of settlement, as reckoned up by Judge Lynde, was a little more than \$800, and whatever sum there was over \$800 the said Eliphalet paid her at the time, and then and there executed to her a promissory note for the said \$800, in words and figures following:

Williamstown, July 2, 1864.

For value received, I promise to pay Althea Coleman, or bearer, eight hundred dollars on demand, and interest.

[Signed]

Eliphalet Coleman.

Mr. J. D. Denison, for appellant:

The deed of Eliphalet has no effect upon the rights of appellant.

Blaisdell v. Stevens, 16 Vt. 179; *Pownal v. Myers*, Id. 408.

A party claiming lands as discharged from a trust of which he has notice must show such discharge.

Ellis v. Steadman, 36 Vt. 210.

Mr. Allard G. Fay, for appellees:

The mortgage was given by Eliphalet Coleman to Martin M. Benedict, one of the defendants. The oratrix was not a party to the mortgage, nor an assignee of the mortgage.

2 Jones, *Mortg.* § 1871.

This whole transaction amounted to an agreement of separation between the husband on one hand and the wife and a trustee on the other hand. Such agreements are now upheld by the courts.

Schouler, *Husb. and W.* § 478, *et seq.*; *Dupre v. Rein*, 56 How. Pr. 228. See *Barron v. Barron*, 24 Vt. 375, 398, *et seq.*

The agreement of separation was no bar to divorce proceedings, or even to a claim for alimony.

Schouler, *Husb. and W.* § 476; *Wilson v. Wilson*, 40 Iowa, 230; *Marlow v. Marlow*, 77 Ill. 633; *J. G. v. H. G.* 33 Md. 401.

The Statute of Limitations has long since run, the period from the giving of the mortgage to the death of her brother being twenty-eight years.

Rev. Laws, § 951; *Ang. Lim.* p. 373, *et seq.*

The oratrix by her silence during the whole twenty-seven years from the sale of the land by her brother, to the death of her brother, has been guilty of such laches and negligence that she has forfeited any right she might ever have had to the premises.

Ang. Lim. pp. 20, 31; *Bowman v. Wathen*, 42 U. S. 1 How. 189, 11 L. ed. 97; *Phillips v. Rogers*, 12 Met. 405.

The oratrix is barred of any claim in this suit by the settlement of July 2, 1864. She settled all deal between herself and her brother, including the \$400 consideration for this mortgage. Her brother paid her some money and she took his note for the balance, \$800. The taking of the note was payment of the debt for which it was taken.

Hutchins v. Olcott, 4 Vt. 549; *Collamer v. Langdon*, 29 Vt. 82; *Wait v. Brewster*, 31 Vt. 519.

Munson, J., delivered the opinion of the court:

In 1853 the oratrix, while living with her husband, Martin M. Benedict, at Stockholm, N. Y., was taken sick, and wrote to her brother, Eliphalet Coleman, who lived in Williamstown in this State, requesting him to come and help her. Coleman thereupon went to see the oratrix, and during his visit an arrangement was made as to the oratrix's future residence and support. The oratrix and her husband agreed to thereafter live apart. The husband gave Coleman \$400, and Coleman executed to the husband a bond and mortgage, conditioned as set forth in the statement of facts. Coleman then took the oratrix to his home in Williamstown, where she afterwards lived, except as hereinafter stated. Coleman died in 1881, leaving no provision for her maintenance. The oratrix is now without means, and in need of support, and brings this bill to obtain a maintenance from the mortgaged premises. The master reports the condition in the bond, which was not produced, to be as recited in the mortgage. From this it appears that the mortgagor agreed to take the oratrix to his home, and to provide for, support and maintain her, during her natural life, separate from and without expense to the husband, and to indemnify and save harmless the husband from any charges on her account. It is claimed that this is simply an obligation to indemnify the husband, and that the wife takes no benefit under it. We do not so construe the instrument. We think the obligation assumed by Coleman included the support of the wife during her life, and was not limited to the mere indemnity of the husband. He was not at liberty to leave her in destitution, on the chance that her impoverished condition might not result in expense to the husband, but was to give her such necessary support as it would otherwise have been the duty of the husband to provide. His undertaking was not merely to protect the husband from loss. He undertook to support the wife, and to so fulfill that obligation as to save the husband harmless. The consideration moved from the husband for the benefit of his wife, as well as for his own security. The mortgage taken by him secures a provision directly beneficial to the oratrix. She can enforce that provision although not a party to the instrument.

In 1864, the mortgage being then on record, Coleman conveyed the premises by warranty deed to one Glysson; and through subsequent conveyances, mostly with covenants of warranty, the title has come to the defendant

Electa Whitney. No recital of the mortgage was embraced in these conveyances. The successive owners have occupied the premises under their deeds, and have in no way recognized the right of the oratrix. The oratrix made no claim upon the premises prior to Coleman's death. For several years after the oratrix went to live with Coleman, she was able to work, and was allowed wages for her services. A settlement of some kind was had between them in 1864, in which Coleman paid the oratrix some money, and gave her his note for \$800. The amount Coleman received from Benedict was included in the settlement. After this, Coleman made no payments to the oratrix except upon the notes. The oratrix, however, still continued to live with him. But the report indicates that at some subsequent period she was living elsewhere. It is stated that, after leaving the farm on which they had lived, the oratrix supported herself from the payments made on the note. This means of support was not exhausted at the time of Coleman's death. Nothing appears from which it can be determined when any payment upon the note was made, nor when the oratrix ceased to live with her brother.

The defendants insist that the oratrix is barred from asserting her claim. They assume that the right to future support is lost by the mere failure to receive support during the period of limitation; and contend that the oratrix received nothing prior to 1864 except compensation for her services, and nothing after that time except payments upon the note, and that the note represented only her earnings, and the money received from Benedict. In maintaining this view, no account is taken of the inference which may properly be drawn from the facts reported, that while living with Coleman, subsequent to the settlement, the oratrix was receiving a part of her support as a member of his family. But the view of the court upon the question of limitation is such that it will not be necessary to have further facts as to the support of the oratrix ascertained, nor to consider what effect should be given to the payments made upon the note, nor the effect of a performance of the condition of the mortgage by Coleman upon the rights of his grantees. We do not think the right to enforce an obligation for a life support is barred by the mere neglect for any length of time to take the benefit of the provision. A mortgage to secure support during life is similar to one conditioned to secure the delivery of articles within a certain extended period at such times as they may be called for. This mortgage is security that the oratrix shall have her support when required, and the lapse of fifteen years without receiving support, simply because she did not ask it, would be no bar. She was not obliged to sit in idleness and take her support when able to earn it, in order to save her right to support when sickness or failing strength should make it necessary. We think there was no breach of the condition of this mortgage, until the application for support and the failure to furnish it, subsequent to Coleman's death. It is urged that the oratrix should be denied relief because of her neglect to assert her right until after Coleman's estate was sub-

stantially settled. It does not appear from anything disclosed in regard to the settlement of Coleman's estate, or the disposition of his property, that the defendants have lost their remedy upon his warranty. It does appear that before Coleman's death the defendant Electa, who now has the title, and who is the wife of the defendant Ralph, was told by the oratrix of her claim upon this land. The oratrix cannot be denied relief on the ground of laches.

It remains to consider what effect shall be given to the settlement of 1864. The oratrix had shortly before obtained a divorce from her husband without alimony, and he had no further interest in the question of her support. The master reports that, at the time the settlement was made, nothing was said about the future support of the oratrix, or the mortgage given to secure it, and says, further, that it did not fully appear just what was settled. There is no finding that the settlement was in discharge of the oratrix's claim to future support. It does not necessarily follow from the fact that the \$400 was included in the settlement, under the circumstances reported, that the oratrix accepted the note in satisfaction of her claim. Before a final disposition of the case, it should clearly appear whether it was understood that by this settlement the oratrix released her claim for further support, and, if not, whether it was understood that she was to discharge her security upon the land. The statements of the bill are sufficient to entitle the oratrix to a foreclosure, and she should have leave to so amend her prayer as to ask for that specific relief.

Decree reversed, and cause remanded with mandata.

Ross, J., dissenting:

I do not concur with my brethren with reference to the construction to be placed upon the condition of the deed set forth in the bill. The only parties to that deed and to the bond, to secure which the deed was given, are Eliphalet Coleman, the brother of the oratrix, and her then husband. She had been married to her husband about nine years, and was then about thirty-three years old. For some undisclosed reason, she and her husband concluded to live separate and apart from each other, and concluded an agreement to that end. They were husband and wife, and could not legally enter into a contract which would be binding upon them or others. Notwithstanding such a contract between them, the husband, so long as she remained his legal wife, was legally bound to support her, and she would take dower in his estate, if he first deceased. She also had the right to pledge his credit for necessities. Resting under these legal obligations, rights and disabilities, the brother of the oratrix, Eliphalet Coleman, was called in, and executed to the husband the bond and deed to secure the same. This was in 1853. The bond is lost, and we only know its terms from the condition of the deed. From that it appears that the brother agreed with the husband, in consideration of \$400 paid by the husband, to take the oratrix to his home, and to provide for, support and maintain her separate "from her husband," and without cost or expense to "him,"

and to indemnify and save "him" harmless for all claims for support, maintenance or otherwise, from charge through the wife, "for and during her natural life, and to save harmless" the husband, his heirs and assigns, from all claim of dower or thirds by the wife. Every contract is to be read with reference to the circumstances which called it into existence. Thus reading, I find nothing in it but an obligation on the part of the brother of the oratrix to save the husband from all charges for the support of his wife, and from all claim of dower or thirds, so long as he should legally rest under these liabilities, notwithstanding they were to live separate, even if she should continue to be his wife to the end of her life. I find nothing in the circumstances under which it was made, nothing in the language of the contract, as set forth in the condition of the deed, to indicate that the brother was to support the oratrix in health and in sickness during her natural life. If this were so, we should expect that she would have been a party to the bond and deed, and that therein she would have transferred to her brother the obligation which she legally rested under to labor for the husband. But she is not made a party to either the bond or deed, nor does she agree to perform the least service for her brother. It is incomprehensible to me that the brother should have become, under the circumstances, obligated for the sum of \$400 without any agreement on her part to labor or perform any service for him, to support her during her natural life, whatever might befall her. She also then had a son, not more than seven or eight years old, to support. It does not appear that either the husband or wife contemplated a divorce when this contract was entered into. It was therefore natural and proper that the indemnity by the brother should be for her natural life. The only support which the brother contracts to provide is such as shall be without cost or expense to, and shall indemnify and save harmless, the husband, from all costs and charges of that kind. Having come under this obligation to the husband, it was natural that the brother should retain the \$400 received from the husband in trust for the oratrix, so long as the obligation existed. But if he had come under an obligation not to indemnify the husband against charges for her support, but to support her during her natural life, the \$400 received of the husband would have belonged to the brother absolutely. The oratrix and her brother acted upon the understanding that his obligation to her husband was only for the purpose of indemnifying him against her further support. As soon as she had obtained a divorce, in 1864, she called upon him to settle not only for the services which she had rendered, but for the \$400 which he had received when he gave the bond and deed to her husband, and he without objection settled with her for both claims. She then must have understood, as he did, that his obligation to her husband was at an end. Thereafter he did not have left a cent of consideration for an agreement to support and maintain her for the rest of her life. With her knowledge, and without objection, he dealt with the land covered by the deed given to her husband, not as though it was incumbered with her support for life, but,

at most, as though the incumbrance was that the grantee in the deed, the husband, should not be charged with her support. Reading the contract set forth in the deed in the light of the circumstances which called it into existence, and in the light of the subsequent conduct of the oratrix and her brother, I find it a contract

to indemnify the husband against subsequent charges for the support of the oratrix only. On this view, there has been no breach of the condition of the deed. I would affirm the decree of the court of chancery dismissing the bill.

WISCONSIN SUPREME COURT.

Maria PHILLIPS, Admx., etc., of Henry Phillips, Deceased, *Reest.*,

MILWAUKEE & NORTHERN R. CO.,
Appt.

(...Wis....)

1. If a person killed by negligent management on the part of a railroad company of its cars met his death while walking on a sidewalk where he had a right to be, the company, in order to escape liability to answer in damages for his death, must show that he was guilty of some want of ordinary care in placing himself in the position where he was killed. If there is no evidence upon the subject the presumption is that he was not lacking in ordinary care.
2. A person who has been killed upon a sidewalk by a railroad car at a point where the walk crossed the railroad track will, in the absence of evidence to the contrary, be presumed to have been making the ordinary use of the walk by traveling on it.
3. A person killed by a railroad car at a point where the railroad tracks cross a sidewalk will not be presumed to have been walking along the tracks at the time of his death, since he would thereby have been a trespasser and engaged in doing that which was unlawful.
4. Neglect on the part of a traveler upon a highway to observe the rule that when nearing a railroad crossing he must look and listen for approaching cars, by reason of which he collides with, and is killed by, a car which runs across the road on a side track, will not necessarily defeat a recovery of damages from the railroad company for his death where he had just before seen a train containing the car pass along the main track beyond the switch leading to the sidetrack and there was nothing to lead him to suspect that cars were to be sent back from the train along the side track, and the day was so cold that he had a shawl over his head, which might have interfered with his sight and hearing, while the railroad employes, instead of taking care of detached cars and warning persons of their movements, left them to go wild and remained on the engine to protect themselves from the weather.

(September 23, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Winnebago County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

NOTE.—Compare Cincinnati, I. & St. L. R. Co. v. Howard (Ind.) 8 L. R. A. 563.
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See also 32 L. R. A. 149.

The facts are fully stated in the opinion.

Mr. Charles W. Felker, with **Mr. Alfred H. Bright**, for appellant:

Failure on the part of deceased to look out for the approach of cars along the track which he was about to cross was the cause of his colliding with them, and is such negligence on his part as will preclude a recovery in this action.

Butler v. Milwaukee & St. P. R. Co. 28 Wis. 487; *Gower v. Chicago, M. & St. P. R. Co.* 45 Wis. 183; *Ferguson v. Wisconsin Cent. R. Co.* 63 Wis. 145; *Hoye v. Chicago & N. W. R. Co.* 62 Wis. 668, 67 Wis. 1; *Piper v. Chicago, M. & St. P. R. Co.* (Wis.) June 21, 1890; *Seefeld v. Chicago, M. & St. P. R. Co.* 70 Wis. 216.

Messrs. Bouch & Hilton and Smith & Schoets, for respondent:

When a person is killed, he cannot be conjectured negligent; negligence must be proven.

Hoye v. Chicago & N. W. R. Co. 62 Wis. 668, 67 Wis. 1; *Pennsylvania R. Co. v. Weber*, 76 Pa. 157.

Deceased seeing the train east going west, was justified in supposing it was safe to cross. He had no reason to believe or expect that in a few minutes three cars would come running wildly back, and this when the engine which he saw pass with cars was distant about 400 feet.

Duane v. Chicago & N. W. R. Co. 72 Wis. 523; *Ferguson v. Wisconsin Cent. R. Co.* 63 Wis. 145; *Butler v. Milwaukee & St. P. R. Co.* 28 Wis. 487; *Bonnell v. Delaware, L. & W. R. Co.* 39 N. J. L. 189; *New Jersey R. & Transp. Co. v. West*, 32 N. J. L. 91; *New Jersey Exp. Co. v. Nichols*, Id. 166; *Brown v. New York Cent. R.* 32 N. Y. 603; *French v. Taunton Branch R.* 116 Mass. 537; *Randall v. Connecticut River R. Co.* 132 Mass. 269.

Deceased was not required by any legal rule to look continually until he crossed the track. *Bonnell v. Delaware, L. & W. R. Co. supra.*

Orton, J., delivered the opinion of the court:

In the City of Menasha there are three streets running north and south, viz.: Milwaukee Street, and, towards the east, Racine Street, and then Appleton Street. The railroad of the appellant Company, coming from the west, after it crosses Milwaukee Street, runs in a southeasterly direction towards Racine Street, and then crosses Racine and Appleton Streets in a due easterly direction. The depot grounds lie between Milwaukee and Appleton Streets, and the depot buildings are situated between Racine and Appleton Streets. From some distance west of Racine Street there is a main switch track south of the main track, running east across Racine Street; and a short distance

east of that switch there is another switch track running east, also across Racine Street, and some distance south of the other switch track. The deceased lived northwest of the Company's yard, and on the morning of the 4th day of April, 1887, had left his home to go to church on Appleton Street, southeast of the yard, through the Company's grounds, as he had been accustomed to do. The weather was cold and stormy, and he had on a heavy overcoat, a cap, and a shawl about his face and head. The men doing the switching protected themselves by staying on the engine when not throwing a switch, and the persons usually around the depot were inside. Five loaded cars had been taken from east of Racine Street, and two of them were cut off and kicked west on the main line, and the remaining three cars were kicked east on the south switch track, to run unattended over Racine Street. The deceased was first seen by the engineer and other employes walking eastwardly on the main track west of the switches, and then again further east on the north side of the main track, and then lastly on the south side of the south switch track going towards Racine Street. He was met and passed by the two cars going west. There was a sidewalk on the west side of Racine Street from Third Street south, across both of the switch tracks towards the north. Soon afterwards the crushed and mangled body of the deceased was found partly on the south switch track about fifteen feet east of the sidewalk. The upper part of it was lying south of the south rail and the feet over it. Blood was found on the east side of the sidewalk on the south switch track, and from there blood was trailed along on the track to where the body was found. Some of the witnesses of the defendant testified to seeing one or two drops of blood about fifteen feet west of the sidewalk on the track; but the witnesses of the plaintiff testified that they examined the track for blood spots at that place, and could not find any. The jury had the right, therefore, to treat such fact as unproved, as they evidently did. It is therefore reasonable to suppose that the deceased was struck by the cars on the sidewalk where it crosses the south switch track, and his body dragged to where it was found. There being no witness to this painful accident, how the deceased came to be on the sidewalk at that place, and whether walking north or south on it, must be determined, if at all, by circumstantial evidence. The learned counsel of the appellant contends that it is unaccountable how the deceased came to be there, and that it is entirely a matter of conjecture. That may be so, but is it necessary that the plaintiff account for his being on the sidewalk at that time and place? If it is shown that he met his death while walking on the sidewalk, where he had a right to be, that is sufficient for the plaintiff's case, and it is incumbent on the defendant to show that he was guilty of any want of ordinary care in placing himself in that position. It is therefore incumbent on the defendant to account for his being there, and if there is no proof of it, and it is all a matter of conjecture, then it follows that the deceased is presumed to have placed himself where he was killed, with due care, or at least without any want of ordinary care. The

learned counsel says in his brief: "Admitting that the deceased had reached that place when struck, is not the manner of his coming there left to conjecture? But verdicts cannot rest upon conjecture." The verdict in this case does not rest on any conjecture as to how he came there. The verdict for the plaintiff rests rather on the fact alone that he was lawfully there, where he had a right to be, when he was killed. If the manner of his coming there was not shown, then no negligence of the deceased could be predicated upon it. That was the misfortune of the defendant, and not of the plaintiff. We will not, therefore, consider the plausibility or otherwise of any of the theories of the learned counsel as to how the deceased came to the place where he was killed.

The main and important question is, Was he struck by the cars while he was on the sidewalk? It seems to be conclusively shown that he was struck and killed at that place. No marks of blood or any traces of his presence on that track, west of the sidewalk, were found. The presumption is that he was struck and killed where the first blood in that direction was found, which was on the sidewalk, and that he was dragged by the car to where his body was found, as the cars were going in that direction. There is no evidence whatever that the deceased walked on the track from the west to the sidewalk, and it is reasonable to conclude that he was walking in the direction of the sidewalk, north or south, for this is the ordinary use of a sidewalk. This is not conjecture, but a reasonable inference or deduction from these known facts. The presumption is that he was making the ordinary use of that sidewalk by traveling on it when he was struck by the car. It would not be a reasonable, but it would be a violent, presumption that he came to the sidewalk from the north while walking on the defendant's track. He would be a trespasser, and do that which was unlawful, to so use the track, and this cannot be presumed. So far, then, the negligence of the deceased is not shown. The only other evidence of his want of care, it is contended, was the fact that he did not look or listen before crossing the track, or attempting to cross it. The contention of the learned counsel of the appellant is that if he had looked he would have seen the cars coming towards that point from the west, and that, if he had seen them, it was negligence on his part to attempt to cross the track as he did, and that therefore he did not look, and that he was guilty of a want of ordinary care in not doing so. This contention is correct if there is nothing in the circumstances to excuse his not looking, or his not seeing the cars approach, or to mitigate the consequence of such omission. This has been so often decided by this court that I need only to refer to the cases cited in the appellant's brief. It is said that he ought to have looked west for the approach of these cars. Why look west, any more than east; and perhaps he did look east, and seeing none, he attempted to cross over. At such a point, where a great deal of switching is done in all directions, out of as well as into side tracks, the deceased may have had greater reason to look east for the approach of cars at that time than in the opposite direction. Let us see. He had been met by the train of five cars attached to

the engine just before, and had stepped off the track for them to pass. It is not known that he walked on the track after that. He was last seen walking some distance south of the south switch track towards Racine Street. He had reason to suppose that the train he met would pass on towards the west on the main track. It was after he had met the train of six cars going west that the two cars had been detached and kicked west on the main track, and the three remaining cars had been kicked east on the south switch track. Those occurrences took place behind him, and he probably knew nothing of them. He might have well supposed that the train would keep on westerly, or, at least, that it would not return to pass down the south side track. He was thus deceived and thrown off his guard, and had no reason to expect that any of those cars would interfere with his crossing the side track on the sidewalk, or that they would so soon be sent down that track without anyone to look after them, or to take care of them. The jury might well have excused the deceased from looking for any of these cars on the south side track going east at that time, and have found that he was not guilty of any contributory negligence, under these peculiar circumstances. This view of the case is justified by the late cases of *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, and *Duane v. Chicago & N. W. R. Co.*, 73 Wis. 538.

The jury may also very properly have considered the facts that it was a cold and stormy

day, and that the deceased had a shawl about his head and ears, which might have interfered to some extent with his seeing as well as hearing. It was not a day for taking observations, but for keeping straight on. The employees of the road kept themselves protected from the weather on the engine, where they could not look out for these wild detached cars that they had sent down the track, or warn the deceased of their approach. These facts may well modify the rule that it was the duty of the deceased to look just at the time when the cars were near him. It may be that he had looked in that direction, but when these detached cars had not yet started on the side track. He is not here to be questioned as to what he did or did not do, and his conduct is entitled to all reasonable probabilities. One thing is certain,—that he did not know that these cars were creeping towards and so near him when he undertook to cross the track. We think the jury might have properly found, as they did, that the deceased was not guilty of any want of ordinary care, under the circumstances of the case, that contributed to his death.

These are the only controverted questions in the case. The learned counsel of the appellant does not contend that the defendant Company was not guilty of a want of ordinary care in thus sending down the track these unguarded cars, and across the traveled streets of the city. We find no errors in the case. *The judgment of the Circuit Court is affirmed.*

NEBRASKA SUPREME COURT.

Cassie A. STEVENS, *Ptff. in Err.*,

Washington I. CARSON, Sheriff.

(.....Neb.....)

- *1. In a contest between a wife and a creditor of her husband over property transferred to her by him after the debt is contracted, she must establish that she is a bona fide purchaser by a preponderance of the evidence.
2. The fact that the wife had possession of the property, claiming ownership, when it was attached by the creditor of the husband, does not relieve her of the burden of proving that the transfer was not made to her for the purpose of hindering, delaying and defrauding such creditor.

(October 7, 1890.)

ERROR to the District Court for Fillmore County to review a judgment in favor of defendant in an action brought to recover possession of certain personal property or damages for its conversion. *Reversed.*

The facts are fully stated in the opinion.

Mr. F. B. Donisthorpe, for plaintiff in error:

The verdict should have been for the plaintiff in error.

Lipscomb v. Lyon, 19 Neb. 511; *Gillepie v. Brown*, 16 Neb. 457.

*Head notes by NORVAL J.

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If the jury found there had been an actual change in the possession of the property, it would not be incumbent upon the plaintiff in error to overcome the presumptions of fraud, that arise where there has been no change of possession.

Comp. Stat. chap. 82, § 11.

Possession is prima facie evidence of title.

Woodruff v. White, 25 Neb. 745; 1 Greenl. Ev. § 84; *Gregory v. Burlington & M. R. Co.* 10 Neb. 258.

In civil cases a preponderance of the evidence is sufficient.

Patrick v. Leach, 8 Neb. 588; *Search v. Miller*, 9 Neb. 27; *Kopplekom v. Huffman*, 12 Neb. 95; *Altchuler v. Algaza*, 16 Neb. 681; *Dunbar v. Briggs*, 18 Neb. 97.

Messrs. W. C. Sloan, John D. Carson and W. V. Fifield, for defendant in error:

The court did not err in giving the third and fourth instructions asked by the defendant in error.

Lipscomb v. Lyon, 19 Neb. 511; *Woodruff v. White*, 25 Neb. 745.

When questions of fact are fairly submitted to a jury, and there is sufficient evidence to support the verdict rendered, it will not be disturbed.

Colton v. Shaffer, 28 Neb. 724; *Riley v. Melquist*, Id. 474; *Forbes v. Thomas*, 22 Neb. 541; *Cooper v. Hall*, Id. 168; *Dricoll v. Troughton*, Id. 261.

If the plaintiff took a transfer of the goods for the purpose of holding possession of them

and selling out to pay her husband's debts, then the transfer became an equitable assignment for the benefit of creditors, and is void under the Assignment Laws of the State of Nebraska.

Bonns v. Carter, 22 Neb. 495.

Norval, J., delivered the opinion of the court:

The plaintiff in error sued out a writ of replevin in the court below against the sheriff of Fillmore County, to recover possession of a general stock of goods and merchandise taken by defendant in error, under several writs of attachment issued against Garrett Stevens, her husband, she claiming title to the goods under an alleged bill of sale from her husband to her. She failed to give the replevin bond to the coroner required by law, and the suit was prosecuted against the sheriff for the conversion of the property, praying for the restoration of the goods or judgment for their value.

The defendant answered, admitting that he was sheriff of the county, and denying that the plaintiff was the owner of the goods; that orders of attachment were issued against Garrett Stevens and the goods seized by the defendants to satisfy the following claims:

Jan. 28, 1889, Donald Bros.....	\$208.48
" 24, " S. A. Blasland & Co.....	570.95
" " " J. P. Robinson Notion Co.	141.06
Total.....	\$920.44

The only right and title of the plaintiff to the property was by a pretended bill of sale made by Garrett Stevens to her on the 15th day of January, 1889, at which time said Stevens was wholly insolvent, of which the plaintiff had full knowledge and notice; that no consideration was paid by her on said pretended sale, which was entered into by the plaintiff and her husband with the intent and sole purpose of hindering and delaying the creditors of her husband, and was not a bona fide sale; that plaintiff knew at the time the pretended sale was made that it was for the purpose and intent aforesaid; that no change of possession took place, and that at the time defendant levied on said goods and chattels they were the property of said Garrett Stevens.

The plaintiff replied by a general denial.

There was a trial to a jury, with a verdict finding that at the commencement of the action the right to the possession of the property was in the defendant, with damages assessed at five cents. The plaintiff's motion for a new trial was overruled and the cause brought up to this court on the following assignments of error: (1) the verdict is against the weight of evidence, is contrary to law, and the court erred in not granting a new trial; (2) in refusing to give the first, second, third, fourth, fifth, sixth, seventh and eighth instructions asked for by the plaintiff; (3) in giving the third and fourth instructions asked for by defendant.

On the 15th day of January, 1889, Garrett Stevens, the husband of the plaintiff, was engaged in the dry goods and grocery business at Strang, Neb., and on that day he executed and delivered to the plaintiff a bill of sale of his entire stock of goods, worth from \$1,800 to \$2,000. The consideration specified in the

bill of sale was \$1,150. At the time of the alleged sale, Garrett Stevens was indebted in about the sum of \$1,400, besides an alleged indebtedness of \$1,150 to his wife. He was the head of a family, and owned no property other than that covered by the bill of sale. The plaintiff was engaged in the millinery business at Strang at the time of the transfer. Her stock was of the value of about \$300. At the time the bill of sale was made, Mr. Stevens was being pressed by his creditors for money, of which fact the plaintiff had knowledge. The plaintiff claims, and she and her husband both so testified on the trial, that she let her husband have money and property from time to time after their marriage, for which he agreed to account; that on the 30th day of June, 1886, they had a settlement, by which it was found that he was indebted to her in the sum of \$1,000; that on that day he gave her in settlement his promissory note for \$1,000, due in three years, drawing 6 per cent interest; that, when the bill of sale was made, there was due upon the note \$1,150; that part of the property was transferred to her in payment of this note, and that he at the same time gave her goods to the amount of \$500, claiming that the same was exempt property. The stock covered by the bill of sale was levied upon by the sheriff, to satisfy the several writs of attachment sued out against Garrett Stevens. It was the theory of the defendant in the court below that the transfer of the property from Garrett Stevens to his wife was fraudulent, and was made for the sole purpose of hindering and delaying his creditors in the collection of their debts. The plaintiff testified, among other things, upon examination, in answer to questions, as follows:

Q. How did it come that he paid this [referring to the note] before it was due?

A. Because his creditors were pressing him, and if I got the goods I could satisfy his creditors; whereas, if they got it, there would be only one or two that would get anything, and the rest would have to go without.

Q. Were you not afraid that about the time you made this transfer that the creditors would come on and take the goods by attachment?

A. There were two houses that had written threatening letters.

Q. You knew that?

A. Yes, sir.

Q. And then you and he came to Geneva, and had those matters drawn up?

A. Yes, sir.

Q. Mr. Stevens came with you?

A. Yes, sir.

Q. That was after the houses had made threats, and were about to push their claims and collect their debts?

A. Yes, sir.

Q. Wasn't this transfer from Mr. Stevens for the purpose of placing the property where these other creditors could not reach it?

A. No, sir; it was not.

Q. Didn't you state a while ago that you knew that they were going to push their claims?

A. I knew that, but I wanted it where Mr. Stevens' creditors could not get it all, but each get his share.

Q. One did get it all?

A. I wanted to loan him the money if he

would leave the goods with me, and pay the debts with interest.

Q. Why didn't you turn the goods over to me?

A. They wouldn't get that much out of them.

Q. It was to pay your debts?

A. It was to get the goods, and pay it out to Mr. Stevens' creditors.

Q. That was the only object you had in making that transfer?

A. I knew there was sufficient goods to settle my own indebtedness, and all his creditors if I could keep them.

Q. You say that he owed other creditors about \$1,800?

A. Yes, sir.

Q. And you \$1,100?

A. Yes, sir.

Q. Could that pay it out?

A. If I had continued in business, I could have made it out of the goods, with what goods I have there in the store of my own.

Q. Would you have made the transfer at the time, if it had not been for the fact that those creditors were crowding your husband?

A. I should not have molested Mr. Stevens until the note was due if it had not been for that.

Q. You told him that the creditors were coming on, and you wanted to fix the matter up so as to put them off?

A. No, sir; I did not tell him so.

Q. It was the mutual understanding between you and Mr. Stevens that this should be done for that purpose?

A. For the purpose that I should pay myself first, and afterwards pay off the other creditors.

It appears from the testimony contained in the bill of exceptions that Garrett Stevens, on December 29, 1888, for the purpose of obtaining goods on credit, made a written statement to Donald Bros. of his liabilities, as follows: "S. A. Blasland, Quincy, Illinois. Due March 1, \$402.50; due January 1, \$242.48; in small amounts, about \$400; confidential, and all other debts not included above, not any."

It will be observed that the alleged indebtedness of Mr. Stevens to the plaintiff was not included in the above statement. It does not appear from the evidence in the record that the goods transferred to the plaintiff were invoiced. The property was turned over to her in the bulk, without any separation from the stock,—that part claimed as exempt from that claimed to have been purchased. The bona fides of the transaction was directly in issue upon the trial in the district court. Upon this question the court instructed the jury, at the request of the defendant in error, as follows: "(3) The jury are instructed that in a contest between the wife and the creditors of her husband, in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof, and prove beyond question. (4) The jury are instructed that in a contest between the wife and the creditors of her husband, in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof, and prove beyond question the bona fides of said sale."

The giving of these instructions is made the

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basis of the third assignment in the petition in error. These instructions appear to have been copied either from the syllabus in *Aultman v. Obermeyer*, 6 Neb. 280, or from the instructions copied in the opinions in the cases of *Lipscomb v. Lyon*, 19 Neb. 511, and *Woodruff v. White*, 25 Neb. 745. It is claimed that these instructions held the plaintiff to a greater degree of proof than is required in civil cases. They required the plaintiff, in order to recover, to establish the good faith of the transfer of the property beyond question. The word "question" is synonymous with "doubt." The plaintiff, by the change of the word, was therefore held to as high degree of proof as is required of the State in a criminal prosecution. It has been repeatedly held by this court in civil cases that the party holding the affirmative of an issue is only required to establish it by a preponderance of the evidence. *Patrick v. Leach*, 8 Neb. 538; *Search v. Miller*, 9 Neb. 27; *Kopplekom v. Huffman*, 12 Neb. 95; *Aitschuler v. Algaes*, 16 Neb. 681; *Dunbar v. Briggs*, 18 Neb. 97.

Where a debtor transfers property to his wife, and such transfer is contested by the creditors of the husband, the presumption is against the bona fides of the transaction, and the law places the burden upon the wife to show that the sale was not made to defraud the creditors of the husband. But she is not required to satisfy the jury, in such a case, beyond question, that the sale was an honest one. A preponderance of the evidence is all that is required. This view is in direct line with the decision of this court in the case of *Thompson v. Loenig*, 18 Neb. 386.

We quote from the syllabus: "Where property is transferred by a husband to his wife after a debt is contracted, as against that debt, she must show by a preponderance of proof that she is a bona fide purchaser."

The third and fourth instructions stated the rule too strongly against the wife, and should not have been given to the jury. It follows that *Aultman v. Obermeyer*, *Lipscomb v. Lyon* and *Woodruff v. White* are overruled, in so far as those cases hold that the good faith of transactions between husband and wife, in relation to the transfer of property from the one to the other, by which creditors are affected, must be established beyond question.

Eight instructions requested by the plaintiff in error were refused. It is conceded in the brief of the plaintiff that no error was committed in not giving the first, second, third, fifth and eighth, as they were substantially given by the court in his own instructions.

Complaint is made of the refusal to give the plaintiff's seventh request, which reads: "If you shall believe from the evidence that the property in controversy was in the possession of the plaintiff, she claiming to be the owner thereof at the time it was taken under the attachment, this is prima facie evidence of ownership in her; and if you further believe from the evidence that, while the plaintiff was so in possession, the defendant took the same from her, then you should find the right of property in the plaintiff, unless you further find from the evidence that the plaintiff did not own the property, or that the sale thereof from Garrett Stevens to the plaintiff was without sufficient consideration."

This request does not contain a correct statement of the law applicable to the case. The fact that the plaintiff had possession of the property when taken under the writs of attachment was not prima facie evidence against the attaching creditors that she was the owner. In a contest between her and the creditors of her husband, the burden was upon her to satisfy the jury by a preponderance of the testimony that the property was not transferred to her to hinder, delay and defraud such creditors. The instruction entirely ignored the question of bona fides of the transaction, and required the defendant to prove that the plaintiff did not own the property.

The fourth and sixth requests were not based

upon the evidence in the case, and were properly refused.

It is insisted that the court erred in sustaining the defendant's objections to certain questions propounded to the plaintiff by her attorney, when on the witness stand. It may be observed that such errors are not assigned in the petition in error, and will not be considered by this court.

As there must be a new trial, we refrain from expressing an opinion upon the sufficiency of the testimony to sustain the verdict.

The judgment of the District Court is reversed, and the cause remanded for further proceedings.
The other Judges concur.

ARKANSAS SUPREME COURT.

Helen E. HOBBS, *Appt.*,

v.

Sol. F. CLARK.

(...Ark....)

1. Whether or not a person, who, in building a division fence between his land and that of his adjoining owner, has placed it by mistake on the latter's land, first caused a survey to be made of the division line by the county surveyor after notice to such owner, is not the sole test of the exercise by him of good faith in the matter which will permit him to recover the materials which he put into the fence.
2. Where the complaint in an action of replevin describes the articles sought to be recovered, and there is no denial of the taking and withholding of any part of the property described, a verdict simply finding for plaintiff and the value of the "property taken," without describing it, is sufficient to support a judgment in the alternative for a return of the property or its value.
3. An objection that the verdict did not contain a separate valuation of the articles taken cannot be raised for the first time on a motion for new trial by the defendant in an action of replevin against whom a verdict has been returned, which is sufficient to support the judgment rendered.

(October 11, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to recover possession of certain fence materials which he had placed by mistake on defendant's land. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Blackwood & Williams* for appellant.

Mr Sol. F. Clark, in propria persona, for appellee.

Cockrill, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment in replevin obtained by Clark, who was plaintiff below, against Hobbs, for the possession of the lumber, wire and posts which went to make a fence

which Clark erected as a partition fence between his lands and Hobbs'. Hobbs removed the fence and claimed the materials as his own, and, when the action was begun, gave bond and retained them.

The record, as represented by the appellant's abstract, presents only the rejected prayers for instructions, with the verdict and judgment, and there is no complaint of any error except such as may be disclosed by that part of the record.

It is urged that the court erred in refusing the following prayer for instruction: "The court instructs the jury that before plaintiff can justify placing or building a fence on defendant's land, with privilege or right of taking it off within a reasonable time, if it afterwards turns out that it was placed there by mistake, it must appear from the evidence in this case that plaintiff had had the lines between him and defendant run out by the county surveyor, and notice of such survey given to defendant before it was made. In other words, before plaintiff can be said to have built the fence on defendant's line in 'good faith,' he must, under the evidence in this case, have caused the disputed line to be run out by the county surveyor, upon notice to defendants of such survey."

Whether one who, intending to build a partition fence, places it through mistake upon the land of the adjoining owner, loses forthwith all property in it, is a question about which judicial opinions differ. But assuming, as the rejected prayer does, the right to recover in case the party building the fence on his neighbor's ground through mistake has acted in good faith in his effort to establish the dividing line between the tracts, it does not follow that a survey, by a county surveyor, after notice to the adjoining land owner, is the exclusive test of good faith, as the prayer assumes. The only effect the statute gives to such a survey is to make the officer's record of it prima facie evidence of its correctness. *Jefries v. Hargis*, 50 Ark. 65.

The other rejected request for a charge presented no other question, and there was no error in refusing either.

The other points urged are questions of practice, arising upon the form of the verdict,

which was in the following language: "We the jury find for the plaintiff and the value of the property taken to be \$72.05 and interest."

The appellant's answer merely put in issue the plaintiff's title. There was no denial, as the appellant presents the record, of the taking and withholding of any part of the property described in the complaint. There was then no issue as to the identity or quantity of any of the articles described in it, and when the jury found for the plaintiff and assessed the value of the "property taken," it was only necessary to refer to the complaint to ascertain what property was referred to. The rule that that is certain which can be made so applies to verdicts as well as other writing. *Fagg v. State*, 50 Ark. 506.

There was therefore a verdict upon which a valid judgment in the alternative could be entered.

The judgment is said to be erroneous, however, because the value of the several items which were separately described in the complaint were not separately assessed by the jury in their verdict.

In an action of replevin for several distinct articles of property, the defendant, who has retained the possession and against whom the verdict is returned, is entitled to have it spec-

ify the separate value of each article, and it is error to refuse him the right. *Hanf v. Ford*, 87 Ark. 544.

But it is a right which he may waive. In the absence of a demand for a separate valuation before the verdict, or of objection to the verdict before the jury is discharged, it is fair to presume that the right is not insisted upon, but that the intention is to waive it. *Blake v. Powell*, 26 Kan. 320; *McGehee v. Lomax*, 49 Ala. 181.

If the verdict were insufficient to sustain a judgment, the rule would be different, for then there would be nothing upon which the court could act. Objections to deviation from the strict line of procedure, which do not vitiate the judgment, must ordinarily be made at a time when they can be corrected without retracing the steps of the trial, or the party failing to object will be held to acquiesce in the course pursued. See *Ruble v. State*, 51 Ark. 126; *Moore v. State*, Id. 180; 1 Thompson, Trials, § 113.

The appellant made no demand for a separate valuation of the articles, and made no objection to the form of the verdict when it was returned. It was too late to complain first in his motion for new trial.

Finding no error, the judgment is affirmed.

NEW YORK COURT OF APPEALS.

James GAMBLE, *Resp't.*,

QUEENS COUNTY WATER CO. *et al.*

(.....N. Y.....)

1. At a meeting of the shareholders of a corporation each shareholder represents himself and his own interests solely, and in no sense acts as a trustee or representative of others; hence he has a legal right to vote upon a measure, even though he has a personal interest therein separate from other shareholders.

2. If the action of a majority of the stockholders of a corporation resulting from their votes at a stockholders' meeting is so detrimental to the interests of the corporation itself as to lead to the necessary inference that their interests lie wholly outside of and in opposition to those of the corporation and of the minority of the stockholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority, it may be subjected to the scrutiny of a court of equity at the suit of the minority.

3. Where the action of the majority of the shareholders of a corporation is plainly a fraud upon, or is really oppressive to, the minority shareholders, and the directors and trustees have acted with and formed part of the majority, a suit to enjoin such action may be maintained by one of the minority shareholders suing in his own behalf and in that of all others coming in, to which suit the corporation must be made a party defendant.

4. To warrant the interposition of a court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the

majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subvert some outside purpose regardless of the consequences to the company, and in a manner inconsistent with its interests.

5. In determining the question whether or not the price paid by a corporation to one of its directors for property owned by him, by direction of a majority of the shareholders, of which he was one, is so excessive as to constitute a fraud on the rights of the minority, the value of the time and the interest on the money which he has expended thereon may be added to its cost, and he may, in addition, be allowed a fair profit thereon, and whatever advantage he may have gained by a fortunate purchase of materials used.

6. The true inquiry in determining whether or not the price paid by a majority of the stockholders of a corporation for property is so excessive as to be a fraud on the minority is what, under all the circumstances, is the fair value of the property to the company considering its proposed use and the general purpose for which the company is organized.

7. An order by a majority of the stockholders of a corporation to pay an excessive sum for property purchased for it in stock and bonds is not to be condemned as a fraud unless the majority acted in bad faith, on which question possible or probable prospective value of the property purchased may be considered.

8. A corporation cannot issue its stock

in exchange for property purchased by it at anything less than its par value, under Laws 1848, chap. 40, § 2, which empowers the purchase of property with stock to be issued to the amount of the value of such property, and provides that the stock so issued shall be declared and taken to be full-paid stock, not liable to further calls.

9. The bonds of a corporation subject to the provisions of the General Manufacturing Act, Laws 1848, chap. 40, § 2, may be issued by it at less than par for either money or property required for its use.

10. A corporation which purchases property intending to pay therefor by issuing its stock and bonds, the former of which must be issued at par, will not be permitted to issue a much larger quantity of bonds taken at their actual value than is necessary to make up the difference between the par value of the stock offered and the purchase price of the property, the surplus of bonds being rendered necessary by the fact that the actual value of the stock is much less than par.

11. A corporation which has power to issue bonds to raise money for the construction of its works may issue them in payment for works already constructed which are suitable for its purposes and can be purchased by it.

12. A corporation which purchases property intending to issue stock in payment therefor need not make the whole payment in stock; it may issue stock for a portion and pay in cash or issue bonds for the balance.

(October, 1890.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Special Term perpetually enjoining the defendant Company from carrying out a resolution of a majority of its stockholders authorizing the issuing of stock and bonds for the purchase of an extension of its waterworks, known as the Rockaway Beach Extension, from defendant Mullins, one of its directors. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. William B. Hornblower and James Byrne, for appellants:

Both the general and the special term are in error in limiting the value of the work to the actual cash expended.

The test is not what it would cost a contractor to build waterworks, but what it would cost a waterworks company to have works built by a contractor; in other words, What is the cash value of the works as completed?

Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 27 L. ed. 1018; *Wardell v. Union Pac. R. Co.* 4 Dill. 389; *Gardner v. Butler*, 80 N. J. Eq. 702; *Great Luxemburg R. Co. v. Magnay*, 25 Beav. 595; *New Castle N. R. Co. v. Simpson*, 28 Fed. Rep. 214.

In estimating the value of the waterworks, for which stock and bonds were to be issued, the Company was not limited, nor was Mullins limited, to the actual amount in cash for which other contractors might have been willing to construct the works. This is not the test in cases of this character. The real test is the fair value of the works to the Company as completed works.

9 L. R. A.

Lake Superior Iron Co. v. Drezel, 90 N. Y. 87; *Schenck v. Andrews*, 57 N. Y. 142; *Boynion v. Andrews*, 63 N. Y. 94; *Douglass v. Ireland*, 78 N. Y. 100; *Brockway v. Ireland*, 61 How. Pr. 872; *Liebke v. Knapp*, 79 Mo. 24; *Knowles v. Duffy*, 40 Hun, 486.

The "prospective value" of the property to the Company may be taken into account in fixing the price of the property, not merely its present market value.

Thurber v. Thompson, 21 Hun, 472; *Carr v. Le Fevre*, 27 Pa. 413; *Stewart v. St. Louis, Ft. S. & W. R. Co.* 41 Fed. Rep. 736.

A contract between a corporation and one of its directors is only voidable, not void; and in the absence of actual fraud or bad faith, it may be ratified by the stockholders. A minority of the stockholders cannot disaffirm it. The corporation itself as a body must disaffirm it.

Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co. 11 Daly. 878; *Wallace v. Long Island R. Co.* 12 Hun, 460; *Omaha Hotel Co. v. Wade*, 97 U. S. 18, 24 L. ed. 917; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

There is no rule, and never was one, that a corporation, acting through a meeting of its stockholders, cannot contract with one of its shareholders or one of its directors.

Northwest Transp. Co. v. Beatty, L. R. 12 App. Cas. 589; *Wallace v. Long Island R. Co.* 12 Hun, 460.

In an action by a stockholder, the presumption is that the purchase is a good one for the corporation, and the burden of proof is on the plaintiff to show the contrary.

Mac Naughton v. Osgood, 41 Hun, 109.

Mullins, having violated no duty to the Company in building the extension, was at liberty to sell it to the Company for the best price he could get.

1 Morawetz, Priv. Corp. § 521; *Parker v. Nickerson*, 137 Mass. 498; *Inglehart v. Thousand Island Hotel Co.* 82 Hun, 877.

It is not illegal to issue stock and bonds for constructing works although the cost of such construction is less than the face value of the stock and bonds.

Van Cott v. Van Brunt, 82 N. Y. 535; *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 595; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

A corporation may issue its bonds for less than par.

Curtis v. Leavitt, 15 N. Y. 9; *Ellsworth v. St. Louis, A. & T. H. R. Co.* 98 N. Y. 553; *Central Gold Min. Co. v. Platt*, 8 Daly, 263; *Graham v. Atlanta Hill Gold Min. Co.* (Sup. Ct.) N. Y. Daily Reg. Oct. 14, 1884; *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414, 16 L. ed. 154; *Re Compagnie Générale de Belgrade*, L. R. 4 Ch. Div. 470; *Re Anglo-Danubian Steam Nav. Co. L. R.* 20 Eq. Div. 339; *Neuse River Nav. Co. v. Newbern Comrs.* 7 Jones, L. 275; *Gould v. Sterling*, 23 N. Y. 456; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190.

It is lawful for a corporation to issue or sell its stock below par.

Otter v. Brevoort Petroleum Co. 50 Barb. 255; *Lorillard v. Clyde*, 86 N. Y. 884; *Stein v. Howard*, 65 Cal. 616; *Reed v. Hayt*, 109 N. Y. 659; *Christensen v. Eno*, 8 Cent. Rep. 70, 106 N. Y. 97. See *Memphis & L. R. Co. v. Dow*,

120 U. S. 287, 80 L. ed. 595; *Coffin v. Ransdell*, 9 West. Rep. 83, 110 Ind. 417; *Knowlton v. Congress & E. S. Co.* 57 N. Y. 518; *Morrow v. Iron & S. Co.* 87 Tenn. 262; 1 Morawetz, Priv. Corp. § 306; *Clark v. Beaver*, 81 Fed. Rep. 870.

The defendant corporation can lawfully issue bonds in payment for property.

Lord v. Yonkers Fuel Gas Co. 1 Cent. Rep. 241, 99 N. Y. 547; *Munson v. Syracuse, G. & C. R. Co.* 4 Cent. Rep. 191, 103 N. Y. 58.

Plaintiff cannot, as a stockholder, maintain a suit in equity to restrain the proposed action of the Company on the ground of illegality unless he shows that he will be pecuniarily damaged thereby.

Thomas v. Musical Mut. Prot. Union, 8 L. R. A. 175, 121 N. Y. 45.

Messrs. Knevals & Perry, for respondent:

The contract or resolution in this case, the carrying out of which has been perpetually enjoined, was made by five trustees, with the defendant Mullins, one of the five, against the protest and rights of the plaintiff, and is unlawful and void.

Green's Brice, Ultra Vires, 479, note a; *Munson v. Syracuse, G. & C. R. Co.* 4 Cent. Rep. 191, 103 N. Y. 58; *Barnes v. Brown*, 80 N. Y. 585; *Butts v. Wood*, 87 N. Y. 817; *Coleman v. Second Ave. R. Co.* 88 N. Y. 201; *Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co.* 14 Abb. N. C. 108.

The judgment is right in morals and law and should stand.

Risley v. Indianapolis, B. & W. R. Co. 62 N. Y. 240; *Smith v. Lansing*, 23 N. Y. 531; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 328; *Davous v. Fanning*, 2 Johns. Ch. 260, 1 N. Y. Ch. L. ed. 871; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 199.

In a case like that here, where unauthorized acts are threatened to be done by the directors or trustees of the defendant corporation, they may be restrained in equity at the instance of a stockholder; and the unauthorized act or course of dealing prevented by injunction, as here.

Biswell v. Michigan S. & N. I. R. Co. 23 N. Y. 275, and cases cited; *Barnes v. Brown*, 80 N. Y. 528, and cases cited; *Bisley v. Indianapolis, B. & W. R. Co. supra*; *Anderton v. Aronson*, 8 How. Pr. N. S. 216; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Robinson v. Smith*, 8 Paige, 222, 8 N. Y. Ch. L. ed. 126; *Greaves v. Gouge*, 69 N. Y. 154; Ang. & A. Corp. § 810; *Currier v. New York, W. S. & B. R. Co.* 85 Hun, 860.

This suit is properly brought by the plaintiff as a stock and bond holder.

Leslie v. Lorillard, 40 Hun, 895; *Gray v. New York & V. S. S. Co.* 8 Hun, 833; *Hand v. Atlantic Bank*, 55 How. Pr. 281, and cases cited; *Heath v. Erie R. Co.* 8 Blatchf. 347, 393.

The plaintiff was entitled to his injunction restraining the defendant's directors from carrying out the threatened unlawful acts.

Duncomb v. New York, H. & N. R. Co. 84 N. Y. 199.

Where it appears that property, the value of which is well known and understood, or capable of being ascertained, "is purchased at a price far beyond its real value, this raises a presumption of fraud, and unless rebutted by evidence explaining this apparent bad faith, the transaction is fraudulent in law, and the hold-

ers of the stock are liable for the unpaid portion thereof."

Boynnton v. Andrews, 63 N. Y. 94.

There is no authority in law for the issuing of both stock and bonds in the purchase of property, or either of them, at a discount or for less than their face.

Duncomb v. New York, H. & N. R. Co. supra.

Stock issued by a corporation for the purchase of property must be issued at its face value, in order to make it full-paid stock, and not liable for further calls.

Garnsey v. Rogers, 47 N. Y. 233; *Boynnton v. Hatch*, 47 N. Y. 225; *Boynnton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Duncomb v. New York, H. & N. R. Co. supra*, and cases cited.

Peckham, J., delivered the opinion of the court:

The defendant corporation was organized under the Laws of 1873, chapter 737, relating to the incorporation of water companies, as amended by chapter 214 of the Laws of 1881. The provisions of the General Manufacturing Act of 1848, and its amendments, as to payment for capital stock, were made applicable to corporations formed under the Act of 1873.

The so-called Rockaway Beach extension was not built by defendant Mullins under any contract with the defendant corporation. The plaintiff requested the court to find that he did so build it, but the court refused the request, and in the opinion delivered by the learned judge at the trial term, it is distinctly stated that there was no contract between the parties for the building of such extension. Upon its completion Mullins was the sole and absolute owner thereof, with power to operate it himself or to sell it to others, or, in brief, to exercise such acts of ownership over the property as any other owner might have exercised. This is not the case of a trustee entering into a contract with himself or purchasing from himself, where the contract is liable to be repudiated at the mere will or even whim of the *cestui que trust*. Having the rights of an absolute owner of this extension, Mullins was at liberty to make such contract in regard to its disposal as he should see fit, so long, of course, as he did not, while acting in his own interest on the one side, also act on the other in the capacity of trustee or representative, so that his interest and his duty might conflict.

In this case Mullins did not so act. He bases his right to the stock and bonds of the Company defendant upon the vote of the majority of its shareholders taken at a regularly convened meeting, to purchase the property at the price named in the resolution adopted at such meeting, the price being \$60,000 in bonds and \$50,000 in the stock of such Company. At this meeting four hundred and ninety-seven out of a total of five hundred shares, into which the capital stock of the Company was divided, were represented, and four hundred and sixty-seven shares were voted upon in favor of the adoption of such resolution, while the thirty of the plaintiff were voted upon by him in opposition thereto, and three shares were not voted upon. There were a majority of shareholders and a majority of shares voted upon, in favor of such resolution, without counting the defendant

Mullins or his shares, although he voted upon them in favor of such resolution. In so doing he committed no legal wrong. A shareholder has a legal right at a meeting of the shareholders to vote upon a measure, even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote upon their own stock vote upon it in the light solely of their own interest, or at least in what they conceive to be their own interest. Their action resulting from such votes must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority. In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders.

These views are exemplified in the comparatively recent English case of *Northwest Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589, where one of the directors in a company contracted with his colleagues to sell to the company a vessel which he owned, for a price named. The contract was, in fact, a fair one, but it was admitted to be voidable, and it was held that the vendor director had a right, at a meeting of the shareholders, to vote in favor of ratifying such contract and concluding such purchase, and that his conduct was not to be regarded as oppressive towards the minority of shareholders because he individually owned a majority of the stock. It was said that a resolution of the majority of shareholders, upon any question with which the company was competent to deal was valid and binding upon the minority. A voidable contract, it was also said, might be ratified or affirmed by a majority of shareholders at a proper meeting, provided that such ratification was not brought about by improper means, and the contract itself was not fraudulent or oppressive towards the minority. Baggallay, L. J., said that great confusion would be introduced into the affairs of joint-stock companies if the circumstances of shareholders voting in that character in general meeting were to be examined and their votes practically nullified if they also stood in some fiduciary relation to the company.

I think that where the action of the majority is plainly a fraud upon, or, in other words, is really oppressive to, the minority shareholders, and the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders suing in his own behalf and in that of all others coming in, etc., to enjoin the action contemplated, and in which action the corporation shall be made a party defendant. It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the shareholders that

enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. Generally the rule must be that in such cases the will of the majority shall govern. The court would not be justified in interfering, even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any court to follow.

I do not understand that these views are substantially drawn in question in the courts below, but there are facts found in this case upon which they have thought the plaintiff was entitled to their interference in his favor, to prevent the consummation of the action of the majority in providing for the issuing and delivering to Mullins of the stock and bonds mentioned in the resolution adopted by the shareholders. So far as fraud may be made the basis for an action like this, it is to be noted that there is no finding by the court that any fraud existed in fact, or that the individual defendants, or any of them, were actuated by any fraudulent intent in taking the action which they did. Therefore, if the action is to be sustained on the ground of fraud, its existence must be the necessary legal inference from facts which have been found. But the trial court made certain findings of fact from which the general term has inferred the existence of this fraudulent purpose, and to which findings an exception was taken by defendant Mullins upon the ground that there is no evidence to support them. A question of law is thus raised which this court is called upon to decide. These findings and exceptions relate to the actual cost of the Rockaway Beach extension.

The court found that such actual cost was not more than the sum of \$65,000, including about \$8,000 paid to defendants Mullins and Du Bois for disbursements and services rendered by them in relation to the work, while they were officers and trustees of defendant corporation. It was further found that the actual net cost of the work to defendant Mullins was less than the sum of \$61,000, and that the work, as completed, was not worth more than \$65,000, while the corporation, by the terms of this resolution, was to pay Mullins for the doing of such work, in

bonds and stock, to the amount in value of \$110,000. The evidence is uncontradicted in regard to the cost and worth of these works.

It was shown that the actual expenditures for the work amounted to \$69,055.79, which included labor and cost of material. There were also included in such gross amount \$8,000 for the personal services of Mullins and Du Bois, both of whom were, at the time when they did the work, officers and directors of the corporation defendant. Also, an item of \$1,800 for four months' interest on \$65,000,—thus making a total of these items, for personal service and for interest, of \$9,800, which, when deducted from the above total of \$69,055.79, leaves a balance of \$59,755.79, and upon this basis the finding of the court that the actual net cost of the work to Mullins was less than the sum of \$61,000 may be sustained. But why should the \$8,000 for the personal services of Mullins and Du Bois be deducted? The deduction is claimed upon the ground that while Mullins was engaged in the work of building this extension, he and Du Bois were also officers of the corporation defendant, and therefore it is assumed that neither had any right to charge such company for his services. I see no rule of law which forbids such charge, nor is there any in the nature of the transaction itself. When Mullins engaged in the business of building the extension, he was under no contract with the Company to build it for them. He was free to build it in such manner and at such expense as he chose, and when completed he was free to make such use of it as he chose, to keep it or to sell it to others. As he did not do the work for the Company, he was not bound to give his time or labor to the work and to make no charge for it, if he subsequently sold the work, as completed, to the Company. There is no reason whatever why such charge for his personal service should not enter into the legitimate and proper cost of the work. The same may be said of the charge for the services of Du Bois. He was employed by Mullins to do certain necessary work in connection with the extension, and Mullins had the perfect legal right to include the amount due Du Bois for such services as a part of the cost of the extension. There is no claim made that the amount of either item is excessive, in case it was proper to make the charge and include it in the alleged cost of the work. The same can be said of the charge for interest on the \$65,000. It is, in any event and in regard to all these items, a mere means of arriving at a fact, viz.: the actual cost of the work, for the purpose of seeing hereafter what kind of a bargain was made by the Company defendant in its purchase. The question is, Do these items legitimately enter into the cost of the work and so form a part of its value? On that question it seems to me there can be no doubt.

In arriving at an answer to the other proposition, as to the fair value to the Company of the property purchased, or, in other words, in coming to a conclusion as to what kind of a bargain was obtained for the Company by this purchase, it is proper to scrutinize the evidence going to show the value of the completed work, and for that purpose the various items given by Mullins may be examined. We ar-

rive at the conclusion that the items already criticised were properly included as a part of the actual cost of the work to the contractor, and that he was fully justified in treating with the Company and the Company with him on the basis of the actual cost of the work being \$69,055.79. This, of course, gives not a penny of profit to the contractor. So far as Mullins was concerned, and in regard to his holding an official position in the Company, he had the same right to demand a profit on his work when he subsequently sold it to the corporation defendant that he had to charge for his personal services as a part of the cost of the work. As he did not do the work as agent of the Company, or oversee it in his capacity of trustee or director thereof, but, on the contrary, as he did the work for himself wholly and at his own risk, his position in the Company, up to the time of the actual sale of it, had no effect upon his work on the extension or his right to realize a profit thereon. Of course, when he came to sell it to the Company, if the sale were made by him as vendor to the directors, he being one of them and acting as such, the sale was a voidable one, liable to be set aside at the suit of the Company and possibly at the suit of a shareholder. But we have seen that this was not the way in which the sale was made. Mullins did not act in his capacity as director at any meeting of the board, but he voted as a shareholder to make the purchase, at a meeting of the shareholders, under the circumstances already mentioned. Profits upon the work were therefore a proper item to be considered when looking at the question as to what kind of a bargain the Company defendant really made. Upon this subject there is no dispute if profits are to be allowed at all. Doing this work where there is risk arising from the necessary laying of the pipes under water, a contractor would want the equivalent of \$30,000 to \$35,000 in cash. In this amount from 10 to 15 per cent would be estimated for profit, but it might be only 5, and it might be nothing. It was of an objectionable character to put pipe in swamp and salt meadow, as shown by the witnesses for plaintiff.

While showing the actual prices paid for some of the material, it was proved by Mullins, when called as a witness by the plaintiff, that he had obtained about six hundred tons of eight and four inch cast-iron pipe in January, but when he came to use it in April the price had gone up about \$4 per ton, which would enhance the actual cost of the work, if thus charged, some \$2,400. In making up the account of the value of such work, a fortunate purchase of a part of the material used in its construction is proper to be taken into consideration.

It is plain that the court, in finding that the work, as completed, was not worth more than \$65,000, failed to take into consideration many items entering into the actual cost of the work, and upon the assumption of such actual cost the court below chiefly based its finding of the completed value of the work. In truth, all the items already mentioned should have been included. When viewing the completed work and endeavoring to place some value upon it, we are not to be confined to the mere cost of the materials and the value of the labor con-

tained in and expended upon it. A fair profit to the contractor is to be included, and the inquiry should be, What, under all the circumstances, is the fair value of the property to the Company, considering its proposed use by it and the general purpose for which the Company is organized? This seems to be the rule derived from the cases of *Schenck v. Andrews*, 57 N. Y. 142; *Boynston v. Andrews*, 68 N. Y. 94; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87,—in which the suits were brought by creditors of the corporations. Looking at the case in this light, it can be said that, from the uncontradicted evidence, it clearly appears that the cost of the completed work to the contractor (including his fair profit) was at least \$80,000 or \$85,000. The trial court, in finding to the contrary, made a finding which is wholly unsupported by the evidence. The finding proceeds upon a wrong theory, and is arrived at by excluding from the computation items which should properly have been considered. But this is the mere value to the contractor, while the true question is, What is the value to the Company?

In answering that question the trial court should take some other and additional facts into consideration.

It must be remembered that the defendant corporation was organized for the purpose of supplying water to villages within the Town of Hempstead. The evidence shows that it had completed its work so as to supply the Village of Far Rockaway, within such town. Rockaway Beach was another village in the same town, about seven miles distant. It was one of the villages included in the charter powers of the defendant Company, and it may therefore be said to have been within the contemplation of the members of the Company to supply such village with water. The Company finds this extension ready made to its hands, with pipes laid, risks successfully encountered, and all work done, so that nothing is wanting but the purchase and taking possession of the property, in order to at once enter upon the work of supplying this village with water, which is, as I have said, one of the purposes for which the Company was organized. The question which at once confronts the Company is, Would it be good policy to refuse to purchase at the price named (\$110,000), with not only the possible, but the very probable, contingency of seeing a portion of its own legitimate field of operations occupied by some rival, either to its entire exclusion, or else under circumstances where it would be obliged to compete for business? It might be that the Company could well afford to pay such price, considering the prospective profits to be derived from supplying the village with water, and the driving out of any competition with it in such work. Any court materially considering all these facts, and taking all the circumstances into consideration, might reasonably come to the conclusion that the value of this property to the Company defendant was the sum of \$110,000.

The court below has not passed upon this question. After taking all these matters into consideration, and if, after doing so, it should find that the value of the property to the Company was the last-named sum, then, of course,

all basis for maintaining this action would be at an end.

But if, after a critical examination of the facts, the court should find the value of the property, at the time of the proposed purchase, to have been but \$80,000 or \$85,000, the vote to pay the sum above stated in stock and bonds is not to be condemned as a fraud unless the majority acted in bad faith. Possible or probable prospective value of property thus ordered to be purchased at a shareholders' meeting may be taken into consideration upon this question of fraud, and actual good faith in the majority shareholders might be decided, among other things, by a consideration of the reasonableness, or the reverse, of such expectations of future value. This is not the case of a creditor seeking satisfaction from a shareholder because of the unlawful issue of stock under the provisions of the Manufacturing Statute, such as the cases above cited were; and in order that the minority shareholders should be able to successfully attack the action of the majority in such a case as this, something more must be shown than that the property purchased was not of the full value of the stock or bonds issued at par in payment therefor. A discrepancy as large as that between \$80,000 or \$85,000 and \$110,000 is not necessarily a fraud. The court would have to find the further facts already stated in this opinion as necessary to exist, before such action should be enjoined.

From these views it may be that no question will arise upon another trial as to the power of the Company to issue its stock or bonds at less than par. It might be, however, that the findings of the court upon the questions of value would be such as to necessitate the decision of that question, and we think it proper, therefore, to state the conclusion to which its examination has brought us.

We think that, under the Manufacturing Act, the Company cannot issue its stock as full paid at anything less than its par value. The Act makes special provision for the exercise of the power to issue stock in payment for property purchased by the Company. Whatever the right of a corporation under the general powers pertaining to it as a corporation might be, we must look at the provisions of the Statute, where it specifically grants such power, to find the terms and conditions upon which it is to be exercised. By section 2 of chapter 40 of the Laws of 1848, the trustees of a manufacturing corporation founded under the Act are empowered to purchase property necessary for their business, and to issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and taken to be full-paid stock, and not liable to any further calls. We think this language must mean that the amount of the nominal or par value of the stock must be put against the value of the property purchased. Otherwise, we should have such a case as \$100 in cash purchasing \$100 of stock at par, under a subscription to the capital stock of the Company, while the same hundred dollars, if first turned into property to be sold to the Company, might purchase double the quantity of the stock, if the stock were only of the actual value of 50 per

centum of its par value. The stock would issue only at its actual value in return for property, but, in return for cash, it could only issue at its par value. In other words, if the stock were really worth but fifty per cent of its par value, actual cash would purchase only half as much stock as could be purchased with an equal value in property. This was never meant. And I think the expression that the stock thus issued for property purchased is to be taken as full paid-up stock, and that it is to be issued to the amount of the value of the property purchased, must mean that it is to be issued at its par value.

It may be said that this construction prevents a corporation from purchasing property and paying for it with its stock, where actual value of the stock is enough below its par value to make the difference in a large purchase very appreciable. That may be so; but it was undoubtedly the object of the Statute to make the full-paid capital stock that is issued the representative, dollar for dollar, of the money or property that has been paid in for its purchase, so that the Company would start off in business with money or property of the full value of its paid-up capital.

The learned counsel for the appellant cites the case of *Van Cott v. Van Brunt*, 83 N. Y. 585, as conclusive upon the point under discussion. But we do not agree to that statement. The *Van Cott Case* related to a railroad corporation which was organized under a statute which does not contain this provision as to purchasing property. It was decided that it had the right, under the general powers of a corporation, to procure the building of its road and pay for the construction of the same by the issuing of stock and bonds, and that it might issue such stock at its actual value, even though it were less than its par value. But where the provision as to the purchase of property is expressly stated, and the condition mentioned, a fair construction must be given such language, even though it curtail the power of a corporation as to the issuing of its stock. The provision in the General Railroad Act, chapter 282, section 16, of the Laws of 1854, making each stockholder liable individually to the creditors of the Company, etc., until the whole amount of the capital stock shall have been paid to the Company, is not, as we think, the equivalent of the language used in the Manufacturing Act, and hence stock in a railroad corporation may be regarded as full paid when issued at its actual value in payment for the building or equipping of the railroad. The language is used in reference to the liability of stockholders, and the section is silent upon what shall be regarded as paid-up stock, while the section of the Manufacturing Act clearly contemplates, as it seems to us, that only the amount of the stock as named in the scrip is to be issued to the amount of the value of the property, and is then to be regarded as full-paid stock.

A different rule, however, prevails in regard to the bonds of a corporation. An extended discussion of the question is not needful. We think a corporation has the power to issue its bonds at less than par. So far as this point is concerned, it is not restricted to an issue only upon payment to the Company of the par value
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of the bonds, either in money or property, for its use. The case of *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 208, does not hold any principle to the contrary. It was there decided that the bonds given the director as a mere bonus, on his subscribing to the stock, were without consideration, and the director, as a trustee of the Company, had no right to receive them, and therefore in his hands they were void.

The principle decided in *Curtis v. Leavitt*, 15 N. Y. 9, gives validity to bonds thus issued. The repeal of the Statute of Usury, so far as regards corporations, operates to give validity to bonds negotiated at less than par. The case of *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 558, also impliedly holds that bonds thus issued are valid.

But the court might hereafter, possibly, find these facts, viz.: that the Company, at a meeting of shareholders, resolved to purchase property of the value of but \$80,000, and to pay for it by the issuing of stock of the par value of \$50,000, and bonds of the par value of \$80,000. Holding, as we do, that the stock must be issued at par, in order to pay only the balance of \$30,000 of the purchase price, the \$80,000 of bonds would be issued at 50 per cent only of their par value, while it may be assumed that their actual value was 95 per cent thereof. Would the issue of such an amount of bonds, under such circumstances, be enjoined as a fraud upon the minority? Considering the fact that the stock must be issued at par, the Company must therefore receive in money or property the equivalent of its face or par value, and unless it does so receive it, the issue is illegal. Under these circumstances, the issue of almost twice the number of bonds, taken at their actual value, necessary to pay the balance due on the property purchased, such issue being made, in fact, because the stock was really worth not more than 40 per cent of its par value, would be, as it seems to me, a mere evasion of the Statute as to issuing stock at par, and ought not to be tolerated any more than any other evasion of the Statute, no matter for what purpose such evasion was attempted. If the facts assumed were to be hereafter really found, the issue of the bonds should then be enjoined.

The plaintiff's counsel makes the point that the Company defendant was not authorized to issue its bonds for the purpose mentioned. It is authorized, by section 5 of the Act under which it was organized, as amended by chapter 213 of the Laws of 1881, to borrow money for the purpose of constructing its works and to issue bonds for its payment. It is altogether too narrow a construction of the Statute to hold that the corporation must itself construct the works, and may not purchase works already constructed, and fit and suitable for its purposes. Nor do we think that in purchasing property the corporation, if it intend to issue stock in payment, must make the whole payment in stock. It may issue stock for a portion, and may pay in cash or issue bonds for the balance.

From these views it results that *the judgment in this action must be reversed, and a new trial ordered, costs to abide event.*

Sophie LUHRS, *Resp't.*,

v.

Anna LUHRS, Substituted, etc., *Appt.*

(....N. Y.....)

1. Where a member of a benefit society has complied with all the requirements necessary to effect a substitution of a proper person as beneficiary in place of the one originally designated by him, and has surrendered his certificate to the proper officer of the local lodge for the purpose of having the change made, and all that remains to be done is the purely formal matter of making the change without a particle of discretion remaining in anyone, the right of the substituted beneficiary attaches, and the new certificate, when issued, will relate back to the time of such surrender, so that his claim will not be defeated by the death of the member before the change is actually made.
2. The acceptance by a member of a mutual benefit association of a certificate issued for him and in accordance with his directions will be presumed, although he never signed the blank form of acceptance printed upon its face, where it does not appear that such signature was made in the slightest degree a requisite for showing acceptance.
3. The designation of the member's wife as beneficiary in a mutual benefit certificate will give her no absolute right to the money due thereon, of which she cannot be deprived by the substitution in her place of a new beneficiary in accordance with the rules of the association, where such change was provided for by the constitution and by-laws of the society at the time she was originally designated.

(October 28, 1890.)

APPEAL by the substituted defendant from an order of the General Term of the Supreme Court, First Department, granting a new trial upon exceptions ordered to be heard before it in the first instance of an action brought to recover the amount due on a mutual benefit certificate in which the Trial Term had directed a verdict for defendant. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Cameron & Kropp, for appellant:

The power of the member to change his beneficiary, and make a change in the disposition of the fund, under the laws of the organization, is absolute.

National American Asso. v. Kirgin, 28 Mo. App. 80, 88; *Barton v. Provident Mut. R. Asso.* 1 New Eng. Rep. 856, 63 N. H. 535, 538; *Swift v. Railway Pass. & F. C. Ben. Asso.* 96 Ill. 309, 814; *Richmond v. Johnson*, 28 Minn. 449, 450; *Lamont v. Grand Lodge I. L. of H.* 31 Fed. Rep. 177, 181; *Luhrs v. Supreme Lodge, K. & L. of H.* 37 N. Y. S. R. 88; *Laws* 1883, chap. 175, § 18.

The old certificate, issued in favor of the plaintiff, with the proper designation and direction indorsed, was legally surrendered by

John Luhrs while living, and plaintiff's contingent interest in the fund thereby terminated.

National American Asso. v. Kirgin, *supra*; *Kepler v. Supreme Lodge K. of H.* 45 Hun. 274, 277, 278; *Manning v. A. O. of U. W.* 86 Ky. 186; *Crown Point Iron Co. v. Aetna Ins. Co.* 58 Hun. 220; *Hellenberg v. District No. 1 of I. O. of B. B. 94 N. Y.* 588; *Grand Lodge A. O. U. W. v. Child*, 14 West. Rep. 454, 70 Mich. 163.

By the issuance of the new certificate in favor of defendant, the supreme lodge determined the regularity of the proceedings on the part of John Luhrs, and that the new beneficiary was competent under its laws.

Luhrs v. Supreme Lodge, K. & L. of H. supra; *Spencer v. Spencer*, 11 Paige, 159, 160, 5 N. Y. Ch. L. ed. 91, 92; *Bouvier, Law Dict. title, Family*; *Wade v. Jones*, 20 Mo. 75; *Marak v. Lazenby*, 41 Ga. 153.

The new certificate issued in favor of the defendant is a regular and valid certificate. The fact that it was issued after John Luhrs' death does not affect its validity, the surrender of the old certificate being regular.

National American Asso. v. Kirgin and Manning v. A. O. of U. W. supra.

John Luhrs and the supreme lodge were the parties to and controlled the contract.

Swift v. Railway Pass. & F. C. Ben. Asso. 96 Ill. 314.

If the certificate, issued in defendant's favor, is not valid, she is still entitled to receive the fund, having been regularly designated as the beneficiary thereof.

Bishop v. Grand Lodge E. O. of M. A. 112 N. Y. 627, 635, overruling 43 Hun. 472; *National American Asso. v. Kirgin and Manning v. A. O. of U. W. supra.*

When the member has exercised the power to change his beneficiary, and the disposition of the fund, as fully as he could exercise it under the laws of the organization, the contingent right of the defendant to the fund, in the event of his death, attached, and the fact that the certificate was issued after his death is immaterial, since it is not the right itself, but merely the evidence of the right.

National American Asso. v. Kirgin and Manning v. A. O. of U. W. supra; *Kepler v. Supreme Lodge K. of H.* 45 Hun. 274, 277, 278; *Grand Lodge A. O. of U. W. v. Child*, 14 West. Rep. 454, 70 Mich. 163; *Deady v. Bank Clerks Mut. Ben. Asso.* 17 Jones & S. 248, 250; *Bacon, Ben. Societies*, p. 415; *Supreme Lodge K. of H. v. Nairn*, 60 Mich. 44.

Mr. Alfred Stecker, for respondent:

John Luhrs having designated the plaintiff, his wife, as the beneficiary, could not by any act of his deprive her of the money due upon the policy.

Martin v. Funk, 75 N. Y. 134; *Eadie v. Slimon*, 26 N. Y. 9; *Whitehead v. New York L. Ins. Co.* 8 Cent. Rep. 84, 102 N. Y. 152; *Ferdon v. Canfield*, 6 Cent. Rep. 208, 104 N. Y. 143; *Brunner v. Cohen*, 86 N. Y. 11; *Weiser v. Muehl*, 81 Ky. 386; *Pulcher v. New York L. Ins. Co.* 33 La. Ann. 822; *Ruppert v. Union Mut. Ins. Co.* 7 Robt. 155; *Bailou v. Gila*, 50 Wis. 614; *Splawn v. Chew*, 60 Tex. 532; *Greene v. Greene*, 28 Hun. 482.

No rights could be acquired after the member's death.

NOTE.—Benefit societies, change of beneficiary, distinction between ordinary insurance policy and benefit certificate. See *notes* to *Milner v. Bowman* (Ind.) 5 L. R. A. 97, 98.

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Coyne v. New York L. Prot. Society, 18 Daly, 1.

The indorsement on the back of the first policy cannot be considered as an assignment of the policy to the defendant.

St. Clair County Benev. Society v. Fietsam, 97 Ill. 474.

Peckham, J., delivered the opinion of the court:

The facts in this case are undisputed, and are substantially as follows:

John Luhrs, in the year 1881, became a member of the Supreme Lodge, Knights of Honor, a charitable organization of the State of Kentucky, doing business in New York State. It had a branch lodge in the City of Brooklyn, and he joined that lodge. He received a certificate from the supreme lodge, by which it was promised that if he should comply with all the rules and regulations of the supreme lodge, and should be in good standing at the time of his death, the supreme lodge would pay to such member or members of his family, or person or persons dependent upon him, as he should direct or designate by name, a sum not to exceed \$2,000, as provided by general law. He designated his wife as the beneficiary, and the certificate which he originally received from the supreme lodge, and which was dated on the 22d of September, 1882, contained her name as such. In the constitution of the organization it is provided that every lodge shall forward to the supreme reporter all applications for membership, and that each application shall have the name of the person to whom the benefit is to be paid inserted therein, and where more than one certificate is issued the beneficiary named in the last shall alone be entitled to the benefit.

It is further provided in the constitution that a member desiring to change his beneficiary may at any time, while in good standing, surrender to his lodge his benefit certificate, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge to the supreme reporter, who shall thereupon cancel the certificate and issue a new one in lieu thereof to such member, payable as he shall have directed, within the limitations prescribed by the laws of the order, said surrender and direction to be made on the back of the benefit certificate surrendered, signed by the member and attested by the reporter of the lodge.

On the 8th day of March, 1887, while Luhrs was a member in good standing, an indorsement was made upon the certificate which had been issued to him and which contained the name of his wife as the beneficiary, and such indorsement was in the following words: "I hereby surrender to the Supreme Lodge, Knights of Honor, the within benefit certificate, and direct that a new one be issued to me, payable to my sister, Anna Luhrs." At the end of this indorsement John Luhrs signed his name on the same day. The certificate thus indorsed and signed was then placed in an envelope and sent to Edward Cook, who was the reporter of the Brooklyn Lodge, and it was received by him on the 9th of March, and the words "Attest, Edward Cook, Reporter," were placed, together with the seal of the lodge, on the certificate at the end of the indorsement.

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The reporter, Cook, sent the certificate thus indorsed by mail to the supreme lodge at St. Louis, on the morning of the 10th of March. It does not appear in the case that any question was raised upon the trial that the sister, Anna Luhrs, was not a person dependent upon her brother, within the meaning of the constitution and by-laws of the organization, and I think it can be assumed that she was and was so regarded upon the trial. She was with her brother at the time he died, and no one else was, and he died on the 10th of March, 1887.

The certificate thus forwarded to the supreme lodge at St. Louis was received at the home office on the 12th of March, and on that day it was formally canceled and another certificate, with the name of Anna Luhrs as the beneficiary and signed by the supreme dictator and supreme reporter, was sent from the St. Louis office. At the end of the old and new certificates the words, "I accept this certificate upon the condition herein named," were printed, and at the bottom of such acceptance on the old certificate John Luhrs had signed his name. Of course there was no signature of his attached to the new certificate, nor does it appear that this written acceptance was called for by the constitution or by any by-law of the association. The supreme lodge kept the old certificate thus canceled as the authority for the issuing of another.

After the death of John Luhrs, his sister Anna made a demand upon the supreme lodge for the payment to her of the \$2,000 mentioned in the second certificate. The plaintiff, the widow of the deceased, also demanded of the supreme lodge the payment of the \$2,000 mentioned in the first certificate. The supreme lodge acknowledged an obligation to pay to one or the other of the parties, but not to both. The widow, therefore, commenced an action against the supreme lodge to recover the amount named in her certificate, and, upon motion, defendant Anna Luhrs, the sister, was substituted as defendant in place of the supreme lodge, which deposited the money in court to await its order as to the proper disposition of such sum, and the supreme lodge was therefore discharged from further liability in the matter. By this equitable proceeding the widow and the sister of the deceased have been brought together to litigate the question which of them has the better right to the fund in question. Upon the trial the court directed a verdict in favor of the defendant. Upon appeal the general term reversed the judgment entered upon such verdict and granted a new trial. The general term held that there had never been a valid and completed change of certificates within the lifetime of the deceased, and that hence the widow was entitled to the sum. The defendant has appealed to this court from the order reversing the judgment entered in her favor and granting a new trial, and has given the usual stipulation for judgment absolute against her in case such order be affirmed.

The question is not at all one which is free from doubt, and about all that can be said in favor of either view has been said by the learned judges who have written at the special and general terms. Upon the whole, and with some hesitation, we are inclined to favor the opinion pronounced at the special term, and

to hold that the sister, the beneficiary named in the new certificate, is entitled to the fund.

The deceased had expressed his desire in the premises as fully as it was possible for him to do. He had himself complied with all the requirements imposed by the supreme lodge as necessary for him to perform in order to obtain another certificate. He had directed in writing to whom he wished the certificate payable, and he had surrendered his old certificate to the authorized agent of the supreme lodge, which agent had accepted such surrender and attested it by the signature of its reporter and the seal of the lodge. The person designated as the new beneficiary was one of those mentioned in the by-laws of the organization as a proper person to be named as such, and there was no discretion resting in the officers of the supreme lodge to refuse to issue a new certificate in accordance with the direction of the deceased, upon receipt of the old one. If the old certificate had been actually surrendered into the hands of an officer of the supreme lodge, and it had been by him canceled before the death of the deceased, although the new one was not issued in accordance with his direction until after his death, would it not properly be held that the issuing of the new certificate was, under such facts, a purely formal matter, a mere written evidence of the fact which was in reality consummated by the surrender and cancellation of the old certificate?

The cancellation must follow the surrender, if the surrender has been properly made, and the new certificate must issue in accordance with the directions of the member, if the beneficiary be one of that class named in the by-laws.

The question is whether the valid and proper direction of the member shall be complied with when he has done everything that was required of him to do in order to effectuate his intention, and all that remains to be done is a purely formal piece of business, and one in the doing of which there is not (upon the facts in this case) one particle of discretion remaining in the officers of the supreme lodge, or in any other body. Is not this written indorsement of a surrender of the certificate and the written direction thereon to issue a new one to a new and proper beneficiary, followed by an actual and manual surrender of the old certificate to the acknowledged and authorized agent of the supreme lodge, equivalent, for the purpose of acquiring rights under the new certificate, to an actual delivery of the surrendered policy by the agent to the supreme lodge, and a formal cancellation thereof? May not the old one be regarded as in law canceled when it is properly surrendered by a writing to that effect, signed by the member and indorsed thereon, and the certificate itself actually placed in the custody of the authorized agent of the principal? We think, in this case, these questions may fairly be answered in the affirmative.

The supreme lodge acted upon the surrender and did cancel the certificate, and did, in fact, issue the new one as directed by the member, and does not now deny the legality of the surrender or make any claim that it was not effectual. The only trouble is that when it for-

merly acted in accordance with the valid direction of the deceased, and did what ordinarily upon the facts of the case it would have been bound to do, the member was dead. We do not think the decease should, upon these conceded facts, operate to prevent the consummation of the surrender and cancellation.

It is said that, until the actual cancellation by the supreme lodge, there might be a recall of such surrender by the member. Possibly there might be, but there was none in this case. After cancellation the member might also ask for another certificate containing the same name as the old one. In other words, the member might change his mind. But, as already stated, in this case he did not.

Feeling, as we do, that the surrender of the old certificate and the designation of a proper beneficiary in the manner and under the circumstances described in the evidence herein, amounted to a surrender and cancellation by the supreme lodge, we think the subsequent issuing of a new certificate, designating a new beneficiary, as directed by the member, may be held to relate back to the time of the original surrender to the agent of the supreme lodge. Although upon the face of the certificate there was this printed form: "I accept this certificate upon the condition herein named," and a place left for the signature of the member, yet it does not appear anywhere that such signature was in the slightest degree requisite in order to show an acceptance of the certificate. An acceptance may be presumed when the certificate is issued in accordance with the direction of the member, and consequently if the issue of such certificate can be regarded as relating back to the time of the legal surrender of the old one, the acceptance may be also presumed to have followed as of that time. The certificate, when issued, may be thus regarded as relating back, on the ground that it is merely and purely a formal act on the part of the supreme lodge, registering and giving written evidence of a transaction, all the material facts of which had occurred during the lifetime of the deceased. No new rights were brought into being by the action of the supreme lodge after the death of the member, but that action simply gave the proper written evidence to the beneficiary of the existence of those rights which had, in fact, accrued before the formal issuing of such written evidence. There is nothing in the point that the deceased, having designated his wife as the beneficiary, could not thereafter deprive her of the money due upon the policy. The contract was one provided for by and in accordance with the constitution and by-laws of the organization, and the original certificate was issued subject thereto, and it was undoubted law that if the rules and regulations were complied with the beneficiary could at any time be changed by the direction of the member.

We are of the opinion that *the order of the General Term should be reversed*, and judgment ordered upon the verdict at Special Term, with costs to the defendant in all courts.

All concur, except **Andrews, J.**, not voting.

WISCONSIN SUPREME COURT.

Alice DICKSON
v.
Silas D. FIELD.

(....Wis....)

1. A condition in a devise of a farm that the testator's daughter shall be supported out of said property during her life will not be construed as requiring her to reside on the farm to be entitled to support, in the absence of anything to show that such was testator's intention.
2. Delivering specific articles necessary for her maintenance, to the testator's daughter, with due regard to the condition in life of testator and his family at the time of his death, fulfills the condition in a devise of a farm which requires the devisee to support such daughter out of the property, and the devisee cannot be required to pay her a cash annuity or deliver such articles elsewhere.
3. The failure of a devisee to inform one whose support out of the property devised was made a condition to his receiving it of his readiness to furnish such support, puts him in default and renders him liable to pay a cash commutation for past support, even though no demand therefor was made upon him. Such failure will not, however, have such effect as to future support; nothing short of absolute refusal or neglect to furnish the support after the obligation to do so and the manner of doing it have been authoritatively adjudicated, will entitle the one to whom the support is due to receive a cash annuity for life.
4. One entitled to a life support out of lands devised to another upon condition that he furnish such support, waives her right thereto by relying upon her husband for her support, but upon the latter's death the obligation of the devisee revives as to future support and maintenance.

(September 23, 1890.)

CROSS-APPEALS from a judgment of the Circuit Court for La Fayette County in an action brought to enforce compliance with a condition in a devise of certain real estate which required the devisee to support plaintiff out of the property devised. *Affirmed on plaintiff's appeal. Reversed on defendant's appeal.*

Statement by **Lyon, J.:**

The parties are sister and brother. Their father, William Field, late of La Fayette County, died testate in May, 1858, leaving surviving him his widow and eleven children. His estate consisted chiefly of lands in various localities, appraised at \$13,845. His personal estate was appraised at \$1,569. The estate was indebted in the sum of \$863, which was paid out of the proceeds of the personal property. By his last will and testament, William Field devised specific real estate to each of his children, except his daughter Alice, the plaintiff. He devised his homestead farm consisting of 143½ acres, now worth about \$45 per acre, to his widow for life, together with the use of all his personal estate except one horse; and to his son Silas D., the defendant, he devised the same

property upon the decease of his widow, "conditioned said son shall support and maintain my daughter Alice out of said property, above described, during her natural life." When their father died, Alice was twelve and Silas three years old. By reason of an injury which she received when five or six years old, or because of constitutional tendencies, probably both, Alice was afflicted with a disease in one of her hips, which resulted in shortening the limb about twelve inches, and rendering her a cripple for life. She resided with her mother on the homestead farm until she was about nineteen years of age, when she left home, and has not resided there since. In 1881, she married one Samuel Dickson, by whom she has two children, one born in 1882, the other in 1886. Dickson died April 22, 1888, leaving a little property, but which is insufficient for the support of his widow. The widow of William Field occupied the homestead farm until September, 1887, when she died, and Silas thereupon went into possession thereof under the will, and has ever since occupied it as owner. At that time little or none of the personal estate remained. Prior to the commencement of this action, Alice never demanded her support of Silas, and he did not, before that time, offer to support her. In his answer, however, he does offer to support her if she will make her home with him on the homestead farm, and conduct herself properly. In his testimony, given on the trial, he says: "I am now willing to furnish her a home, and support her there on the farm. I have been willing so to do always since mother's death." He also testified that he was not willing to support her children. Alice resides at Beetown in Grant County, and Silas with his wife and children, on the land thus devised to him, which is probably forty or fifty miles from Beetown. This action was commenced March 22, 1889. It is an equitable action, brought to charge the homestead farm with the support and maintenance of the plaintiff, to compel the defendant to perform the conditions of the devise to him, in her favor, in their father's will. A sale of the land, the appointment of a receiver, etc., is demanded.

The circuit judge substantially found the facts above stated, and also found that the plaintiff is dependent for her maintenance and support upon the above-mentioned provision for her in her father's will, and has been thus dependent since May 1, 1888, or from about the time her husband died; that an economical estimate of the cost of her maintenance per year, in health, is \$200; and that, because of ill feeling manifestly existing between the parties, it is incompatible with her peace and comfort, and her duty as a mother, to reside in defendant's home, and receive her maintenance there. The judge also found, as conclusions of law, that it was and is the duty of defendant to support and maintain the plaintiff from the time she became dependent, and while she continues so; that it is not a condition of her receiving support and maintenance that she should reside with defendant upon the homestead farm; that the defendant should

pay her at the rate of \$200 per annum for such support and maintenance from May 1, 1888, to the trial of the action, to wit, December, 1889; that she is entitled to judgment for that amount, and costs chargeable upon the homestead farm, and for which execution should be awarded; and that, to prevent a multiplicity of suits, the judgment should direct that the defendant pay to the plaintiff, or to the clerk of the court for her use, from and after December 1, 1889, the sum of \$200 per year in quarterly payments of \$50 each during the life of the plaintiff, all said sums being also a charge upon the homestead farm, for which the plaintiff may have execution. Also, that the judgment should provide that, in case of failure to pay any of such quarterly installments, the plaintiff may move, on the foot of such judgment, for further appropriate relief. In case the plaintiff should cease to be dependent upon the provisions of her father's will for her support, it was directed that the judgment provide that the defendant have leave to apply to the court to be released from further payments, but the question whether he would be entitled to such relief is reserved; and further, if, by reason of sickness or like disability, the allowance above mentioned shall become inadequate for maintenance, the plaintiff may, in like manner, apply to the court to increase it. Judgment was ordered accordingly, and was afterwards entered, pursuant to the above conclusions of law. The defendant appeals from the whole judgment. The plaintiff appeals from that part of it which provides that her allowance shall commence May 1, 1888, instead of September, 1887, when the title to the homestead farm vested in the defendant.

Messrs. Joseph Bock and Bushnell & Watkins, for plaintiff:

Omitting to do anything towards plaintiff's support was a breach of the condition of the devise, although no special demand for such support was made. Plaintiff was not bound to receive support at defendant's house, but had a right to be supported wherever she might choose to live, provided she caused no needless expense to him.

Pettee v. Case, 2 Allen, 546; *Wilder v. Whittemore*, 15 Mass. 263.

It is an amply sufficient answer to the contention that plaintiff's support must be received upon the farm out of farm products that the will does not so read, and there is no such necessary inference that such was the testator's intention. In the construction of wills, doubtful inferences cannot be indulged.

Beach, Wills, § 333; 1 Redf. *Wills*, 430.

The testator meant that after his wife's death the plaintiff should have her support and maintenance out of this property, at all events because he gave her nothing else; otherwise, she would be disinherited, and that he clearly did not intend. An heir is not to be disinherited without an express devise, or by necessary implication; such implication importing, not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed.

Beach, Wills, § 334.

By accepting a devise conditioned upon maintaining a person during the continuance
 § L. R. A.

of the estate, the devisee becomes bound to perform the condition, whether the income thereof is sufficient to support the person or not.

Beach, Wills, § 241; 2 Redf. *Wills*, 300, 301.

Such support may be enforced by action at law, or by resort to a court of equity.

Pickering v. Pickering, 6 N. H. 120; *Veazey v. Whitehouse*, 10 N. H. 409.

Messrs. Orton & Osborn and F. J. Law, for defendant:

The duty of the mother, and of Silas, only required of them to be willing to furnish support at the home, where the will requires it to be furnished; and if Alice abandons that home she has waived for the time being the provision made by her father for her, and must be content not to receive it.

Jenkins v. Stetson, 9 Allen, 128; *Dodge v. Benedict*, 5 New Eng. Rep. 141, 59 Vt. 651.

Lyon, J., delivered the opinion of the court:

I. The judgment of the circuit court herein, so far as it is adverse to Silas D. Field, the defendant, rests upon the propositions (1) that Alice Dickson, the plaintiff, is not required to live with Silas on the homestead farm to entitle her to the support provided for her in the will of her father; (2) that, although Alice did not, before this action was commenced, request Silas to support her, yet his failure to do so was a permanent breach of the condition in the will in favor of Alice upon which the homestead farm was devised to him, entitling her to demand the cost of her maintenance in cash; (3) that the money value of such support has heretofore been, and, while the plaintiff continues in health will continue to be, \$200 per annum; and (4) that Silas must pay her that sum in cash annually during her life, unless the court shall thereafter relieve him therefrom, and a larger sum should the court so order in case of her sickness or like disability. Whether these are or are not correct propositions of law are the questions to be determined on the appeal of the defendant.

1. Is the condition of the devise to Silas of the homestead farm to be construed as requiring Alice to live with him on such farm as a condition precedent to her right to support, and the obligation of Silas to support her? The condition of the devise is expressed in the will thus: "Conditioned said son [Silas D.] shall support and maintain my daughter Alice out of said property, above described, during her natural life." This clause provides in general terms for the support and maintenance of Alice out of the homestead farm, which we understand to mean that the homestead farm shall be charged with her maintenance, and perhaps that she should be supported out of the products thereof, but has no reference to the place where she shall reside. The clause contains no provision requiring Alice to live on the land devised to Silas, or in his family, or at any other specified place. Neither is there anything in the surrounding circumstances, as they existed when William Field died (in so far as such circumstances are disclosed by the testimony preserved in the bill of exceptions), which will authorize the court to say that he intended any such restriction upon the right of Alice to a support out of the farm. We are not informed whether the father thought Alice

would die young or live to old age, whether she would marry or remain single, or whether she would be a helpless invalid or able to labor and care for herself. His opinion on these subjects is a matter of mere conjecture. Moreover, his devises to all his other children were unconditional and absolute. Why should he impose a restriction, or, rather, why should it be conjectured that he intended a restriction which he did not express, upon the enjoyment by Alice of the only provision made for her in his will, except an interest in certain rents, from which she realized \$64 only? It could not have escaped his thought that the changing circumstances of his family might, in after years, render it improper that she should reside with Silas, and unjust and cruel to require her to do so. To adopt the construction contended for by the learned counsel for the defendant, the court will be compelled to read the sentence "out of said property above described" thus: "out of and upon said property," etc. In view of the plain language of the provision in question, yet at the same time giving due weight to what may reasonably be supposed to have been the intention of the testator, we do not feel authorized to make this interpolation. The provision must be construed, just as it reads, as giving Alice the absolute right to her maintenance out of the homestead farm, without restriction as to the place of her residence. The learned circuit judge negatived the existence of such restriction. Of course there is no obligation upon Silas to contribute directly or indirectly to the support of the children of Alice, and none is claimed.

2. The condition of the devise to Silas does not require him to pay Alice a cash annuity, or cash sufficient for her maintenance. Had the testator intended cash payments, he would have expressed such intention in very different language. It is scarcely controverted, however, that, in the first instance, Silas might have discharged his obligation to Alice by delivering to her specific articles necessary to her maintenance, having due regard to the condition in life of the testator and his family when he died. And it is but reasonable and just to hold that he may deliver the same on the homestead farm, and cannot be required to deliver them elsewhere. Although Alice made no formal demand of such necessities at the farm or elsewhere, yet, presumably, Silas must have known she was living; that her husband was dead and that he (Silas) was under obligations to furnish her the means of support. He should have informed her of his readiness to do so. This he failed to do, and his failure puts him in default, and renders him liable to pay a cash commutation for her past support. *Bogie v. Bogie*, 41 Wis. 209, 220.

The case of *Dodge v. Benedict*, 59 Vt. 651, 5 New Eng. Rep. 141, is cited by counsel for defendant to sustain the opposite doctrine. It is not in point, because the covenant there under consideration expressly provided the place where the covenantees should be supported, and the covenantor was held not bound to support them elsewhere. But counsel rely chiefly on *Jenkins v. Stetson*, 9 Allen, 128, to sustain their position. In that case, the plaintiff covenanted to support one Polly Gurney for

life, in consideration of her bond to devise to him certain property. He supported her on his own farm seventeen years, when, for the purpose of avoiding her agreement to devise such property to the plaintiff, she left the farm, and made a similar agreement with another, to whose wife she devised the property pursuant to such agreement. She died four years later. The plaintiff brought the action against the executor of Polly on her bond. After Polly left the farm, he asked her to return, but made no offer to and did not support her further. The court held that, under the circumstances of the case, Polly had waived any further support by the plaintiff, and that such failure further to support her was no breach of the plaintiff's covenant in that behalf. Clearly that case is not an authority here. We hold, therefore, that in the present case no formal demand of support was necessary to charge Silas with the obligation of performing the condition of the will. But we are not prepared to hold that such failure puts Silas in default during the life of Alice, and entitles her to a cash annuity for life. Nothing short of an absolute refusal or neglect to support her, after his obligation to do so and the manner of doing it has been authoritatively adjudicated, should work that result. Hence, we conclude that Alice is entitled to recover in this action only the reasonable expenses of her maintenance, from the time hereinafter indicated to the date of the judgment to be hereafter entered.

8. The testimony preserved in the record supports the finding that such reasonable expense amounted to \$200 per annum.

4. We think the leave to apply to the court to relieve Silas from the payment of the quarterly installments, or to increase allowances in certain contingencies, has no proper place in the judgment, and should be omitted therefrom. It follows that on the appeal of the defendant the judgment in its present form cannot be upheld.

II. The appeal of the plaintiff presents the single question whether the obligation of Silas to support and maintain Alice commenced at his mother's death, in September, 1887, when title to the homestead farm vested in him, or May 1, 1888, which was about the time Alice's husband died. The circuit court held it commenced at the latter date. It has already been said that the failure of Alice to demand her support did not release Silas from his liability to furnish it. But it was competent for Alice to waive her right to it, as was held in *Jenkins v. Stetson*, *supra*. While her husband lived, it was his duty, under the law, to maintain her. At the same time it was the duty of Silas to do so under his father's will. She could elect upon which of them she would cast the burden. She received her maintenance from her husband, and thus elected to look to him for it, instead of Silas. This was a waiver by her of the obligation of Silas until the death of her husband, which revived the obligation. We think the court did not err in computing the cost of her support from May 1, 1888. In view of the relationship of the parties, and the manifest difficulty of determining precisely the rights of the plaintiff and the corresponding obligations of the defendant in respect to the kinds and quantities of articles he should fur-

nish for her support, we are constrained to say that there should be no further litigation between these parties over the provisions in the will of their father. Silas should inform his sister at once that he will deliver to her, at his homestead farm, or some other place they may agree upon, all articles necessary for her support, in suitable quantities, and, if they cannot agree upon such articles and quantities, they will be wise if they submit the controversy to the judgment of discreet mutual friends. It will be better still if they can agree upon a cash annuity in place of the specific necessities. The charge upon the estate of Silas in favor of Alice, created by the will of their father, may

be a burdensome one. But it was created by the owner of the estate, who had the undoubted right, when he devised it, to impose any lawful charge upon it, even though it might destroy or largely impair the value of the estate of the devisee. The courts are powerless to relieve against it.

On the appeal of the plaintiff, the judgment of the Circuit Court is affirmed.

On the appeal of the defendant, such judgment is reversed, and the cause will be remanded, with directions to that Court to render judgment for the plaintiff as indicated in this opinion.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA.

Richard MORGAN, Jr., *et al.*,

v.
H. H. HUGGINS *et al.*

(....Fed. Rep.)

***1. Construing a will in the following language:** "In the name of God, Amen, I, Riley Garrett, of the County of Randolph and State of Georgia, being of perfect mind and memory, thanks be given unto God; calling into mind the mortality of body, and knowing that it is appointed for all men once to die, I do make and ordain this my last will and testament; that is to say, principally and first of all, I give and recommend to the earth, to be buried in a decent Christian manner, at the discretion of the executors, who shall be Isham Wheelus, and so much of my worldly estate I give and bequeath unto William Augustus Wheelus, and I do hereby revoke and disannull all other wills, legacies and bequests, confirming this to be my last will and testament. In testimony whereof, I have hereunto signed my signature this 18th day of January, 1844."—*Held*, that the decision of the Supreme Court of the State (*Garrett v. Wheelus*, 69 Ga. 406), holding that the intention of the testator by this will, read in the light of surrounding circumstances, was, after paying burial expenses, to give the remainder of the estate to William Augustus Wheelus, is the correct construction of this will, and is followed and adopted in this case.

***2. The Code of Georgia, enacted in 1863, contained the following provision (§ 2161):** "All property acquired subsequent to making of the will shall pass under it if its provisions be sufficiently broad to embrace such property." This provision is prospective only, and after-acquired real estate does not pass under a will made before this provision went into operation, even though the testator did not die until afterwards.

(February 27, 1880.)

BILL in equity for the construction of a will.

The case fully appears in the opinion.

Messrs. H. H. Perry, P. L. Mynatt and G. A. Howell for complainants.

Messrs. John L. Hopkins and Alexander S. Erwin for respondents.

*Head notes by NEWMAN, J.

9 L. R. A.

NEWMAN, J., delivered the following opinion:

This is a case in equity, and the question before the court, at the present stage of the case, is the construction of the will of Riley Garrett, deceased, late of this district, which is as follows:

In the name of God, Amen. I, Riley Garrett, of the County of Randolph and State of Georgia, being of perfect mind and memory, thanks be given unto God; calling into mind the mortality of body, and knowing that it is appointed for all men once to die, I do make and ordain this my last will and testament; that is to say, principally and first of all, I give and recommend to the earth, to be buried in a decent Christian manner, at the discretion of the executors, who shall be Isham Wheelus, and so much of my worldly estate I give and bequeath unto William Augustus Wheelus, and I do hereby revoke and disannull all other wills, legacies and bequests, confirming this to be my last will and testament.

In testimony whereof, I have hereunto signed my signature, this 18th day of January, 1844.

Robert C. Conner, Riley Garrett. [L. s.]
Hezekiah Broke,
W. C. Perkins.

After the death of Riley Garrett, in May, 1880, Isham Wheelus, the named executor, having died, the will was offered for probate, in the Court of Ordinary in Hall County, Georgia, by William Augustus Wheelus. In this proceeding a caveat was filed by the next of kin and heirs-at-law of Riley Garrett. The caveat was on the following grounds:

"1. Because said alleged will is not a lawful will, because it was not signed, executed and published as the last will of the said Riley Garrett according to the provisions of the law in such cases made and provided.

"2. Because said alleged will is null and void in law for uncertainty as to what was intended to be conveyed by it, as to whom it was intended to convey anything, and for uncertainty as to what was meant by the language used.

"3. Because said paper, offered for probate, is not testamentary in its character, and the court of probate has no jurisdiction to admit the same to probate."

The case, thus made up in the court of ordinary, was taken by appeal to the Superior Court of Hall County, Georgia, and by writ of error to the Supreme Court of the State. The final decision in the Supreme Court, the court of last resort in the State, affirming the judgment of the Superior Court of Hall County, was in favor of the will and determined that, by the will, William Augustus Wheelus took all the property of Riley Garrett, less the expenses of burial. It appears from an examination of the evidence submitted here on this question, and from the report of the case in the supreme court, that substantially the same evidence, so far as material and admissible, has been submitted here as was submitted in the state court. It may be that the evidence offered in this court is somewhat fuller than that offered in the state court, but the leading facts which can properly be considered in construing this will, and that throw light on the question, seem to be substantially the same. The decision by the Supreme Court of Georgia is reported in the case of *Garrett v. Wheelus*, 69 Ga. 466.

It may be proper to observe that the complainants in the bill in this court are the assignees of the heirs at law of Riley Garrett, who were the caveators in the proceeding in the state court, and who are therefore in privity with the complainants and stand in their place as to the effect to be given the former adjudications. It will be perceived that one of the grounds of the caveat in the state court was that "said alleged will is null and void in law for uncertainty as to what was intended to be conveyed by it, as to whom it was intended to convey anything, and for uncertainty as to what was meant by the language used." This ground seems to have been urged through the various stages of the case, and was passed on by the supreme court, as appears from the decision. After copying the instrument as above, the supreme court held "that such a will was not so uncertain as to be void. A will should not be refused to be admitted to probate on account of uncertainty unless it be so uncertain that it cannot be construed by the aid of parol testimony;" and then proceeds:

"It appears that the testator in this will was a bastard; that the executor was his first cousin, and the legatee named was executor's child, six years of age; that he kept his will and a photograph of the boy in his trunk together; and that a year before his death he stated that this legatee was the only relation he recognized (the father of the legatee having died), though there were others nearer of kin in fact. Held that, in the light of the facts, the intention of the testator was to provide for his burial expenses and leave the remainder of his property to the legatee named." The decision thus stated, which is copied from the syllabi of the case, is elaborated in the opinion of Jackson, *Ch. J.*, subsequently, in a case growing out of the administration of the Garrett estate. The Supreme Court of Georgia, in affirming the awarding of the administration to Huggins, the representative of the Wheelus estate, uses this language in commencing the opinion by Hall, *J.*: "Riley Garrett of Randolph County in this State, in 1844, executed his last will and testament, whereby he appointed Isham Wheelus his executor, and gave all his real estate to

William Augustus Wheelus." *Long v. Huggins*, 73 Ga. 776.

So it will be seen that the Supreme Court of Georgia has held that by this will Riley Garrett provided for his burial expenses, and left the remainder of his property to William Augustus Wheelus; and that in a subsequent case arising from the same estate that court has treated this question as settled. It is said, however, by complainants here, that the court of ordinary in the first case named, and the higher courts on appeal, had no jurisdiction to do more than admit the will to probate; and that all expressions by the supreme court in the opinion cited as to the construction of the last clause were *obiter dicta*. In brief the question is that the jurisdiction of the court of ordinary is confined to the question of the probate of the will, and does not extend to the construction of the will. It will be perceived in the grounds of the caveat that the strong point made by the caveators on the right of the propounders to have the will admitted to record was the same urged with so much force here, viz.: that it was void for uncertainty, that the language used had no meaning, and that, without extrinsic evidence, it was (except as to the appointment of an executor and providing for the burial expenses) an insensible thing. It would seem difficult for the court to determine that the instrument was not meaningless without finding some meaning. It might have found one of several different meanings, but where it is held upon an issue of this sort that the paper has a definite specific meaning, it is not so clear that this determination is without the jurisdiction of the court reviewing the judgment of the probate court on the question of the probate of the will. Attention has also been called in argument to the last paragraph in the opinion of the Supreme Court of the State, as follows: "A man has a right to give enough of his property to his executor to have his body buried, and the probate would be necessary for that purpose, and, the *factum* being proved, it should stand. But if there had been nothing but the subsequent bequest, and it being objected to for uncertainty, unless so absolutely void as not to be aided by the rule of construing it by surrounding circumstances, the *factum* being proved, the probate should stand, in order that it may have the light of these circumstances thrown on it, if on the issue of *devisavit vel non*, that light could not be used; for it would not do to defeat a will as void for uncertainty, when it is not so uncertain that parol evidence could not make the writing certain in meaning,—not to make a different will, but to construe the writing, and thus carry into effect testator's intention as expressed in it." It is said that the expressions used in this clause indicate that the supreme court intended to leave the construction of the will for future determination. An examination of the case does not sustain this argument. After three pages of the opinion are devoted to reasoning in favor of the sufficiency of the language in the will, which has been quoted, to convey the remainder of the estate, after paying burial expenses, to William Augustus Wheelus, the language which has just been given from the last paragraph of the opinion is used. There is much more reason for treating this last paragraph as

dicta of the court than the main portion of the opinion, as contended by the complainants. The head notes of the case, which are supposed to embody a succinct statement of the points decided, are devoted entirely, as will be seen, to the question of William A. Wheelus' rights under the will. It seems clear that the supreme court understood that the construction of this will was properly before it, and that it intended to determine it. It is not deemed necessary, however, to determine whether or not this issue as presented here is strictly *res judicata*. As persuasive authority the opinion of the Supreme Court of the State must necessarily have very strong and weighty effect. With the same will before it, with substantially the same surrounding circumstances, and with the same parties thereto, so far as legal status is concerned; with a will made, and a testator dying in Georgia, and all of the property of the estate, both real and personal, in the State, and with the same issues made, the decision of that court, even if not controlling, must be, as stated, very influential here. But construing this will independently of the decisions of the Supreme Court of the State, is it void for uncertainty? The argument for complainants in this case is to this effect: That the intention of the testator is not to be derived from extrinsic evidence unless that intention is expressed; that the question is not what the testator intended, but what he expressed; that the intention is to be obtained from the will, and not the will from the intention; and that, even if we are absolutely certain from extrinsic evidence as to what the testator intended, still, unless he has expressed it, the will is a nullity. A very elaborate and well-prepared brief and argument have been submitted with quite an array of authorities on this line, all ably presented. The oral argument to the same effect has been thorough and complete. The position that the intention of the testator must be gathered from the will itself is undoubtedly correct. It is equally true, however, that the court must place itself in the position of the testator, and to that end may gather the circumstances surrounding the testator at the time the will was made for the purpose of arriving at this intention. *Allen v. Allen*, 59 U. S. 18 How. 385 [15 L. ed. 396].

Secs. 2456 and 2457, Code of Georgia, relating to this subject, are as follows: 2456. "In the construction of all legacies, the court should seek diligently for the intention of the testator, and give effect to the same, as far as it may be consistent with the rules of law; and to this end the court may transpose sentences or clauses, and change connecting conjunctions, or even supply omitted words in cases where the clause as it stands is unintelligible or inoperative and the proof of intention is clear and unquestionable; but if the clause as it stands may have effect, it shall be so construed, however, well satisfied the court may be of a different testamentary intention." 2457. "When called upon to construe a will, the court may hear parol evidence of the circumstances surrounding testator at the time of its execution; so the court may hear parol evidence to explain all ambiguities, both latent and patent."

Taking this will and the evidence submitted here, and reading in the language of the Supreme Court of Georgia, "in the light of surrounding circumstances," is it not clear what the testator intended? It is not denied that the effect of the decision of the state court was to determine the right of the propounders to have the will admitted to probate, the contention being that its construction was left open. On the face of the paper it is perfectly clear that he intended to make a will, and by it, it must be supposed, to dispose of all his property. He appoints Isham Wheelus, the father of William Augustus, his executor, and it is conceded—although the language is imperfect,—that he provided for the burial of his body, and then is the remaining clause, which has caused such extended discussion in the state court and here: "And so much of my worldly estate I give and bequeath to William Augustus Wheelus." It must be clear as stated that he intended by this paper to dispose of all his property, and except the provision for burial expenses, there is no other disposition of property than that contained in the words last quoted. Now, can there be any reasonable doubt, from an examination of this paper alone, that the testator intended to leave the remainder of his property to William Augustus Wheelus? No other meaning can be given it, consistently with the view that by this paper he intended to dispose of all his property. It is clear that he did so intend, and equally clear that the only construction which can effectuate that intention is the one just stated. Is it going, then, too far to say that this is a case in which the courts may properly invoke and apply that portion of section 2456, Code of Georgia, which authorizes them to "supply omitted words in cases where the clause, as it stands, is unintelligible or inoperative and the proof of intention is clear and unquestionable?" But if nothing can be inserted, as is so strongly contended, is the will as it stands intelligible viewed from the position in which the testator stood when it was made and gathered by extrinsic evidence the circumstances then surrounding him for that purpose? A case coming as close to this in its facts as any other cited in the argument is that of *Re Bassett's Estate* (*Perkins v. Fladgate*), L. R. 14 Eq. 54. The testatrix there made a will which she declared to be her last will and testament, by which she appointed an executor, and after giving several legacies proceeded as follows: "After these legacies and my doctor's bills and funeral expenses are paid, I leave to my sister Mary Perkins without any power of control whatsoever of her husband, G. P., in case of her death, to be divided equally amongst the children or grandchildren." This was held to be a good gift of the residue of the estate. *Sir James Bacon, V. C.*, in his opinion says: "I should feel the greatest objections to supplying any words in a will; but I do not think this will unintelligible as it stands, and accordingly I do not see the necessity for supplying any words. I read the will as intended to dispose of the whole of testatrix's estate and effects. That must have been her intention, as is generally the case when she set about making her last will and testament, that would pass the whole of her estate to or in her executor. Then she gives certain legacies which was the duty of her executor to pay, then she says 'after these

premise Court of Georgia, "in the light of surrounding circumstances," is it not clear what the testator intended? It is not denied that the effect of the decision of the state court was to determine the right of the propounders to have the will admitted to probate, the contention being that its construction was left open. On the face of the paper it is perfectly clear that he intended to make a will, and by it, it must be supposed, to dispose of all his property. He appoints Isham Wheelus, the father of William Augustus, his executor, and it is conceded—although the language is imperfect,—that he provided for the burial of his body, and then is the remaining clause, which has caused such extended discussion in the state court and here: "And so much of my worldly estate I give and bequeath to William Augustus Wheelus." It must be clear as stated that he intended by this paper to dispose of all his property, and except the provision for burial expenses, there is no other disposition of property than that contained in the words last quoted. Now, can there be any reasonable doubt, from an examination of this paper alone, that the testator intended to leave the remainder of his property to William Augustus Wheelus? No other meaning can be given it, consistently with the view that by this paper he intended to dispose of all his property. It is clear that he did so intend, and equally clear that the only construction which can effectuate that intention is the one just stated. Is it going, then, too far to say that this is a case in which the courts may properly invoke and apply that portion of section 2456, Code of Georgia, which authorizes them to "supply omitted words in cases where the clause, as it stands, is unintelligible or inoperative and the proof of intention is clear and unquestionable?" But if nothing can be inserted, as is so strongly contended, is the will as it stands intelligible viewed from the position in which the testator stood when it was made and gathered by extrinsic evidence the circumstances then surrounding him for that purpose? A case coming as close to this in its facts as any other cited in the argument is that of *Re Bassett's Estate* (*Perkins v. Fladgate*), L. R. 14 Eq. 54. The testatrix there made a will which she declared to be her last will and testament, by which she appointed an executor, and after giving several legacies proceeded as follows: "After these legacies and my doctor's bills and funeral expenses are paid, I leave to my sister Mary Perkins without any power of control whatsoever of her husband, G. P., in case of her death, to be divided equally amongst the children or grandchildren." This was held to be a good gift of the residue of the estate. *Sir James Bacon, V. C.*, in his opinion says: "I should feel the greatest objections to supplying any words in a will; but I do not think this will unintelligible as it stands, and accordingly I do not see the necessity for supplying any words. I read the will as intended to dispose of the whole of testatrix's estate and effects. That must have been her intention, as is generally the case when she set about making her last will and testament, that would pass the whole of her estate to or in her executor. Then she gives certain legacies which was the duty of her executor to pay, then she says 'after these

legacies are paid, I leave to my sister Mary Perkins, without any power of control whatsoever of her husband, G. P., and in case of her death to be divided equally amongst her children and grandchildren.' The intention of the testatrix is expressed. If I could find an indication of any intention to give anything else, as, for instance, a legacy of 500 lbs., it would be different, but what other meaning can be attributed to these words except that which I have suggested? What answer can be given to the question, What did she intend to leave except this, the entirety of the residue of her estate? Where, then, is the difficulty? No doubt the word 'residue,' if supplied, would satisfy the meaning, but that only shows that the meaning of the testatrix may be expressed by other words than those she had used. The cases which have been cited furnish no rule whatever for the interpretation of the present case. If the whole of the property had been realized and placed on a table, the executor must have first paid out the legacies, and then handed over all the rest to the testatrix's sister."

The same argument presented in this was presented in that case, as shown by brief of counsel in the report of that case, and yet the conclusion of the vice-chancellor was as above quoted. There was no language whatever in that will to show how much was left to Mary Perkins, and yet as it was clear that the testatrix set about making her last will and testament, and there was no other disposition of her property after certain legacies, except the one before the court for construction, it was held that the intention was to give the residue. All that is said in favor of giving effect to that may with equal force be said of the will now before the court. The case of *Mohun v. Mohun*, 1 Swanst. 201, cited by complainants and favorable to them, was decided three quarters of a century ago, and is not authority, even in England, now, as is evident from the decision in the case of *Re Bassett's Estate*, *supra*.

The Master of the Rolls, in *Mohun v. Mohun*, says: "The court cannot insert or transpose words for the purpose of giving a meaning to instruments which have none." The Code of Georgia, before quoted (§ 2456), provides that "the court may transpose sentences or clauses and change connecting conjunctions, or even supply omitted words, in cases where the clause as it stands is unintelligible or inoperative and proof of intention is clear and unquestionable." This would seem to dispose of the reason given for that decision at least. While the case of *Hawman v. Thomas*, 44 Md. 80, strongly relied on by complainants' counsel, is very much like the case at bar, still it does not appear from the report of the case that the facts were as here. The part of the will there construed is stated in the report to be the second clause. How

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many other clauses in the will there were is not shown in the report of the case. It does not furnish simply and clearly the question presented in this case, or in the case, *Re Bassett's Estate*, *supra*. It is probably true, however, that the decision of the Supreme Court of Georgia in construing this will and the views of this court are not in harmony with that decision.

The case cited of *Allen v. Allen*, 59 U. S. 18 How. 885 [15 L. ed. 896], is unlike this in its facts, although supporting the general position of complainants as to the strict rule governing the admission of extrinsic evidence in the interpretation of wills; which position it is not considered necessary to controvert.

Nor is it necessary to go further into the many authorities cited to discuss the question of the extent *aliunde* testimony will be heard for the purpose of explaining ambiguities, latent and patent, and the nice distinctions and differences in the several lines of authorities. The law in Georgia on this subject is now embodied in the Code, § 2457. The view taken by this court of this will and the law controlling its interpretation seem to render consideration of this phase of the law superfluous.

There is no sufficient reason to justify this court in departing from the decision of the Supreme Court of the State. On the contrary there is much reason to adhere to it as a correct rule to be adopted in the construction of this will.

The other question submitted in this case, and which may now be disposed of, is, What class of property passes by this will? The Code of Georgia, § 2161, declares: "All property acquired subsequent to making of the will shall pass under it, if its provisions be sufficiently broad to embrace such property." The Code containing this provision went into effect January 8, 1863. The Supreme Court of the State, in *Gibbon v. Gibbon*, 40 Ga. 562, held that this section of the Code "is prospective only, and after-acquired real estate does not pass under a will made before the Code went into operation, even though the testator did not die until afterwards." The facts here are like the facts there, so far as the question presented is concerned. The will here, as there, was made before the Code, and here, as there, the testator died after the Code went into effect. That decision must be controlling here; and the conclusion is, that the after-acquired real estate of the testator does not pass by this will.

This disposes of the questions that can now be settled, and an order may be taken for a reference to a master in order that the condition, extent and character of the estate may be ascertained, and the proper accounting had, that final decree may be rendered in the case.

WEST VIRGINIA SUPREME COURT OF APPEALS.

George W. ATKINSON *et al.*, *Appts.*,v.
Robert M. MILLER *et al.*

(....W. Va.....)

*1. A paper made for a deed of trust conveying land to secure a debt signed by the grantor, but without a seal, though not effectual as a deed of trust at law, is an equitable mortgage, enforceable in equity, and may be recorded under § 4, chap. 74, Code 1868, and when recorded is a lien valid against subsequent purchasers and creditors.

2. The syllabus in *Pratt v. Clemens*, 4 W. Va. 448, and point 2 of the syllabus in *Shattuck v. Knight*, 25 W. Va. 590, disapproved.

(September 12, 1890.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Jefferson County subordinating their liens on the property of defendant Miller to one held by James Logie, in a suit brought to enforce such liens by a sale of Miller's property. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Joseph Trapnell, for appellants:

Such a writing as that under which Logie claims, not under seal, does not constitute a lien so as to defeat a subsequent judgment creditor or so as to give the holder priority over such judgment creditor.

Pratt v. Clemens, 4 W. Va. 451; *Shattuck v. Knight*, 25 W. Va. 590.

*Head notes by BRANNON, J.

The law of West Virginia on this point is well settled, and the court in reaching this conclusion has only applied well-understood principles of law applicable to the conveyance and incumbrance of real estate.

4 Am. Lead. Cas. Real Estate, 585; *McCoy v. Cassidy*, 96 Mo. 429; *Carrington v. Potter*, 37 Fed. Rep. 767.

Mr. George Baylor, for appellees:

This deed of trust in form, lacking only a seal to make it complete, is an equitable mortgage.

Wayt v. Carwithen, 21 W. Va. 516, 520, 521; *Daggett v. Rankin*, 81 Cal. 331; *Alexander v. Ghiselin*, 5 Gill, 189; *Dyson v. Simmons*, 48 Md. 207. See also *Smith v. Patton*, 12 W. Va. 541; *Wadsworth v. Wendell*, 5 Johns. Ch. 226, 1 N. Y. Ch. L. ed. 1065.

This is such a writing as can be admitted to record and have the effect of a deed duly executed, under Code, chap. 74, § 4.

McClaskey v. O'Brien, 16 W. Va. 794; *Western Min. & Mfg. Co. v. Peytona C. Coal Co.* 8 W. Va. 409; *Wickham v. Martin*, 18 Gratt. 427; *Beans v. Greenhow*, 15 Gratt. 153.

But if it is not such a contract as is embraced in chap. 74, § 4, then chap. 74, § 5, does not render it void, and it is as valid and binding as a parol contract partly performed; and a subsequent judgment will not override a prior parol contract in regard to real estate partly performed.

Floyd v. Harding, 28 Gratt. 401; *Long v. Hagerstown Agric. Imp. Mfg. Co.* 30 Gratt. 665; *Young v. Devries*, 81 Gratt. 304; *Alexander v. Ghiselin*, 5 Gill, 189; *Dyson v. Simmons*, 48 Md. 207; *Snyder v. Martin*, 17 W. Va. 276.

NOTE.—Equitable mortgages; nature of.

An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property intended to be mortgaged. *Martin v. Nixon*, 8 West. Rep. 712, 92 Mo. 26; *De Racouillat v. Sansevain*, 32 Cal. 376, 389; *Daggett v. Rankin*, 81 Cal. 327; *McQuie v. Peay*, 58 Mo. 56, 1 Am. Lead. Eq. Cas. 510.

A written agreement for security on certain property, for the payment of a debt is an equitable mortgage, enforceable against all parties thereto and those having notice of it. *Gest v. Packwood*, 39 Fed. Rep. 625.

A written agreement for security on certain property for the payment of a debt is in equity a mortgage, and will be enforced as such against all parties to the agreement and those who have notice of it. *The El Dorado Ditch (Or.)* Aug. 5, 1889.

A court of equity treats an agreement for a mortgage or pledge as binding, and will give it effect according to the intention of the parties. *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414, 16 L. ed. 154.

An agreement for a loan, accompanied by a deposit of title papers and an advance of money, is in equity a mortgage, and parties who deal with the debtor with knowledge of the facts deal at their
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peril. *Rockwell v. Hobby*, 2 Sandf. Ch. 9, 7 N. Y. Ch. L. ed. 498; *Hammond v. Bush*, 8 Abb. Pr. 167; *Mowry v. Wood*, 12 Wis. 423; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 51; *Jackson v. Parkhurst*, 4 Wend. 369.

An agreement intended as a security for the payment of notes into whose hands they may come is an equitable mortgage. *Phelan v. Olney*, 6 Cal. 478; *Pattison v. Hull*, 9 Cow. 747; *Grattan v. Wiggins*, 23 Cal. 80.

Such security follows the notes as an incident to the debt. *United States v. Hodge*, 47 U. S. 6 How. 279, 12 L. ed. 437.

If a transaction resolves itself into a security, whatever its form may be, it is in equity a mortgage. *Flagg v. Mann*, 2 Sumn. 533; 1 Jones, Mort. 168; 3 Pom. Eq. §§ 1235-1237.

An unsealed instrument of writing, pledging the real and personal estate of a railroad company for the faithful performance of a contract, was held to be an equitable mortgage. *Donald v. Hewitt*, 33 Ala. 534; *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472; *Whitworth v. Gaugain*, 3 Hare, 416; *Campbell v. Worthington*, 6 Vt. 448; *Bank of Kentucky v. Vance*, 4 Litt. 169; *Marshall v. Lewis*, Id. 140; *Abbott v. Godfrey*, 1 Mich. 178; *Coster v. Bank of Georgia*, 24 Ala. 87; *Kelly v. Payne*, 18 Ala. 371.

An equitable mortgage passes by an assignment of the debt it secures. *Ober v. Gallagher*, 93 U. S. 190, 23 L. ed. 529.

Braanon, J., delivered the opinion of the court:

This suit in equity was brought in the Circuit Court of Jefferson County by George W. and Fannie B. Atkinson, for themselves and all other lien creditors of Robert M. Miller, against said Miller, to enforce the liens of a judgment in favor of George W. Atkinson, and a judgment in favor of Fannie B. Atkinson, against Miller, both rendered November 30, 1888, by a sale of his real estate for the payment of said judgment and other liens mentioned in the bill. Upon a reference to a commissioner to convene all lienors and ascertain their liens, a report was made ascertaining certain liens upon Miller's land, among them said Atkinson judgments, and denying any place as a lien to a debt of James Logie claimed by him before said commissioner, under a writing purporting to be a deed of trust executed by Miller to Robert M. Duke, trustee, to secure said Logie's debt, dated September 20, 1867, and recorded October 16, 1867, because of the absence of a seal to said writing. Logie excepted to the report, because it failed to report said debt as a first lien on the real estate specified in said deed of trust. The court sustained Logie's exception, and in its decree made Logie's debt a first lien, and thus gave it priority over the Atkinson judgments as to said land embraced in said trust, and said Atkinsons have taken this appeal. It thus involves a contest between Atkinson's judgment and the Logie debt.

This case presents the question whether a writing purporting to be a deed of trust, formal in all respects save the want of a seal, creates a lien on the land mentioned in it. Suppose a deed for a fee were executed without a seal. It would not pass the legal estate, for our Statute provides that no estate in land, greater than a term of five years, shall pass except by deed or will. Code 1887, chap. 71, § 1. But a court of equity would not allow the intent of the parties, as manifested by the writing, to be wholly defeated by the omission of a seal, but would treat the instrument as a contract or agreement to convey, or a memorandum of such an agreement; and properly so, for he who executes an instrument, using proper words of actual present conveyance, but which, for want of a seal, fails to do what the words were meant to do, as fully discloses a willingness and intent to convey as if he executed an executory contract covenanting to convey in future. Accordingly, defective deeds signed by the parties, purporting to convey the legal title, but because of some defect not doing so, are treated in equity as agreements to convey, and specific execution of them will be decreed by providing for the execution of a formal and effectual conveyance. 1 Hil. Vend. 118; opinion in *White v. Donnan*, in extract given below.

If such is the law as to a defective deed purporting to convey in fee, why is not an instrument purporting to be a deed conveying in trust on like principles to be deemed a contract for a conveyance,—that is, for a conveyance in trust for a debt? The only difference is that the one is a conveyance absolutely, the other in trust to secure a debt. I suppose an instrument conveying to A., to be held in trust for B., would,

if defective, and not operating to convey the legal estate, be treated as evidence of an agreement to convey, which would be specifically executed. The only difference between the instruments would be that one is in trust for the purpose of paying a debt, the other in trust for another purpose. In other words, in all these cases the defective instrument is treated as written evidence of the fact that the party did make an oral agreement to convey, and that is just what the Statute requires,—written evidence of the fact that a contract to convey was made. It would be a formal memorandum of the agreement under the Statute. In the face of such an instrument it could not be said there was no contract to convey. Our Statute (Code, chap. 74, § 4) provides that a contract "made for the conveyance of real estate" may be recorded, and be effectual as a deed conveying the estate as to creditors and purchasers. An instrument made for a deed of trust being, as I hold, for reasons just stated, evidence of a contract to convey, it may be recorded under this Statute, because it is in the view of a court of equity a contract for the conveyance of real estate in trust for payment of a debt. The defective deed of trust involved in this cause was duly recorded before the date of appellants' judgments, and has the force of a recorded contract to execute a deed of trust, and is therefore a lien on the land to which it relates. An executory agreement in writing, stipulating for the execution in future of a mortgage or deed of trust, is of common occurrence, and is valid, and will be specifically enforced in equity, or, what is the same thing, treated as an equitable mortgage. *Ott v. King*, 8 Gratt. 224; *Alexander v. Newton*, 2 Gratt. 266; 1 Jones, Mort. § 163.

And I think it may and must be recorded to affect creditors and purchasers for value without notice. The conclusion we have reached, that a deed of trust having no seal may be treated as a contract for the conveyance of real estate, and recorded as such under our Statute, and thus create a lien as to creditors and purchasers, is in conflict with the case of *Pratt v. Clemens*, 4 W. Va. 448, which holds that a deed of trust unsealed does not create a lien on land, and cannot be recorded. In that case it is said that, "while it might be technically a contract for the conveyance of the land, it is, in substance, nothing more than a contract for a lien on land to be created by a deed of trust." This admits that it is a contract for a conveyance of the land, and this admission carries with it the conclusion that it may be recorded under our Statute, and its force is not weakened by the proposition that "it is, in substance, nothing more than a contract for a lien on the land, to be created by a deed of trust;" for a deed of trust would be to all intents a conveyance of the land, though it be but to secure a debt, for it would convey the legal title. The conclusion that, because it is, in substance, nothing more than a contract for a lien upon the land, to be created by a deed of trust, it is not a recordable paper, does not follow from the premise. It is a *non sequitur*. According to the theory of that case, could an executory agreement to execute in future a deed of trust or mortgage for a debt be recorded? I suppose not.

But will it be said that such an agreement is

valid as to creditors and purchasers unless recorded? I think not, because it would be deemed a contract for the conveyance of land, and therefore required to be recorded; but, if the Statute does not require its recordation, it would not be void as to creditors, though it might be as to purchasers without notice. For a like reason a defective deed may be treated as a contract for conveyance, and recorded with effect. In my opinion, the Statute allows the recordation of any writing evidencing any contract between parties respecting real estate, so operating as that it may affect subsequent purchasers and creditors. This construction and application of the Statute better accomplishes the purpose aimed at by it, requiring the registry of all instruments, and protecting all parties. It was designed for their benefit, and should receive such a construction as to subserve that design. This construction sustains liens which the parties intended to create. As we apply the Statute, it better attains the ends of justice than that given to it in the case of *Pratt v. Clemens*, for it upholds, instead of defeating, a lien under the instrument, according to the unquestionable intention of the parties, and thus carries out that intention, instead of nullifying it. Its application in this case comes within the letter, and within the spirit, of the Statute.

The case of *Pratt v. Clemens* was applied as law in the opinion on page 437 of 7 W. Va., in the case of *Dickinson v. Railroad Co.*, but no discussion of its principles was made; and, though under it an instrument was held to create no lien, no point in the syllabus was based on it. And in the case of *Shattuck v. Knight*, 25 W. Va. 590, it is incorporated as law in the syllabus, but is simply referred to without any investigation of its principles. In this case, this doctrine is challenged, and we are reluctantly led to a disapproval of it, by a decided conviction of its unsoundness, and its practical result to the injury of lienors. The decision in *Pratt v. Clemens*, *supra*, was based in the opinion on the case of *White v. Denman*, 16 Ohio, 59, holding that "an instrument, executed as a mortgage, with but one subscribing witness, cannot be so reformed in equity as to defeat a subsequent judgment lien." The case of *Alexander v. Newton*, 2 Gratt. 266, is contrary to this, holding that "a mistake of the scrivener in drawing a deed, whether of law or fact, will be corrected by a court of equity, even against bona fide creditors of the grantor." In fact, I do not think the case of *White v. Denman* was relevant to the question involved in *Pratt v. Clemens*, because that question was whether a deed of trust unsealed could be recorded under our Statute, whereas *White v. Denman*, if on any statute, was an Ohio statute, and, I think, was solely decided on the general principle that an equitable mortgage is subordinate to subsequent judgments, a doctrine peculiar to Ohio, and not law elsewhere, and, moreover, the principle of that case was disapproved in the later case, decided by the Supreme Court of Ohio, of *White v. Denman*, 1 Ohio St. 111; and thus, so far as *Pratt v. Clemens* rests on the case of 16 Ohio, its foundation has fallen.

Let us now advert to another view of the effect of said deed of trust. Suppose that it is not a recordable paper under the Statute, then

the Statute does not avoid it for want of recordation, for, of course, the Statute avoids only such writings as it requires to be recorded. Therefore, it is to be governed by the law, regardless of the Statute. What character does it assume in this view? Certainly that of an equitable mortgage, under very many authorities. "Wherever it appears, by writing signed by the party to be charged, that, for a valuable consideration, such as an existing debt, a debt at that time first contracted, or otherwise, he intends to charge his property as security for money, whatever the form of the instrument, the court of equity will fully effectuate the intention of the parties concerned. Hence mere promises, powers of attorney, deeds imperfectly executed, and other written papers have been held to create equitable mortgages in the contemplation of courts of equity." *William & M. College v. Powell*, 12 Gratt. 387; *Ruffners v. Putney*, Id. 551; *Russel v. Russel*, 1 White & T. Lead. Cas. Eq. "674;" 2 Minor, Inst. 297.

"A mortgage or trust deed which cannot be enforced by a sale under the power or by judgment of foreclosure, on account of some informality requisite to a complete mortgage or deed of trust, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by special proceedings in equity. The attempt to create a security in legal form, upon specific property, having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage." 1 Jones, Mort. § 168.

In *Wayt v. Carwithen*, 21 W. Va. 516, it is held that any deed or written contract used by the parties for pledging real property as security for a debt, which is informal and insufficient as a common-law mortgage, but which shows that the parties intended that it should operate as a lien or charge on the property, will be an equitable mortgage and enforced in equity. See also *Knott v. Manufacturing Co.* 30 W. Va. 790; *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 33 W. Va. 761.

This instrument being an equitable mortgage, and (let us suppose) not a recordable writing, and therefore not declared void as to creditors and purchasers by it, but tested by the general law regardless of the Statute, what would be its status? It would be valid against creditors, though perhaps void as to subsequent purchasers for valuable consideration without notice.

In the opinion in *White v. Denman*, 1 Ohio St. 112, it is said: "It is a principle of familiar application in equity jurisprudence that a specific equitable interest in real estate, whether it be created by an executory agreement for the sale and conveyance of land, or by a deed so defectively executed as not to pass the legal estate, but treated in equity as a contract to convey, or even a vendor's lien, is upheld by courts of equity, and uniformly take priority, not only over judgment liens and assignments in bankruptcy, but also assignments for the benefit of creditors generally."

Judge Green, in *Snyder v. Martin*, 17 W. Va. 299, shows, by many cases, that judgment liens yield to prior equitable mortgages, and other trusts and equitable estates created by written contract, and on page 301, says: "It may therefore be laid down as a universal rule,

established by many cases, that a judgment lien is always subject to every possible description of equity held by a third party against the debtor at the time the judgment lien attached, and that it is immaterial whether the rights of such third party consist of an equitable estate or interest in the judgment debtor's land, an equitable lien on his land, or a mere equity which attaches to or affects his land. Nor is it at all material whether the judgment debtor had or had not, when he contracted his debt, or obtained his judgment, or docketed the same, notice of such equitable estate, equitable lien, or mere equity. If they be prior in time to the judgment, they will always be preferred to the judgment lien. The authorities we have cited abundantly sustain this conclusion, and there is no exception to the universal rule, except

where such exception is made by statute law." It follows, therefore, that this defective deed of trust as an equitable mortgage, being prior in time to the judgments of the appellants, takes precedence over them, though it might, in this latter view, be subordinate to deeds of trust. And so, whether we view this deed of trust as a contract for a conveyance recordable under the Statute, which we hold it to be, or as an equitable mortgage recordable under the Statute, or as an equitable mortgage not recordable under the Statute, it is to be preferred to the judgments of the appellants, and on both grounds their appeal is not well taken.

Therefore, we affirm the decree.

English and Brannon, JJ., concurred;
Lucas, J., absent.

NEW YORK COURT OF APPEALS (2d Div.).

Robert CLARE, Surviving Partner, etc.,
Resp't.,

v.

Samuel LOCKARD, *App't.*

(....N. Y.....)

The commencement of an action by a substituted service, in accordance with the requirements of Code Civ. Proc., §§ 435-437, of the summons which has been delivered to the sheriff for service before the cause of action has become barred by the Statute of Limitations, will prevent a plea of the Statute from defeating the action, if such service is made within the time prescribed by Code Civ. Proc., § 390, providing that the attempt to commence an action by delivering the summons to a sheriff for service shall be equivalent to its commencement so far as the Statute of Limitations is concerned, provided the action is actually commenced within a certain time thereafter, although that section mentions as a means of commencing the action only personal service and service by publication.

(October 7, 1890.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the City Court of Brooklyn entered upon a verdict directed for plaintiff in an action to recover the amount alleged to be due on a promissory note. *Affirmed.*

Statement by Parker, J.:

This is an action brought by the plaintiff to recover on a promissory note, with interest from the date of its maturity, and also for goods sold and delivered.

So much of the judgment as embraces the amount found to be due for goods sold and delivered is not questioned. The appellant assigns for error that portion of the judgment which includes the amount adjudged to be due on the note, on the ground that it is barred by the Statute of Limitations. The note became due and payable May 20, 1880. Defendant never made any payment on account of either the principal or interest secured thereby. On the 18th day of May, 1886, the plaintiff caused

to be delivered to the sheriff of the county in which the defendant resided a summons and notice, with the intent that it should be actually served upon the defendant.

Before the expiration of the time for the service thereof, as provided by section 390 of the Code of Civil Procedure, a return was made by the sheriff that proper and diligent effort had been made to serve the summons upon the defendant, but that he avoided service so that no personal service could be made. Thereafter, and on the 8th day of June, 1886, an order authorizing and directing a substituted service of the summons was duly granted, and in pursuance thereof such service was made within ten days thereafter.

Mr. Martin E. Halpin for appellant.

Mr. John Henry Hull for respondent.

Parker, J., delivered the opinion of the court:

Had the sheriff succeeded in making personal service within the time prescribed by section 390, or had there been a first publication of the summons pursuant to an order for service upon him in that manner, then it is conceded that the decision of the court would not admit of question. But the summons was not served personally, or by publication, but a substituted service thereof was timely made in accordance with sections 435 and 437 of the Code of Civil Procedure. The appellant's contention is, that while the action was properly commenced by a substituted service of the summons duly authorized, nevertheless, it did not operate to save the note from the bar of the Statute, because the summons was not served either personally or by publication. We think otherwise. By sections 380 and 382 of the Code of Civil Procedure it is provided that an action upon a contract obligation or liability must be commenced within six years after the cause of action has accrued. Section 398 provides that an action is commenced against any defendant, within the meaning of any provision which limits the time for commencing an action, when the summons is served upon him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him.

To meet any emergency which might arise by the necessary absence or concealment of a debtor, it was provided by section 899 that "an attempt to commence an action in a court of record is equivalent to the commencement thereof, within the meaning of each provision of this Act, which limits the time for commencing an action when the summons is delivered with the intent that it shall be actually served to the sheriff" of the county in which the defendant resides, if "followed within sixty days after the expiration of the time limited for the actual commencement of the action by personal service" of the summons, or by the first publication thereof as against that defendant, pursuant to an order of service upon him in that manner.

It is apparent from the several sections to which we have alluded that the Legislature intended that whether a cause of action should be deemed barred by limitation of time should be dependent upon the actual commencement of the action, and not upon the manner in which the summons should be served.

Now, this action was duly commenced within the time prescribed by section 899, by a substituted service of the summons in accordance with the requirements of sections 435, 436 and 437, and these sections, forming, as they do, a part of the same Statute, must be construed together. Section 437 provides that in the case of a substituted service of a summons "the same proceedings may be taken thereupon as if it had been served by publication." These two methods of service are thus pronounced to be of equal force in the support which they give to proceedings based thereon. Each may therefore be regarded as the equivalent of the other where either method of service is authorized.

In *Pomeroy v. Ricketts*, 91 N. Y. 668, the defendant appeared generally, and subsequently moved to discharge an attachment on the ground that personal service of the summons was not made within thirty days after the granting of the warrant, as required by section 638; and this court held that such section must be read with section 424, which provides that the "voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."

Following the rule adopted in that case, section 899 must be so read as to entitle a plaintiff to the benefit of that section, where the delivery of the summons is followed within the time therein prescribed by the first publication of the summons, pursuant to an order for service in that manner, or by its equivalent, a substituted service of the summons, made pursuant to sections 435-437 inclusive.

The judgment should be affirmed.

All concur, except *Potter, J.*, absent.

Louis ENGELHORN, *Rept.*,
o.

Alexander H. REITLINGER *et al.*, *Appts.*

(.....N. Y.)

An action for breach of contract to purchase a certain quantity of quinine, the terms of which are set out in a broker's sale note, which contains stipulations covering the quantity sold, the price, the place of delivery and the time, place and manner of payment of purchase money, cannot be defeated by showing a breach by the seller of a contemporaneous parol agreement, which is alleged to have been an inducement to the contract, to advance the price of quinine and notify the trade of such advance; especially where it does not appear that the parol agreement was a condition precedent to the validity of the contract.

(October 7, 1890.)

APPEAL by defendants from a judgment of the General Term of the Superior Court of the City of New York overruling exceptions directed to be heard before it in the first instance and ordering judgment to be entered on the verdict directed by the Trial Term in favor of plaintiff in an action brought to recover damages for an alleged breach of a contract to purchase certain quinine. *Affirmed.*

Statement by **Brown, J.:**

Appeal from a judgment of the General Term of the Superior Court of the City of New York, entered upon an order which overruled defendants' exception, and ordered judgment upon a verdict directed by the court.

This action was for breach of contract in refusing to accept fifteen thousand ounces of quinine which defendants had agreed to purchase from the plaintiff's assignors by a contract dated February 7, 1887. The quinine was to be shipped from Europe and delivered to defendants in March following. The defense was that the agreement was entered into upon condition that if the defendants would execute the contract the plaintiff's assignors would immediately raise the price of quinine from fifty-nine cents to sixty-one cents, and would issue a circular to the trade to that effect, and that that condition was never performed by the plaintiff's assignors. The quinine was tendered to the defendants, who refused to accept it, whereupon it was sold upon notice to them for their account and resulted in a loss. The court directed a verdict for the plaintiff.

Further facts appear in the opinion.

Mr. Adolph L. Sanger, for appellants:

The contract was entered into by defendants upon condition that the plaintiff would immediately thereupon raise the price of quinine to sixty-one cents, and issue a circular to the trade to that effect; and the evidence shows that the contract would not otherwise have been made.

An executory consideration generally constitutes a condition precedent, to be performed by plaintiff before his right of action accrues.

1 Chitty, Cont. 11th Am. ed. 72; 2 Chitty, Cont. 11th Am. ed. 1082-1084, 1090; *Grant v. Johnson*, 6 N. Y. 247; *Crane v. Knubell*, 2 Jones & S. 455; *Tipton v. Feitner*, 20 N. Y. 423; *Pordage v. Cole*, 1 Wms. Saund. 819h; *Morris v. Sitter*, 1 Denio, 59; *Rider v. Pond*, 18 Barb. 179; *Dey v. Dox*, 9 Wend. 129; *Mansfield v. New York C. & H. R. R. Co.* 3 Cent. Rep. 199, 102 N. Y. 211; *Cross v. Beard*, 26 N. Y. 85, 88; 2 Benjamin, Sales, 6th Am. ed. §§ 854, 855; *Tompkins v. Elliot*, 5 Wend. 496.

Representations made by the agent to a purchaser as an inducement to concluding a

purchase, form part of the *res gesta* and will bind the principal.

Ahern v. Goodspeed, 73 N. Y. 108, 113, 115; *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Johnson v. Oppenheim*, 55 N. Y. 293; *Remington v. Palmer*, 62 N. Y. 83, 84; *Brewers F. Ins. Co. v. Burger*, 10 Hun, 56.

This inducement could have been properly established by parol.

Reynolds v. Robinson, 110 N. Y. 654; *Chapin v. Dobson*, 78 N. Y. 79-83; *Re Washington Park Comrs.* 52 N. Y. 184; *Benton v. Martin*, 52 N. Y. 570; *Greenl. Ev.* §§ 277, 283; *Wilson v. Randall*, 67 N. Y. 838, 841; 2 Parsons, Cont. 7th ed. 501; *Renard v. Sampson*, 12 N. Y. 566; *Coe v. Tough*, 116 N. Y. 278.

Mr. J. Hampden Dougherty, for respondent:

The bought-and-sold notes constitute a full and complete contract to sell and purchase quinine.

Such a contract falls within the rule which forbids parol evidence to modify any of its terms.

Elghmie v. Taylor, 98 N. Y. 288, 290, 296; *Wilson v. Deen*, 74 N. Y. 581, 586; *Johnson v. Oppenheim*, 55 N. Y. 280; *Naumberg v. Young*, 44 N. J. L. 831; *Angell v. Duke*, 82 L. T. N. S. 820; *McCormick Harvesting Mach. Co. v. Wilson*, 39 Minn. 487. See also *Snouden v. Guion*, 2 Cent. Rep. 447, 101 N. Y. 458, 462, 468; *Long v. Millerton Iron Co.* 2 Cent. Rep. 276, 101 N. Y. 638; *Schmittler v. Simon*, 114 N. Y. 176, 184; *Suydam v. Clark*, 2 Sandf. 133; *Newberry v. Wall*, 84 N. Y. 576; *Butler v. Thomeon*, 92 U. S. 412, 23 L. ed. 684.

There are only three classes of cases in which it is proper to show by evidence outside of the written instrument that a contemporaneous oral agreement was made which affects the apparent meaning of the writing: (1) where the writing is manifestly informal and incomplete; (2) where the oral agreement is a collateral contract consistent with the writing; (3) where the oral agreement does not affect the terms of the writing, but qualifies its meaning by showing that it was conditional.

Jones, Cont. § 120.

The present contract has the further protection which the Statute of Frauds furnishes to contracts of sale. The writing is deemed to express all the terms upon which the sale is made.

The memorandum cannot be helped by parol; nor can parol evidence be given to modify the memorandum.

Wright v. Weeks, 25 N. Y. 160; *Stone v. Browning*, 68 N. Y. 598; *Hill v. Blake*, 97 N. Y. 216; *Williams v. Robinson*, 78 Me. 186; *Benjamin, Sales*, § 206; *Sale v. Darragh*, 2 Hill. 196; *Erwin v. Saunders*, 1 Cow. 250; *McConnell v. Brillhart*, 17 Ill. 860; *Gordon v. Niemann*, 118 N. Y. 152, reversing 42 Hun, 656.

Brown, J., delivered the opinion of the court:

The contract sued upon was made through brokers, and the sale note was as follows:

Dated New York, February, 7, 1887.

Sold for account Messrs. C. F. Boehringer & Soehne to Messrs. A. H. Reitlinger & Company, fifteen thousand ounces B. & S. sulphate 9 L. R. A.

of quinine, in 100-ounce tins at fifty-nine cents per ounce, cash ten days from delivery; delivery to be had from a March, 1887, shipment from the factory in Europe, subject to manufacturers' clauses and war risks.

(Signed) St. John Brothers.

The defendants sought to show that said agreement was entered into by them upon the representations made by the broker, and upon the condition that the price at which Boehringer & Soehne would continue selling quinine would be sixty-one cents per ounce, and upon the further condition that the said Boehringer & Soehne would issue a circular to the trade to that effect. The trial court received the evidence offered by the defendants to establish this allegation over the plaintiff's objection and exception, but at the close of the defendants' case ruled that the proof did not make out a defense and directed a verdict for the plaintiff, to which ruling the defendants excepted.

The general rule which excludes parol evidence when offered to contradict or vary the terms or legal import of a written agreement is so well settled in this State as not to be a proper subject of discussion. It has, however, many exceptions, and its full application has, by the decisions of the courts, been restricted within narrow limits.

In an action by a promisee a promisor may show a failure of a consideration for the promise sued upon (*Eastman v. Shaw*, 65 N. Y. 522), or, that the contract was destined to take effect only on the happening of some future event, and upon condition that it was to be binding only upon performance of a condition precedent resting in parol (*Benton v. Martin*, 52 N. Y. 570-574; *Julliard v. Chaffee*, 92 N. Y. 585; *Reynolds v. Robinson*, 110 N. Y. 654); or that the instrument sued upon was executed in part performance only of an entire oral agreement (*Chapin v. Dobson*, 78 N. Y. 74; *Briggs v. Hilton*, 90 N. Y. 517; *Roulledge v. Worthington Co.* 119 N. Y. 592), and it has no application to collateral undertakings. *Lindley v. Lacey*, 17 C. B. N. S. 578; *Jaffery v. Walton*, 1 Stark. N. P. 267; *Batterman v. Pierce*, 8 Hill, 171; *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Exch. 70.

The subject has been so fully considered in recent cases in this court that any discussion of the reason or policy of the rule and its exceptions is now unnecessary. See, in addition to the cases cited, *Johnson v. Oppenheim*, 55 N. Y. 280; *Wilson v. Deen*, 74 N. Y. 581; *Elghmie v. Taylor*, 98 N. Y. 288; *Snouden v. Guion*, 101 N. Y. 458, 2 Cent. Rep. 447; *Schmittler v. Simon*, 114 N. Y. 176.

The general rule requires the rejection of parol evidence when its effect would be to cut down or destroy stipulations and undertakings entered into between parties and by them put in writing. All prior and contemporaneous negotiations and oral promises in reference to the same subject are merged in the written contract, and the rights and duties of the parties are to be determined by that instrument. When that has been executed it is then conclusively presumed that it contains the whole engagement of the parties.

In *Wilson v. Deen* it was said "the very reason of the rule which excludes evidence of declara-

tions is to avoid the uncertainties attendant upon such evidence, and equity will not set aside that important and well-settled rule for the purpose of relieving a party against a risk, which, upon his own showing, if it be true, he has voluntarily incurred." And accordingly it was held in that case that a written lease would not be canceled upon the ground that contemporaneous or preceding oral stipulations in reference to the furnishing of the house had not been performed.

In *Eighmie v. Taylor, supra*, it was said: "The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties and designed to be the repository and evidence of their final intention. If, upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to show its proper understanding and interpretation, it appears to contain the engagement of the parties and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract. . . . Where the writing does not purport to disclose the contract or cover it; where, in view of its language, read in connection with the attendant facts, it seems not designed as a written statement of an agreement, but merely as the execution of some part or detail of an unexpressed contract; where it purports only to state one side of an agreement merely, and is the act of one of the parties only in the performance of his promise,—in these and like cases, the exception may properly apply and the oral agreement be shown."

We have, then, but to examine the character of the writing executed by the parties, and, reading it in the light of their purpose and surroundings, determine whether it falls within any of the exceptions to the general rule governing the construction of such instruments. The plaintiff's assignors were manufacturers and the defendants were merchants. In a contract between them for the sale and purchase of the manufactured article we should expect to find stipulations covering the quantity of the article sold, the terms, and place of its delivery, and the time, place and manner of payment of the purchase money.

All these are found in the writing in question. The quantity of quinine sold was fifteen thousand ounces. It was all to be delivered at one time, from a shipment to be made from the factory in Europe, in March, 1887. The price was fifty-nine cents per ounce, and it was to be paid in cash within ten days after the delivery of the goods.

Here is a complete agreement. It covers the obligations and duties of both parties, and it leaves nothing unprovided for. If it is to be controlled by evidence of the parol stipulation alleged in the answer, the entire contract is to be changed. The seller's obligation, instead of being limited to a delivery of the quinine at the time mentioned, is increased by a duty of raising the price of his goods and notifying the trade of that fact. His right to the purchase money and the defendants' obligation to pay the same, instead of being dependent upon a delivery of the quinine, is made to depend upon another condition not mentioned in the written

agreement, and wholly independent of the delivery of the goods. In other words, a new contract is to be proven by parol, and the written engagement of the parties is to go for nothing. We are to go outside of the instrument to find a stipulation upon which the validity of the contract is to depend, and then we are to enforce the parol stipulation, to the absolute destruction of the written instrument. In the face of such a result, it might well be asked, What would be left of the rule which forbids parol evidence varying the terms of a written contract?

If we turn to the evidence that was received by the court, it will be seen that the oral stipulation was not a condition precedent to the validity of the contract. The evidence of William Reitlinger and of Mr. St. John, the broker, was to the effect that the price would be raised if the contract was made.

"If you make this contract, the seller will issue a circular that the price will be sixty-one cents," was the evidence of Reitlinger as to the representations of the broker. St. John testified that Boehringer said to him "that, having sold fifteen thousand ounces at fifty-nine cents, he would advance the price to sixty-one cents; he would sell but fifteen thousand ounces at fifty-nine cents, and then would advance the price to sixty-one cents. Upon that statement I predicated that made by me to Mr. Reitlinger."

From this evidence, which is undisputed, it is apparent that a sale was to precede the advance in the price. Instead of being a condition upon the performance of which the validity of the contract was to depend, the advance in price was to follow a contract which should bind the defendants to the purchase of fifteen thousand ounces at fifty-nine cents. And this was so understood by the defendants. The promise to advance the price was contained in a letter from the broker to the defendants, sent to them with the contract, and when Mr. Reitlinger was asked, on cross-examination, why he did not send back the letter and the contract and ask Mr. St. John to put the clause into the contract, and have Boehringer and Soehne agree to it, he answered "I trusted Mr. St. John." That is, knowing the contents of the writing, defendants consented to accept it as it was, relying upon the parol promise of the broker to advance the price.

We are of the opinion that to except this case from the rule that written contracts cannot be controlled by contemporaneous oral stipulations would be to set aside the rule altogether, with a result, as was said by Judge Rapallo in *Wilson v. Deen*, that "writings would be of little value, as they could always be controlled by oral evidence of what was said by the parties at the time of their execution."

The judgment should be affirmed, with costs.

All concur, FOLLETT, Ch. J., on the following grounds:

The defendants have not pleaded directly, or by implication, that the agreement to advance the price was collateral to the contract of sale, and by its breach that they have sustained damages, which should be set off against the plaintiff's claim; but the failure of the vendors to advance the price is pleaded as a defense, and the agreement to advance is, in legal effect,

alleged to be one of several mutual stipulations, dependent on each other, forming one entire contract, and that a breach of this stipulation defeats a recovery on the contract, and so the defendants have pleaded themselves out of the right to establish an independent collateral

contract by oral evidence. Nor have the defendants pleaded that the stipulation to advance the price was part of the original contract, but was by mistake omitted from the written agreement. I concur.

KENTUCKY COURT OF APPEALS.

JACOB *et al.*, Appts.,

v.

WOOLFOLK *et al.*

(.....Ky.....)

Describing a lot in a deed of conveyance as bounded by an alley which is laid off on a certain plat, will pass title to the center of the alley if the grantor's title extended so far, and it is immaterial whether or not the alley is ever brought into public use.

(September 27, 1890.)

A PPEAL by plaintiffs from a judgment of the Louisville Law and Equity Court in favor of defendants in an action brought to recover possession of a certain strip of land. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. A. E. Richards for appellants.

Messrs. Brown, Humphrey & Davis for appellees.

Bennett, J., delivered the opinion of the court:

The appellants, as the devisees of John I. Jacob, brought this action of ejectment against the appellees to recover the possession of ten feet of ground, the southern half of an alley fronting on Second Street, in the City of Louisville. John I. Jacob, the ancestor of the appellants, directed in his will that all his estate be divided among his children. The commissioners who were appointed to divide his estate, in a suit instituted for that purpose, laid off the property of said Jacob, a part of which is now in controversy, into lots with appropriate streets and alleys. Among other blocks thus laid off was one bounded by First and Second Streets on the east and west, and Breckenridge and College Streets on the north and south. There were assigned to Mrs. Tyler, and conveyed to her, lots Nos. 15 and 16. The lots thus conveyed were described by their numbers only. Subsequently Mrs. Tyler con-

NOTE.—Dedication of land to public use, form of.

It is not necessary that a dedication should be by deed or in writing; it may be by act *in pota*. Nor is it necessary that the fee should pass, for dedication has respect to possession and not to permanent estate. *Benn v. Hatcher*, 81 Va. 25.

There is no particular form necessary in the dedication of land to public use; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. *Cincinnati v. White*, 81 U. S. 6 Pet. 481, 8 L. ed. 453; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 748; *Maywood Co. v. Maywood*, 5 West. Rep. 529, 118 Ill. 61; *Dummer v. Den*, 20 N. J. L. 86; *Schuchman v. Homestead Borough*, 1 Cent. Rep. 912, 111 Pa. 48.

After being set apart for public use and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pota*, which precludes the original owner from revoking such dedication. *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 748.

Dedications are to be construed with reference to the use for which they are made. *Palatine v. Krueger*, 9 West. Rep. 759, 121 Ill. 72.

Dedication of land to street purposes; public acquires only an easement; rights of abutters on streets. See notes to *Adams v. Chicago*, B. & N. R. Co. (Minn.) 1 L. R. A. 498; *Villaki v. Minneapolis* (Minn.) 3 L. R. A. 381; *Church v. Portland* (Or.) 6 L. R. A. 259.

A matter of intention.

The dedication of land to public use, by plat or otherwise, is a matter of intention. *Elgin v. Beckwith*, 7 West. Rep. 707, 119 Ill. 367.

It is the intention of the party making the dedication which must govern its extent. *Barclay v. Howell*, 81 U. S. 6 Pet. 493, 8 L. ed. 477; *New Orleans v. United States*, 36 U. S. 10 Pet. 622, 9 L. ed. 573.

9 L. R. A.

To constitute a dedication there must be a manifestation of the owner's intention to dedicate to a public use, and also an acceptance and use by the public for the purpose intended and manifested by the owner. *Spaulding v. Bradley*, 79 Cal. 449.

An intention on the part of the owner to dedicate is absolutely essential, and it must be clearly and unequivocally shown. *State v. Adkins*, 42 Kan. 208; *Eureka v. Croghan*, 81 Cal. 524. See note to *Osgood City v. Larkins* (Kan.) 2 L. R. A. 55.

Where the intention to dedicate is manifest, the dedication so far as the owner is concerned is complete without any acceptance by the public authorities or any public user. *Point Pleasant Land Co. v. Cranmer*, 3 Cent. Rep. 746, 40 N. J. Eq. 61; *Trustees of M. E. Church v. Hoboken*, 33 N. J. L. 12; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *Wood v. Hurd*, 34 N. J. L. 89.

Dedication by platting and sale of lots.

The owner of land, by his plat of the town, which defines the streets and alleys, and by his deeds of conveyance to purchasers, which call for these streets and alleys as boundaries, covenants with purchasers that such streets and alleys are dedicated to their use and that of the public. *Rowan v. Portland*, 8 B. Mon. 232; *Wickliffe v. Lexington*, 11 B. Mon. 163.

See note to *Davoston v. Payne*, 28 Smith, Lead. Cas. pt. 1, 7th ed. 160.

Selling lots with reference to an alley as a public highway amounts to a dedication of the alley. *Fosson v. Landry*, 123 Ind. 138.

A dedication of or offer to dedicate land for the purpose of a street is established by the delivery by the owner of a deed to a third person reciting that the boundary lines of the property conveyed are to run to and along a certain street which is at the time an open public street to the east of, but not extending westerly through, the property of the grantor. *Eureka v. Armstrong*, 58 Cal. 623.

veyed these lots in the same way,—by their numbers. Finally, Henry Mead became the purchaser of these lots by metes and bounds, calling for the alley now in controversy. But said alley never having been opened as such, and half of its width having been closed by Mead's predecessor in the ownership of said lots, Mead extended the fence so as to include the entire width of said alley, to wit, twenty feet. He, it seems, not knowing that he was the owner of half of said alley, and believing that the appellants were the owners of all of it, purchased the same. The conveyance was by deed from the appellants; and, in consideration thereof, Mead conveyed to the appellants a piece of real estate lying in another part of the city. After this Mead, as he says, learned that the appellants had no title to the said alley that they conveyed to him, and they rescinded the contract, each reconveying by a quitclaim deed the parcel of land that the other had conveyed to him. Mead states, in substance, that learning that the appellants had no title to said strip of ground, the object of the reconveyances was simply to rescind the contract of exchange, and place each party *in statu quo*.

Now, did the conveyance of these lots, calling for the streets and alleys as laid off in the plat, or, as said by this court, with clear reference to such streets and alleys, pass the title

to the purchaser to the center of the street or alley, provided the seller's title extended to the center thereof? We, in the case of *Schneider v. Jacob*, 86 Ky. 101, and other cases, held that it did. It was held in the *Schneider Case* that the street, in such case, was to be regarded as a "single line, and as a single line it becomes a boundary of the lot. It is as a tree or a rock which is called for as a boundary. The terminus of the line is ordinarily the center of the tree or rock, unless the vendor's title to the property conveyed extends only to the edge of the tree or rock; and, in the same manner, the street is a monumental boundary. And, if the vendor holds the title to the street, he conveys to the center thereof as the dividing line;" and, if he owns the adjacent property, his vendee, calling to abut on said street, acquires title to its center also. As alleys are dedicated as essential ways to the back entrance to lots, the same reason exists, when the lots are sold with a clear reference to them as boundaries, for holding that the center thereof is the dividing line. In such case the intention of the parties is to be drawn from the deed. As seen, the street or alley is to be regarded as a single line, and the conveyance is to be treated as being to the center thereof, the same as if a tree or rock had been called for. In other words, the center of the street or alley is one of the lines called for in the deed; and, as long as the deed

Streets which have been dedicated by duly recorded deeds are sufficiently accepted, without specifying them, by an order of the common council stating that all streets which have been dedicated by the owners are hereby accepted and declared to be public streets. *Ibid*.

One who conveys a lot of land as it is designated on a certain map, as it is shown to the purchaser, and which shows a piece of land marked "park," abutting on the lot sold, makes the map a part of the deed, and is estopped from afterwards appropriating the park to any other use. *Pierce v. Roberts*, 57 Conn. 81.

If the owner of a tract of land lays it out in lots and streets by a map publicly exhibited or filed in the proper office, and sells lots laid out on such map by reference thereto, he thereby dedicates the streets on the map to the public. *Point Pleasant Land Co. v. Cranmer*, 2 Cent. Rep. 746, 40 N. J. Eq. 81; *Clark v. Elizabeth*, 40 N. J. L. 172; *Ang. Highw.* §149.

Where a land proprietor lays off his land into blocks and streets, makes a plat thereof, and sells lots indicated thereon by reference to such plat, the dedication of the streets becomes irrevocable. *Hicklin v. McClellan*, 18 Or. 126; *Meier v. Portland Cable R. Co.* 1 L. R. A. 856, 16 Or. 500; *Gregory v. Lincoln*, 13 Neb. 352.

Where the owners of land caused a certain portion to be surveyed as a town site, and the plat to be recorded, after being signed by all the owners but one, whose name was signed by an attorney, it was held a sufficient dedication. *Weeping Water v. Reed*, 21 Neb. 261.

Dedication of streets upon a plat, and by conveyances made with reference thereto, will be deemed complete, though not properly certified for record. *Hurley v. Mississippi & Rum River Boom Co.* 34 Minn. 143; *Wiley v. Lovely*, 46 Mich. 53; *Moreland v. Brady*, 8 Or. 303.

The owner of land which is laid off on a map in streets, blocks and squares, who conveys lots with reference to a certain street marked on the map, covenanting that such street shall be left open for-

ever, cannot exclude the public use of that street, or demand compensation for any part of it, when taken for a public road which crosses it. *Harrison County v. Seal*, 3 L. R. A. 656, 66 Miss. 129.

Where the owner of land lays it out into blocks and lots upon a map, and designates certain portions thereof to be used as streets, parks and squares, an implied covenant arises as appurtenant to lots granted with reference to such plan, not to use the portions so devoted to the common advantage, although not of such a nature as to give rise to public rights by dedication, otherwise than in the manner indicated by such map. *Lennig v. Ocean City Assn.* 4 Cent. Rep. 808, 41 N. J. Eq. 608.

Where the owner of land lays off certain territory as an addition to the town, makes the necessary plat, etc., and the territory thus laid off and platted becomes incorporated, the limits of the corporation must in part be the limits of the plat; and its streets, alleys and squares must also, in part, be those indicated and marked as such on the plat; and it would be conclusive evidence of the acceptance of the dedication; and the title to the property dedicated vested in the corporation in trust for public use; and the Statute of Limitations would not run in favor of a private party, to bar the rights of the public. *Lee v. Mound Station*, 6 West. Rep. 329, 13 Ill. 804; *Des Moines v. Hall*, 24 Iowa, 234.

Where the owner of land, who was the agent of the railroad company, in consideration of the location of a railroad station, agreed that the company should have ample ground for its purpose, and made a town plat, according to which he sold lots, on which he designated a certain part of the premises by the word "depot," and a fuller designation by a like diagram was made on the map made for the railroad company, with his knowledge and from data furnished by him, these facts, with his nonpayment of taxes for a long time upon the depot lot, and his repeated declarations that it belonged to the company, and the location and building of the depot upon it, constitute a dedication and an estoppel. *Morgan v. Chicago & A. R. Co.* 98 U. S. 716, 24 L. ed. 748.

(September 27, 1890.)

stands unattacked for fraud or mistake, it is to be conclusively presumed that it speaks the intention of the parties. Of course, the parties may agree in the deed that the edge of the street is to be the dividing line; so also may they agree as to the tree or rock. Where the streets and alleys are designated on the plat, and the lots are purchased, and the deeds made in reference to them, although they are never brought into public use, they become a part of the purchaser's rights, under the deed, in the manner indicated in the *Schneider Case*, and any restriction of those rights must be found in the deed. To allow the verbal intention of the parties to prevail against this written evidence would be to violate one of the most thoroughly settled rules of evidence.

Mrs. Tyler and her vendees, including Mead, acquired, by their respective deeds, the title to the center of this alley, and the appellants, at the time they attempted to convey to Mead, had no title to convey to him. He was then the owner of the ten-foot strip, and acquired nothing by the conveyance of it by the appellants. And that fact being realized by the parties, as the court below found, and as we think upon sufficient evidence, they rescinded the contract by reconveyances, which had the effect to reconvey to each party the title that he had theretofore conveyed; and, as no title was conveyed by the appellants to Mead as far as the ten feet were concerned, he certainly, by this contract of rescission, conveyed no title back to them. Such was not the intention. The only object was, by the reconveyances, to put themselves *in statu quo*, leaving each party, as to title, where he was before he had made the first conveyance. The lower court so adjudged it.

Let the judgment be affirmed.

David ARMSTRONG, Receiver of the Fidelity National Bank, *Appt.*,

BOYERTOWN NATIONAL BANK.

(....Ky.....)

The fact that a bank, which received a draft for collection and credit and in turn transmitted it to a correspondent to have the collection made, credited its owner with the amount of the proceeds upon being notified that it had been paid, will not, in case the bank becomes insolvent before receiving such proceeds, give its receiver or creditors any right, as against the owner of the draft, to demand them from the collecting bank, and the rights of the parties are not changed by the fact that a usage existed between the collecting and the insolvent banks, which permitted the proceeds of collections to be credited on account instead of requiring them to be immediately remitted.

NOTE.—Banks and banking; duty and liability of bank receiving paper for collection. See note to *Freeman v. Citizens Nat. Bank (Iowa)* 4 L. R. A. 422; *Manufacturers Nat. Bank v. Continental Bank*, 3 L. R. A. 609, 148 Mass. 553; notes to *National Butchers & Drovers Bank v. Hubbell (N. Y.)* 7 L. R. A. 365; *Freeman's Nat. Bank v. National Tube Works Co. (Mass.)* 8 L. R. A. 42.

9 L. R. A.

See also 23 L. R. A. 161.

A PPEAL by the intervening defendant, A. Armstrong, from a judgment of the Louisville Law and Equity Court in favor of plaintiff in an action brought to recover the proceeds of a draft which had been sent to the defendant Louisville Banking Company for collection. *Affirmed.*

The facts are fully stated in the opinion.

Mr. A. Barnett for appellant.

Mr. D. M. Rodman for appellee.

Lewis, J., delivered the opinion of the court:

Appellee, National Bank of Boyertown, Pa., brought this action to recover of Louisville Banking Company the amount of a draft collected; but the latter, disclaiming ownership, paid the money into court, and, since then, litigation about it has been between appellee and appellant, Armstrong, receiver of Fidelity National Bank, at Cincinnati, Ohio, who was upon his petition made a party to the action. The draft was made payable at the Bank of Louisville to Hellegass; but appellee, by discounting, became owner, and May 25, 1887, sent it to the Fidelity Bank for collection. Thence it was sent for the same purpose to, and, June 17, the day of maturity, collected by, the Louisville Banking Company, of which fact the Fidelity Bank was notified by letter received June 18, and on that day it mailed to appellee the same notification, which was received June 20. But the only account kept by the Fidelity Bank of either the draft or money was on its collection register, where an entry was made, June 20, of credit to appellee, for the amount so collected by the Louisville Banking Company. It further appears that June 20, after the close of its business, the Fidelity Bank was, by authority of the comptroller of currency of the United States, closed and placed in possession of Armstrong, as receiver. And subsequently, upon information filed in the United States circuit court, judgment was rendered forfeiting its franchise.

The first inquiry that naturally arises in determining which of the parties has the right to the money in dispute is as to the attitude towards each other of appellee and the Fidelity Bank when the draft sent by the former was received by the latter.

The indorsements on the draft when it went into possession of the Fidelity Bank were in blank, which fact, as held by this court, implied a transfer to that bank, as holder, of dominion over and some right to it, with authority to fill up the blanks as proof of the specific character of that right (*Cope v. Daniel*, 9 Dana, 415); but such implication may be rebutted by evidence showing the true character of the transaction and actual rights of parties. If it could not, then the result in this case would be to exclude altogether the claim of appellant, who has title as receiver to only what the defunct bank owned, for the blanks had not been filled up when the draft was received by the Louisville Banking Company, and of course it became entitled to benefit of the same implication. The evidence is conclusive independent of appellant's admission. Appellee did not intend to transfer, and the Fidelity

delity Bank did not elect, by filling up the blanks, to receive the draft as bona fide holder, even if it could have done so. That the actual relation between the parties was that of principal and agent is not only shown by a letter of instruction accompanying the draft, and the entry mentioned, but the theory of appellant's right to the money is based upon the fact conceded in his pleading that the draft was sent by one and received by the other for "collection and credit." There is, however, as contended by counsel, a distinction between an instruction by the owner to a collecting bank to "collect and remit," and the one, given in this case, to "collect and credit." But whatever other difference in meaning of the two phrases there may be, both convey the idea that the party giving is owner, and the one receiving the instruction is agent. Such, then, being the relation when the draft was received, the main inquiry is whether anything thereafter occurred which had the legal effect to change the attitude of the Fidelity Bank from that of agent to owner. It appears appellee was induced to send the draft by a circular letter of the Fidelity Bank containing representations of its solvent and prosperous condition, and proposal to allow to its customers interest on daily balances, and to make no charge for collecting, nor for exchange in transmitting; and it must be taken as true that the draft was sent under an implied contract that, when collected, the amount might be remitted directly, or entered to appellee's credit, at the option of the Fidelity Bank. But according to the plain meaning of that agreement, collection of the money by the Fidelity Bank was a condition precedent of its right to enter the credit, and thus comes the question whether the collection made by the Louisville Banking Company, and entry of the amount on its books to the credit of the Fidelity Company, was, in the meaning of the contract, such collection by the latter as gave it the right, by mere entry on its collection register, before receiving the money to change itself from agent to owner, and appellee from owner to creditor.

The general doctrine seems to be "that, upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank." And if checks, notes, etc., are deposited for collection, credited to the depositor on general account, and drawn against, the bank is holder of the paper for value; and, if it becomes insolvent, it forms part of its assets. *Morse, Banks*, § 573, and authorities cited.

And the rule is so extended that when a customer has a deposit account with a bank on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits, an indorsement of the words "for deposit" on a check so deposited is, in the absence of a different understanding, presumption of more than a mere agency or authority to collect; it is a request and direction to deposit the sum to the credit of the customer. *Id.* § 577.

But it is well settled that where a bank re-

ceives a draft or note for "collection on account," or, what is the same, "collection and credit," it does not owe the amount until collected; and, though credit be given therefor prior to collection, the bank is not precluded from canceling such credit, which is regarded as merely provisional, if the paper is dishonored. It would therefore seem just and reasonable, even if there was no authority to support the position, that if the bank does not, in such case, owe the amount before it is actually collected, it should not be held to have any other right to it than as agent, and that if not bound by an entry of credit, it should not have power to bind the real owner thereby. It has, however, been distinctly, and we think correctly, held that a holder of paper, who delivers it to a bank for collection and credit, is at liberty to treat the bank as an agent until the proceeds are collected by the bank in money, and that authority of the bank to credit the customer does not arise until he has actually received the money. *Levi v. Missouri Nat. Bank*, 5 Dill. 104; *Marine Bank v. Fulton Bank*, 69 U. S. 2 Wall. 258 [17 L. ed. 787]; *Morse, Banks*, § 568; 1 *Daniel, Neg. Inst.* § 334.

We therefore think collection of the draft by the Louisville Banking Company, and entry of the amount to the credit of the Fidelity Bank, did not have the effect of investing the latter, nor changing its relation to appellee; for a mere usage between banks, whereby the collecting bank credits the transmitting bank with the amount collected, instead of remitting, is not alone sufficient to be set up against the real owner of notes or bills to deprive him of his rights. *Morse, Banks*, § 565; *First Nat. Bank of Clanton v. Gregg*, 79 Pa. 384.

It thus follows the only party known by this record entitled in any event to the money in contest is the Louisville Banking Company, for we do not see how appellant as receiver can legally claim money never even reduced to his possession, if the Fidelity Bank, while in existence, could not have done so; nor do we think its creditors have the least interest, as in no sense have they been prejudiced or misled. But it is manifest the Louisville Banking Company was not, when it received the draft, ignorant of the true owner, and therefore did not nor could become a bona fide holder of the draft. Moreover, as its disclaimer here of any interest in or right to the money is equivalent to an admission, no advances were made on the paper by it, and no balances against the Fidelity Bank. Consequently the Louisville Banking Company held the money simply in trust for the true owner, and could not have resisted recovery, even if it had made defense. It is not necessary to consider the question raised as to the effect of the fraudulent conduct of the Fidelity Bank, for the reasons already given are sufficient to make it clear appellee never ceased to be owner of the draft, and consequently is entitled to the money sued for. Authorities differ somewhat as to the remedy of the holder and owner of a bill or note that has passed through a series of banks in course of collection. But no question exists anywhere of his right to maintain an action against the bank having possession of the paper or money collected where the transmitting bank

has become a bankrupt, or, as is the case here, has gone out of existence.

Judgment affirmed.

GRIDLEY, *Appt.*,

v.

BROOKS-WATERFIELD CO. *et al.*

(.....Ky.....)

1. Although in a State where parcels of land, into which a tract subject to a vendor's lien has been divided, and which have been at different times sold and subjected to junior liens, are all compelled to contribute in proportion to their value towards satisfaction of the prior lien, the value of each parcel and the amount which it should contribute should be ascertained before the entry of a decree foreclosing the senior lien, yet this course cannot be insisted on in favor of a parcel which was mortgaged as security against a contingent liability which has not been liquidated when the time has arrived for the entry of such decree.

2. If in such case the contingent liability becomes liquidated and the lien becomes enforceable after a sale of the property covered by it for the satisfaction of the senior lien, but while the case is still pending on the question of contribution, the holder of such lien may plead such facts for the purpose of having the amount which each parcel should pay ascertained and enforcing contribution from those owning the other parcels of their respective proportions of the senior lien in partial exoneration of the parcel covered by his lien.

(September, 23, 1890.)

A PPEAL by defendant Gridley from a judgment of the Circuit Court for Gallatin County, dismissing pleadings filed by him in an action brought to foreclose a vendor's lien on certain real estate for the purpose of compelling contribution from other owners of parcels into which such estate had been divided of their proportions of the amount necessary to satisfy such lien in partial exoneration of a parcel on which he claimed a lien. *Reversed.*

The facts are fully stated in the opinion.

Mr. J. J. Landram for appellant.

Messrs. R. W. Masterson and John S. Gaunt for appellee.

Bennett, J., delivered the opinion of the court:

Rod. Perry, in 1884, sold to Mrs. Hamilton about 140 acres of land, and reserved a lien in the deed to secure the unpaid purchase money. Thereafter, Mrs. Hamilton sold about 73 acres of this land to Mrs. Turly, and took notes from her for the unpaid purchase money, and reserved a lien on the land to secure the payment of the same. Thereafter, Mrs. Hamilton assigned these notes to the appellee, the Brooks-Waterfield Company. After the sale of said land to Mrs. Turly, Mrs. Hamilton and her husband mortgaged the remaining portion of said tract, except 10 acres which had been sold to Holton, to the appellant and others, to indemnify them as the sureties of her said husband on his executorial bond. Thereafter, Rod. Perry asserted his lien by an equitable action

on said 140 acres of land, and his lien was allowed on the entire tract, without reference to the equities of the appellant Gridley and the appellee, as subsequent separate lien holders on the separate parcels of said land.

The rule in several of the States, where subsequent purchasers or holders of liens on different parcels of a tract of land which is incumbered with a prior lien, is to enforce the prior lien so as to protect the first subsequent purchaser, and then the second, next the third, and so on, letting the burden fall upon the last purchaser. The reason of this rule, where it obtains, is that as the first sub-purchaser has a right upon payment of the lien to be subrogated to the rights of the lien holder, and enforce his right thus acquired upon the remainder of the land in the hands of the first owner, and thereby protect his purchase, and this right attaches upon his purchase, which holds good and is enforceable as against a subsequent purchaser of another parcel of the same land, and the second subsequent purchaser stands in the same relation to a third subsequent purchaser as the first did to him, he can push the lien off himself onto the third purchaser, and the latter on the next purchaser, and so on until the burden is made to fall on the last purchaser. But this court, by uniform decision, has adopted the more equitable rule of compelling each subsequent purchaser's portion of land to contribute to the payment of the prior incumbrance in proportion to the value of each portion. This rule and the reasons for it are clearly set forth in *Dickey v. Thompson*, 8 B. Mon. 318, and the authorities there cited. The whole tract is subject to this lien and sale for the satisfaction of the lien, and it should be so adjudged in the decree of sale; but, ordinarily, the value of each portion should be ascertained before the rendition of the decree, and they should contribute to the payment of the prior incumbrance in proportion to the value of each portion, and each portion should be decreed to be sold to satisfy such contribution. But this practice cannot obtain in a case like this, because, at the time of the decree, the court had no power to sell the land on which the appellant held a lien. His lien was to secure him against loss on account of an unliquidated liability, which was not enforceable by a sale of the land, and which could only be enforced by a liquidation of the amount, and its payment by the appellant. Hence, it would not be equitable to compel the lien holder to wait an indefinite time on the appellant to put his lien in a shape that it might be enforced, and which he might never do. Therefore, the chancellor did right to decree the sale of all the land, and postpone the question of contribution until another time.

After said sale, but while the case was still pending on the question of contribution, the appellant filed an amended pleading, setting up, since the decree, the liquidation of said liability and its payment by him, and asking that the appellee be compelled to pay his proportion of said debt, the land on which the appellant held the mortgage having paid the entire amount of the debt, and that on which the appellee held a lien having gone free. The court dismissed this pleading, and also those to which it was an amendment. From this judg-

ment the appellant has appealed. While, when the decree of sale was rendered, the appellant could not force a sale of said land, because his liability had not been liquidated and paid, yet he had a valid subsisting lien on said land to secure him against loss by reason of said liability, which ripened into an enforceable lien as soon as such liability was ascertained and paid by the appellant, and which would entitle him to contribution from his co-sub-lienholders to pay in proportion to the value of each portion. Therefore, the appellant's pleading and amended pleading should not have been dismissed, but the value of each portion should have been ascertained, and that portion on which the appellee held a lien should have been held liable to contribute to the payment of the debt, to satisfy which the land on which the appellant held a lien was sold in proportion to the value of each parcel.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

A. G. SIMRALL *et al.*, Appts.,

v.

CITY OF COVINGTON *et al.*

(...Ky....)

1. Under a city charter empowering the city council to license and tax all agencies of insurance offices within the city an insurance agent may be compelled to pay a license tax for each company represented by him.
2. A city ordinance requiring insurance agents who represent companies not located within the city, and those only, to pay a tax and procure a license before transacting business, is void.

(September 30, 1900.)

APPEAL by complainants from a judgment of the Circuit Court for Kenton County sustaining a demurrer to the petition in an action brought to enjoin the collection of a fine imposed for an alleged violation of a city ordinance on the ground that the ordinance was invalid. *Reversed.*

The facts sufficiently appear in the opinion. *Meers. Tisdale & Gray*, for appellants: In *Lexington v. McQuillan*, 9 Dana, 514, it was decided that while taxation may not be universal, it must be general and uniform.

By-laws or ordinances of a city or town must be reasonable, and the common council cannot make a by-law which shall permit one person to carry on a dangerous business and prohibit another, who has an equal right, from pursuing the same business.

Hudson v. Thorne, 7 Paige, 261, 4 N.Y. Ch. L. ed. 148; *Fecheimer v. Louisville*, 84 Ky. 306; *Ex parte Frank*, 53 Cal. 606, 28 Am. Rep. 643;

NOTE.—Ordinances of municipal corporations must be authorized by law; the authority must be exercised by reason, and their reasonableness is a subject of judicial inquiry. See *note to People v. Armstrong* (Mich.) 2 L. R. A. 721.

Power to license and regulate business pursuits; unjust discriminations unlawful. See *note to Bills v. Goshen* (Ind.) 3 L. R. A. 261.
9 L. R. A.

Nashville v. Althrop, 5 Coldw. 554; *Daniel v. Richmond*, 78 Ky. 548.

Mr. W. A. Byrne for appellee.

Holt, Ch. J., delivered the opinion of the court:

This appeal questions the validity of an ordinance of the City of Covington entitled "An ordinance to impose a license tax upon certain insurance agents and solicitors," and which provides: "Be it ordained by the City Council of Covington that no person, unless he shall have procured a license therefor, shall transact any business as agent or solicit for any insurance company not located within the City of Covington, Kentucky; and such agent or solicitor shall procure a separate license for each insurance company for which he shall transact said business: provided, that any resident of said City who shall have procured a license to transact business for any such company may employ as many solicitors as he may desire to solicit and procure business for him for said company; and provided, further, that, when said business shall be conducted by several persons in partnership, a license to such persons in the name of the firm shall authorize each member of the firm to transact the business of the partnership, but the name of each member of the firm shall be specified in the license." Other sections provide as to the license fees, and for the prosecution and punishment, by way of fine, of violators of the ordinance. The only provision in the city charter authorizing any ordinance upon the subject is: "The council shall have the power to license and tax all exchange, loan and brokers' offices, agencies of insurance offices, . . . in said City," etc.

The appellants, A. G. Simrall & Co., residents of the City of Covington, are insurance agents. They represent in said City the Fire Insurance Association of Philadelphia, Pa.; and, judgment for a fine having been rendered against them as individuals for failing to take out license as the agents of the association, they are defending against it, upon the ground that the ordinance is invalid. The lower court held otherwise, and they have appealed.

It is contended, first, that the city charter does not authorize the levy of a license tax against an insurance agent for each company that he may represent, but only against his business or agency, and that, when he pays the one license fee, he may represent as many companies as see fit to employ him. In our opinion, however, a fair and reasonable construction of the language, "to license and tax all . . . agencies of insurance offices," gives the power to compel each agent to pay the tax as to each company represented by him. It is quite comprehensive in terms; and, unless this construction be the true one, an agent representing a dozen companies only pays as much as he who is the agent of but one, and this, too, although it is probable the former does twelve times as much business as the latter, or at least much more. It cannot well be presumed that the Legislature intended such inequality, and a construction is not required which is likely to work out such a result.

It is next urged that the charter provision does not authorize the passage of such an or-

dinance, and that it is invalid, because it is unequal, unjust and partial. Counsel for the City refer to decisions of this court holding that the Legislature may impose upon a foreign corporation, proposing to do business in this State, terms and conditions as to the exercise of its powers. *Com. v. Milton*, 12 B. Mon. 212; *Phœnix Ins. Co. v. Com.* 5 Bush, 68.

Undoubtedly this is the declared rule in this State. The extent of this power need not be considered. Certainly it reaches so far that the Legislature may provide for the safety of our people in dealing with the corporation. The rule is founded upon the fact that the exercise of the corporate powers here rests alone upon comity. If the Act of incorporation had of itself extraterritorial force, confusion and conflict between the two powers would constantly ensue. We fail to see, however, that this rule has any bearing upon this case. The ordinance affects the individual. He is required to pay the tax and obtain the license. Its penalty for a failure is upon him. Indirectly the interest of the insurance companies may be involved; but the ordinance relates directly to and deals with the individual person, and in this light the question is to be considered. The person who represents a Covington insurance company requires no license, while the representative or solicitor of any other company must obtain a license as to each company he represents. If the representative be a resident of the city, he may employ as many as he may desire to solicit for his company. Thus the ordinance discriminates in two ways. As to the last, however, the appellants are not in an attitude to complain, because they are residents of the City. They are taxed, however, for the privilege of earning a livelihood, while their neighbor, who earns his in the same way, goes untaxed, the only difference being that one works for a city company, while the other represents one located either in or out of the State, but outside of the city.

A doubt as to the constitutionality of a legislative Act must be resolved in its favor; but, while the right to license may be delegated to municipal governments by the Legislature, yet this authority is to be strictly construed and closely pursued. *Sedg. Stat. and Const. L.* 466.

Municipal corporations may exercise: *first*, those powers which are expressly granted; and, *second*, those necessarily implied, or incident to those expressly granted, and which are indispensable to a proper execution of the objects of the corporation. Their authority is not to be so strictly construed as to defeat the legislative intention; but, if there be a fair and reasonable doubt of the existence of the power, it should be resolved by a court against the municipality, and especially so if the exercise of it will encroach upon the rights of the individual or the public. The scope of the delegated sovereignty is not to be enlarged by a liberal construction. These principles are elementary, and the citation of authority is unnecessary. They are necessary to the proper maintenance of legislative authority in this direction. Without them, it would dwindle away, resulting in mischief, and behind them, therefore, lies the best of reasons. The Legislature has not, however, attempted by the charter provision of the

appellee to authorize it to pass an unequal and partial ordinance. If it had done so, the legislative power might well be questioned and denied. But the council of the city, under the general power "to license and tax . . . agencies of insurance offices," has enacted what is unmistakably such an ordinance. Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right. It is a rule, therefore, that, where the by-law of a municipality created under a general grant of power or by virtue of its incidental authority is unfair and partial in its operation, it will be declared void. It will not be upheld if it be unreasonable and oppressive. It must not contravene common right or the general law of the State, or make unwarranted or special discriminations.

Cooley, *Const. Lim.*, 200, 202, says: "Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void. . . . So a by-law, to be reasonable, should be in harmony with the general principles of the common law."

Judge Dillon says: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discriminations, or unjust or oppressive interference, in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature, and impartial in their operation." 1 Dillon, *Mun. Corp.* § 522.

These views are enforced in the cases of *Mobile v. Yuille*, 8 Ala. 187; *Robinson v. Franklin*, 1 Humph. 156; *Anderson v. Wellington*, 40 Kan. 178, and many other cases that might be cited.

All recognize the rule, which is fundamental, that the by-laws of a municipality, whether they purport to regulate callings or otherwise, must, as indeed must every law, preserve equality of right. Those exercising the same privilege must be treated alike. The door must be closed to none by discrimination if we would avoid monopoly and wrong. This principle is as necessary to sound legislation as the circulation of the blood is to the human system, or the flow of tidewater to the ocean. It has produced a line of decisions which are universally regarded as sound by the courts of the country.

Thus, in *Ex parte Frank*, 52 Cal. 606, an ordinance of a city, passed under a general charter power, exacting a license for selling goods, and fixing one rate for selling goods at the time within the city, and another, and much larger, for those without, was held invalid, as unjust, partial and oppressive. In *Nashville v. Althrop*, 5 Coldw. 554, an ordinance discriminating between merchants and other dealers residing within and those without the limits of the City, and prescribing a special rate of taxation for the latter, was declared to be beyond the limit of constitutional legislation. In this State we have no constitutional provision as to taxation *eo nomine*; but it is the settled constitutional rule, declared by oft-repeated decisions of this court, that every tax must be certain, univer-

sal, and, so far as practicable, equal and uniform. Burdens cannot constitutionally be imposed upon particular individuals, while others of the same class or locality, who have rendered no public service, are exempt.

In *Daniel v. Richmond*, 78 Ky. 542, a provision of a town charter authorized a tax of 5 per cent upon all sales made by auctioneers within the limits of the town, except such as might be made by citizens of the town or county who were bona fide owners of the property sold. The board of trustees adopted an ordinance fixing the license of auctioneers at \$5 for residents of Madison County, and \$10 for such as were not residents of that county; and this court held that the charter provision was void, because it, in violation of the Federal Constitution, discriminated against the citizens of other States. The parties whose rights were involved in this case were nonresidents of the State, but the court, in the opinion, declared *arguendo* against the ordinance also, because it discriminated between residents and

nonresidents of the county. The same doctrine has been more recently announced by this court in the case, *Fecheimer v. Louisville*, 84 Ky. 806.

The ordinance now in question not only discriminates between residents of the City of Covington and those residing outside of it, whether within or without the State, but it places a burden upon some within the City, while others of its residents engaged in a like business are exempt. It is therefore unreasonable partial legislation. To be reasonable, a municipal by-law should be equal in its operation. *Tugman v. Chicago*, 78 Ill. 405; *Barling v. West*, 29 Wis. 307.

This one, being clearly an infringement of individual right, partial and unreasonable in its character, cannot be sustained.

The judgment is therefore reversed, with directions to overrule the demurrer to the petition, and for further proceedings in conformity with this opinion.

INDIANA SUPREME COURT.

Benjamin F. MORGAN, *Appt.*,

Thomas J. EAST.

(....Ind.....)

A tender of money in satisfaction of the amount of his bid by one who, acting as clerk at a public sale, bid off property sold thereat will not vest the title to the property in him so as to enable him to recover it from the possession of the seller where the terms of sale provided for payment in interest-bearing notes, with surety.

(November 14, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Greene County in favor of plaintiff in an action brought to recover possession of certain property to which plaintiff claimed title through a purchase at a public sale. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. W. L. Rude and Cavins & Cavins* for appellant.

Mr. J. S. Bays for appellee.

Elliott, J., delivered the opinion of the court:

The appellee obtained a verdict and judgment awarding him possession of the personal property in controversy. His claim is founded upon a purchase made by him at a public sale, at which the property of the appellant and his wife was offered for sale pursuant to a notice containing this provision: "Terms of sale.

For all sums over \$5 a credit of eight months will be given, the purchaser executing a note, with approved surety, waiving valuation or appraisal laws and bearing six per cent interest."

The appellee acted as clerk at the sale. He purchased sundry articles of property, including that involved in this action, the aggregate value of which was more than \$75. The sale took place on Saturday, the 16th day of April, 1887, and the appellee agreed to execute a note on the following Monday. On that day the appellant loaned the appellee some money and a note was prepared for the amount of the loan and the value of the property bid off at the sale, but this transaction seems not to have been fully consummated. The appellee, in speaking of the cattle in controversy, said, in his testimony, that he bid them off at the sale for \$54.25; that he made a tender in money of the amount of his bid on the 4th day of May, and that he made no tender of a note on that day, but that he did tender a note for \$25, and money to the amount of \$55.25 on the Saturday after the sale. He also testified that he sold the cattle on the 8d day of May, and that Morgan told him at the time of refusing the tender that he considered the contract at an end. It further appears from the evidence that payment for other property than the cattle was accepted by the appellant. There is, in addition to the evidence referred to, uncontradicted evidence that the appellee refused to give a note, with surety, for the amount of his bid.

The question of law which arises on the facts

NOTE.—Public sale; rights of vendee.

Where goods have been sold at auction the vendee may recover, for a refusal to deliver, the value of the goods, and recovery is not limited to the purchase price. *Gray v. Walton*, 9 Cent. Rep. 884, 107 N. Y. 264.
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Where a purchaser at an auction sale buys a crib of corn, the tender of a part of the full price thereof is insufficient to vest the title in him. *Jennings v. West*, 40 Kan. 372.

On a sale of corn at auction for cash the purchaser is not entitled to the possession thereof till the price is paid or tendered. *Ibid.*

is whether the appellee acquired full title to the personal property of which he seeks a recovery; for if he did not acquire such a title this action must fail. He could not, it is evident, acquire a complete title unless the contract of sale was so far executed on his part as to transfer ownership from the appellant to him.

The terms stated in the notice of sale form part of the contract. One who purchases at a public sale made pursuant to a published notice presumptively purchases upon the terms proposed. This rule applies to all who purchase at such a sale; but it applies with peculiar force to one who takes an active part in conducting the sale, as the appellee did in this instance. He was bound to know that compliance with the terms stated in the notice upon which the sale was made was essential to completely vest title in him. The terms stated, indeed, bind both the seller and the buyer. *Layton v. Hennen*, 8 La. Ann. 1; *Davidson v. De Lallande*, 13 La. Ann. 826; *Jones v. Edney*, 8 Campb. 285; *Kenworthy v. Schofield*, 2 Barn. & C. 945.

The appellee is therefore a purchaser under the contract of sale, of which contract the terms set forth in the notice form an essential part; and unless he has complied with these terms title did not vest in him so as to entitle him to maintain replevin, for it is elementary law that title does not completely pass until the terms of the contract of sale have been complied with by the purchaser. *Bartleson v. Bower*, 81 Ind. 512; *Dixon v. Duke*, 85 Ind. 434; *Ourms v. Rauh*, 100 Ind. 247; *Sagrist v. Orabires*, 181 U. S. 287 [38 L. ed. 125].

The contract between the parties required the appellee to execute an interest-bearing note, with surety, payable eight months after date; and he could comply with his contract in no other manner than by executing such a note as his contract requires. He could not elect to pay in money, for no right of election was conferred upon him; it was his duty to do what he agreed to do when he purchased the property. This rule prevails even in cases where the property has been delivered to the buyer. *Harris v. Smith*, 3 Serg. & R. 20; *Russell v. Minor*, 23 Wend. 659; *Henderson v. Lauck*, 31 Pa. 359; *Osborn v. Gantz*, 60 N. Y. 540; *Tyler v. Freeman*, 3 Cush. 261; *Whitney v. Eaton*, 15 Gray, 225; *Seed v. Lord*, 66 Mo. 580.

In this instance, however, the seller retained possession and the buyer attempts to deprive him of it without complying with the contract of sale, for he neither executed, nor offered to execute, the note for which the contract provided. It is doubtful whether replevin will lie in a case where there is an unexecuted contract of sale, although there is a tender of performance in strict compliance with the contract; because the general rule is that replevin will not lie to enforce an unexecuted contract, as the parties are left to an action for the breach of the agreement. *Mead v. Johnson*, 54 Conn. 817; *Haverstick v. Fergus*, 71 Ill. 105; *Lou v. Freeman*, 12 Ill. 467; *Beckwith v. Philleo*, 15 Wis. 223; *Boutwell v. Warren*, 62 Mo. 850; *Sneathen v. Grubbs*, 88 Pa. 147.

But as possession was retained by the appellant and there was no complete investiture of title, nor full performance or tender of performance on the part of the buyer, there was

no such transfer of ownership as entitles the appellee to maintain replevin.

The question before us is whether title so fully passed as to entitle the appellee to take the property from the possession of the seller; and hence we are not dealing with the question as to when the property became that of the buyer to such an extent as to impose upon him the risk of loss in case of its destruction. There is a distinction between a complete investiture of title such as will enable the buyer to maintain replevin and such an investiture as will put upon him the hazard of loss in the event of the destruction of the property; but it is neither necessary nor proper for us to mark or illustrate the distinction, for here the question is whether there was an absolute change of ownership. Whether there was such a change depends upon the effect of the tender, since there is no pretense that there was performance. If the tender of money is sufficient in a case where the contract provides for an interest-bearing note with surety, then there was a valid tender, and it might with some plausibility be argued that the appellee has a right to wrest the property from the possession of the appellant by legal process; but if the tender of money in lieu of the promised notes is not sufficient, then it is too clear for argument that there was no complete change of ownership; and if there was no such change possession cannot be secured by replevin. That the tender was not sufficient is clear. A seller may prefer interest-bearing promissory notes to money, for he may regard it as beneficial to him to secure such notes as an investment, and it is not for the buyer to make an election for the seller. But it is immaterial whether the provision for an interest-bearing note was beneficial or was not, for a party who sells property may stand upon his contract whether it is beneficial to him or not; and it is the duty of the buyer to perform his part of the contract as it is written. A tender required by a contract is insufficient unless it is such as corresponds with the provisions of the contract. Thus, a tender of money before a promissory note is due is of no effect. *Abshire v. Corey*, 113 Ind. 484, 13 West. Rep. 297.

So, where the contract provides for a payment by the delivery of a horse of the value of \$40, and of the remainder of the amount of the debt in promissory notes, a tender of a horse of less value than \$40 and notes for the balance due is unavailing. *Henly v. Streeter*, 5 Ind. 207.

So, too, where a party agreed to do work for another a tender of money is ineffective. *Brewer v. Thorp*, 3 Ind. 262.

Illustrations might easily be multiplied in support of the proposition that a tender is of no efficacy unless it is an offer to do what the contract requires; but it is unnecessary to cite many illustrative cases, for the proposition itself carried sufficient evidence of its soundness, and nothing more is required than its exhibition in a clear light.

It is true that the appellee stated in general terms that he was the owner of the cattle, but a general statement of such a character cannot avail against evidence of specific facts. *Teter v. Teter*, 101 Ind. 129-137, 51 Am. Rep. 472.

Such a statement is but the conclusion of a

witness wherein are blended matters of law and of fact, and it must give way to the substantive facts which specifically appear.

Judgment reversed.

BEDFORD BANK, *Appt.*,

v.

John W. ACOAM.

(.....Ind.....)

A bank which in good faith pays a note, made by one of its depositors, payable at its place of business and against which there is no defence, may set off the amount so paid against the balance due on the maker's account, although the payment was made without notice to, or express authority from, him.

(November 12, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Lawrence County in favor of plaintiff in an action brought to recover the balance alleged to be due from defendant to plaintiff on his deposit account.

Reversed.

The facts are fully stated in the opinion.

Messrs. Buskirk, Dunn & Dunn for appellant.

Mr. Joseph Giles for appellee.

Mitchell, J., delivered the opinion of the court:

On the 8th day of May, 1888, John W. Acoam had a sum of money on general deposit in the Bedford Bank in Bedford, Indiana. The Bank on that day received a note indorsed to it for collection, payable by the depositor to Stone Sons & Co. at the Bedford Bank. The Bank remitted the amount due on the note to its correspondent, and charged the account of its depositor with the sum remitted. This was done without notice to the depositor, or other authority, except such as the law implies from the fact that the note was negotiable and payable at the Bank, and was duly indorsed and sent to it for collection. The depositor repudiated the act of his banker and sued the Bank to recover an alleged balance, which it is conceded he is entitled to recover, unless the Bank has the right to set off the amount of the note above mentioned. There is no question but that the Bank acted in good faith, nor is there any dispute but that the plaintiff below owed the note to Stone Sons & Co.

It is settled that as soon as money is deposited in a bank, the depositor and the bank assume the relation of debtor and creditor. The money at once becomes the property of the Bank, and unless the money deposited was designed for a special purpose, or unless there exists an agreement to the contrary, the Bank has the right to apply a sufficient amount of the deposit to the payment of any debt due from the depositor to the Bank. *Lamb v. Morris*, 118 Ind. 179, 4 L. R. A. 111.

If the Bedford Bank had discounted the note of Stone Sons & Co. or taken an absolute assignment to itself of the paper, there would be no dispute about its right to retain the amount due out of the depositor's account. Is the right of the Bank to set off the sum admitted to be due on the note destroyed because the amount was paid, not by way of discount, but in consequence of the note having been made payable at the Bank? The authorities are not agreed upon the question, but upon principle and in consonance with the weight of authority, it seems to us the right of the Bank to set off the amount must be affirmed. In England it is the settled rule that if a note is made payable at a particular bank, the maker thereby authorizes the bank to pay it out of his funds on deposit, or by advancing the amount to his credit. Accordingly, in *Roberts v. Tucker*, 16 Q. B. 560, Parke, *B.*, said: "If this were the ordinary case of an acceptance, made payable at a banker's, there can be no question that making the acceptance payable there is tantamount to an order on the part of the acceptor to the banker to pay the bill to the person who is, according to the law-merchant, capable of giving a good discharge for the bill."

So, in *Keymer v. Laurie*, 18 L. J. Q. B. 218, certain bankers holding in their hands an amount of money on account of a depositor paid a bill of exchange which had been made payable at their banking house when it became due, and was presented to them by the holder. No orders to pay the acceptance had been given, nor had the authority contained on the face of the bill been countermanded. It was held that the bankers had authority to apply the funds of the depositor in their hands to the payment of the acceptance.

This rule, with some modifications, has been recognized almost universally by the courts in this country. Accordingly we find it declared in an early case—*State Bank v. Armstrong*, 4 Dev. L. 519—that there can be no question that if a bank pays off a note or acceptance of a depositor, payable at the bank, this constitutes a

NOTE.—Banking, set off, unliquidated cross-demands.

Making negotiable paper payable at a particular bank is equivalent to authorizing such bank to pay it out of moneys of the drawer. *Etas Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Ford v. Thornton*, 8 Leigh, 695; *Union Bank v. Griffin*, 4 N. Y. Leg. Obs. 244; *National Bank of Fishkill v. Speight*, 47 N. Y. 638; *Commercial Nat. Bank v. Henninger*, 105 Pa. 496.

It may set off a judgment rendered on the note in an action brought for the deposit. *Marsh v. Oneida Cent. Bank*, 34 Barb. 208.

In Illinois the making of a note payable at a bank does not authorize such bank to apply the maker's deposit to its payment without an express direction
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to that effect. *Wood v. Merchants S. L. & T. Co.* 41 Ill. 287; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479.

A bank cannot apply money due to a depositor to the payment of a note upon which he is a surety in the absence of a special agreement giving it the right to do so. See *Harrison v. Harrison*, 4 L. R. A. 111, and note, 118 Ind. 179.

A bank holding for collection a cashier's check of an insolvent bank may, when sued by the assignee of the latter, use such check as a set-off where no defense is shown against the check. *Farmers Deposit Nat. Bank v. Penn Bank*, 3 L. R. A. 273, 123 Pa. 286.

As to the rule in equity that cross-demands, though unliquidated by judgment, will be set off against each other, see note to *Ibid.*

proper debit in the account of the depositor and in *Manderille v. Union Bank*, 13 U. S. 9 Cranch, 9 [8 L. ed. 639], *Chief Justice Marshall* said: "By making a note negotiable in bank the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face."

Many well-considered cases go to the full extent of holding that a note payable at a banking house is in effect the equivalent of a check or draft on the bank in favor of the holder of the note, and that the bank is in default if it allows the paper to go to protest, in case the maker has money due him from the bank, on account, generally applicable to the payment of drafts or checks. *Commercial Nat. Bank v. Henninger*, 105 Pa. 496; *Indig v. National City Bank*, 80 N. Y. 100; *Atna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82. See also *Randolph, Com. Paper*, § 1441; *Daniel, Neg. Inst.* § 8260; 2 *Morse, Banks and Banking*, § 557; *Bolles, Banks and Depositors*, § 408.

A contrary view has, however, been vigorously maintained. *Grisom v. Commercial Nat. Bank*, 87 Tenn. 856, 8 L. R. A. 273; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479.

While we are not inclined to the view that a promissory note negotiable and payable at a bank in this State is in all respects the equivalent of a check drawn by the maker against a fund on deposit in the bank, so as to require the banker to pay the note, on presentation, out of

funds applicable to that purpose, we can conceive of no valid reason why a note or bill thus drawn shall not be held to authorize the banker to pay and thereby become subrogated to all the rights of the holder to the same extent as if it had purchased the paper after maturity. One who has drawn a note or bill payable at a bank must have done so for some purpose, and he cannot be heard to say, after his banker has paid a just debt for which he had given a note, to which the maker claims no defense, that the payment was wholly voluntary and unauthorized. In such a case the banker who has paid the note is entitled to hold it as the equitable owner or purchaser, and is entitled to set it off in a suit to recover a balance due the depositor on a general account.

The decision in *Scott v. Shirk*, 60 Ind. 160, upon the facts there involved, is not necessarily opposed to the conclusion above.

When a note payable at a bank is signed by three persons, one of whom has an account at the bank, it may well be said that the bank has no power to transfer money deposited by one of the makers to the payment of the note without the depositor's consent. *Lamb v. Morris*, *supra*.

The court erred in its conclusions of law upon the facts found.

Judgment reversed, with costs, with directions to the court below to restate its conclusions of law in consonance with this opinion.

WISCONSIN SUPREME COURT.

CRAWFORD *et al.*, *Respts.*,

v.

WITHERBEE *et al.*, *Appts.*

(....Wis.....)

1. A mine owner who undertakes to deliver a portion of the ore taken from the mine to certain persons in consideration of their constructing a level to drain the mine in such a manner that the ore can be raised without trouble or inconvenience from water is not discharged from his obligation by the fact that the level is permitted to become and remain out of repair, if he is not at all prejudiced thereby, the level remaining sufficient for all practical purposes.
2. Objecting to the admission in evidence of a will for the reason that it is immaterial and incompetent for any purpose is not sufficient to raise the question whether or not it is sufficiently authenticated or proved to be admissible.
3. The giving of notice by mine owners that a level built by a third person for the purpose of draining the mine must be repaired in compliance with the agreement under which it was constructed, and that the rents payable for its use will be withheld until it is restored to its original usefulness, is an admission that the persons to whom it is given are the successors in title of such third person which will dispense with proof of such succession.
4. A covenant by a land owner to render to another one eighth of the mineral raised upon his land in consideration

of the latter's covenant to construct a level for the purpose of draining the land and thus making the ore therein available, which is supplemented by a grant to the latter of such one eighth of the ore, runs with the land.

(September 23, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for La Fayette County in favor of plaintiffs in an action brought to recover from defendants certain money which they had obtained by the sale of mineral ore which was alleged to belong to plaintiffs under a certain covenant. *Affirmed*.

The facts fully appear in the opinion.

Messrs. Orton & Osborn for appellants.

Messrs. Carter & Cleary for respondents.

Orton, J., delivered the opinion of the court:

The facts of this case are briefly and substantially as follows: About the 10th day of September, 1882, Jefferson Crawford (now deceased), John L. Crawford, Gabriel Mills (deceased) and Henry Magor, as parties of the first part, entered into a contract in writing and under seal with one Hiram Witherbee (now deceased), who was the owner of the lands therein described, and situated in La Fayette County, in this State, by which the said party of the first part agreed to excavate or run what is usually called a "level," commencing at the bottom of the tail race of "Crawford's Big Wheel," in a northerly direction up what is known as "Hard Scrabble Branch," or

in such direction as they may deem best calculated to drain the said lands of said Witherbee, to be excavated as nearly level in its course as the purpose for which it is intended will permit, and to be commenced within a reasonable time after that date, and prosecuted with reasonable facility. The level was to be run a considerable part of the way through the lands of said Witherbee, described in the agreement, which were supposed to be mineral lands, and to contain lead, and which could not be mined, on account of water, without being drained by said level, and which lay south of the north end of said level, and east and west of it. In consideration of the excavation of said level, the said Witherbee agreed to render to the party of the first part one clear eighth-part of all lead mineral or lead ore raised upon said lands which lie east and west of any excavated portion of said level, and south of an east and west line across the extreme northerly end of the same, as fast as said level shall be prosecuted, free from all expense of discovering or separating it from the earth, and to be paid in kind on the land where raised. It is expressly stipulated in said agreement that it shall bind the heirs, executors, administrators and assigns of both parties, and that the said covenant of said Witherbee shall run with said lands. In the said agreement, and for the purpose of securing to the party of the first part one eighth of all mineral raised on said lands, the said Witherbee thereby grants, bargains and sells to the party of the first part, and to their heirs and assigns forever, one undivided eighth-part of all lead mineral in any and all of said lands, to have and to hold the same, together with all and singular the rights accruing under the agreement to the said party of the first part, and to their heirs and assigns forever. It was found by the court that Crawford, Mills & Co. (said party of the first part), within a reasonable time after the execution of said agreement, began said level, and that it was excavated and run by them with reasonable energy and diligence to a point where an east-and-west line drawn across its northern extremity will pass northward of the places where the ores in controversy were mined, and that the same was so excavated and built many years before the said ores were mined; that the title of said Hiram Witherbee (now deceased) to said lands has become vested in the defendants by and through his devise thereof in his last will and testament, and that they are now in possession of them, and claim title thereto by virtue of said will and conveyances thereunder, and that the plaintiffs are the successors in title of the said Crawford, Mills & Co., and the owners of all the interest in and to said lands of said Hiram Witherbee, conveyed by him in and by said agreement, and are also the owners of said level; that from the date of said agreement to February 1, 1885, the said Hiram Witherbee in his lifetime, and the defendants since his decease, paid to said Crawford, Mills & Co., or to said plaintiffs, all rents which accrued to them under and by virtue of said agreement, but since that time the defendants have paid none of the same; that since that time the defendants have received and retained as the proceeds of the sale by them of one eighth of the ores raised and mined on said lands, and lying

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south of an east and west line drawn across the northern end of said level, the sum of \$670.21, no part of which has been paid to or received by the plaintiffs; that all of said ores were mined and raised from said lands without hindrance, impediment, increase of cost or trouble by reason of water therein, and most, if not all, of them, were so mined and raised from below the water-level therein before the construction of said level, and above the present water-level in said lands. The court further found that the level was somewhat out of repair, but that there is a continuous underflow through each of its shafts, and that at least two thirds as much water pours out of the mouth of said level as it ever discharged since its construction, and that the said Hiram Witherbee in his lifetime, as late as August 2, 1866, by a certain supplemental agreement, approved and applauded the manner in which said level had been built, down to that time, and the energy with which the work of constructing it had been pushed. These findings appear to have been justified and supported by the evidence.

1. The learned counsel of the appellants contend that the defendants are discharged from the obligation to render such one eighth of the mineral to the plaintiffs, because the level or drain was so badly out of repair when it was raised or mined. It does not appear that the defendants were at all injured or prejudiced by any want of repair of the level, if there was any, or that they were at all troubled by water in their mines. The agreement for the construction of the level is silent as to the depth it should be excavated. It only requires the level to be so constructed as to drain or uncover the lead ore so as to permit it to be raised or mined, without any trouble or inconvenience from water. Filled up to some extent, as it may be, the level seems to be yet deep enough for all practical purposes, and the defendants have no cause of complaint. It follows, therefore, that the question as to whether the plaintiffs are bound to keep the level in repair, or to what extent they are so bound, is not raised.

2. The point made that the will of Jefferson Crawford was not sufficiently authenticated or proved to be admitted in evidence can hardly prevail: (1) because the objection was not specific that it was not properly authenticated. The objection was that the will was immaterial and incompetent for any purpose; (2) because the defendants introduced in evidence a notice signed by one of them, dated December 8, 1884, by which the plaintiffs were notified to repair said level in compliance with said original agreement, and that they should withhold the rents until it should be restored to its original usefulness. This notice is an admission that the plaintiffs are the proper parties as successors of Crawford, Mills & Co. in the title, and bound by the agreement. This cured any error that might have been committed in improperly receiving the will in evidence.

The main and important question in the case is whether the covenant sued upon "runs with the land." On that question, the learned counsel on both sides have submitted unusually able arguments and briefs. We may not follow the learned counsel through their able reasoning and well-selected authorities, but it will not be from any want of appreciation for their

professional labor. It appears to us that the covenant to render one eighth of the mineral to the covenantees, read in connection with the dependent covenant, to construct the level for the purpose of making the lead ore in the land available, and the grant of one eighth of such ore in the land, comes within every essential element of one that runs with the land, and binds the present parties. (1) There is an estate granted. (2) The performance or non-performance of the covenant affects the nature or value of the property conveyed. (3) There is a privity of estate between the contracting parties. *Platt, Cov. 461.*

One eighth of the mineral is granted or conveyed. While the mineral is in the earth, undiscovered and unmined, it has but little or no value. The covenant requiring the grantor to raise or mine, and deliver it to the grantees, gives it value. There is not only privity of estate, but the parties are tenants in common of all the mineral in the land. The covenantees own one undivided eighth of it, and the covenantor reserved and owns seven eighths of it, and covenants to raise, separate and deliver the one eighth. The possession of the undivided mineral in the land, by the covenant, remains in the covenantor, until it is raised, divided and delivered. The grant without the covenant would make each party liable to contribute a proportionate share of the labor and expense of raising or mining it. *Clark v. Plummer, 81 Wis. 443.*

The covenant imposes this burden wholly upon the grantor, or the owner of the seven-eighths share. In that it also affects the quality and nature of the estate granted. The grant of the one eighth of the mineral in the land is a grant of an interest in the land, and a part of the realty. *Golden v. Glock, 57 Wis. 118; Daniels v. Bailey, 43 Wis. 566; Young v. Lego, 86 Wis. 894.*

Besides this, the grant with the covenant creates a charge upon the land to secure the mining and delivery of the one eighth in the nature of a mortgage. If the grant and covenant together do not sufficiently show the real nature of the covenant, the dependent covenant of Crawford, Mills & Co. to construct the level or drain through and above the lands containing the mineral, for the sole purpose of making it possible to mine the lead ore in it, as the consideration of the covenant to raise and deliver the one eighth of it, will very clearly and conclusively show the latter covenant to be one that runs with the land. By that covenant, they are to construct, at vast expense, such a level as will remove the water from the lead deposits so that they may be mined with facility, and thereby give to the mineral in the land almost, if not quite, its entire value, and make it possible to deliver the one eighth, and to secure the seven eighths of it to the covenantor. Both parties are interested proportionably in and dependent upon that great and common improvement for the value of their respective shares of the mineral. It is the common source of their beneficial interest in the land. As long as the level drains the mineral deposits, each party may make available his interest in the land; and, when it fails to so drain the lands, both parties will lose that interest. *Sup. 9 L. R. A.*

pose that agreement had provided that each party should bear their proportion of the expense of constructing the level, and keeping it in repair, so that their respective shares of mineral could be raised, would not such a covenant run with the estate granted to Crawford, Mills & Co.? If so, then it follows that the covenant of Hiram Witherbee, to raise and deliver to them one eighth of the mineral granted, is such a covenant, for they would be mutual and dependent covenants in such a case, and if one runs with the land the other would also.

In *Woolscroft v. Norton, 15 Wis. 198*, the owner of the dam and water-power deeded to another certain square inches of water to be furnished from the dam, and the grantee covenanted to pay his ratable share of the expenses of keeping in repair the dam and race-way in proportion to the number of square inches of water by him owned. It was held that such covenant ran with the estate granted, and was binding upon subsequent owners. How much more the covenant under consideration. It is not only incident to the property conveyed, and affects its value, but it lies directly, or the estate granted is inseparable from it, as its subject, and rests upon the same consideration. It is precisely the same as it would be if it was a covenant in the deed granting the one eighth, imposing upon the grantor the duty or burden to raise and deliver the mineral granted. That case certainly rules this in principle, and is conclusive of the question. I regard this case as one of the strongest and most unquestionable to be found in the books of a covenant running with the land. It is like a covenant in a deed to let the grantee into possession of the premises at once, or at a future time. It is necessary to make the grant available. The covenant in *Spencer's Case, 1 Smith, Lead. Cas. 145*, was that the lessee should build a wall on the demised premises. The sixth point resolved in that case was, if the lessee covenant to repair the houses during the term, it shall run with the land. The reasons given were that, if it was not so, great injustice would be done to the lessor, and that reason requires that they who shall take benefit of a covenant should be bound by it. These reasons apply with great force here. The covenantees would lose all benefit from the construction of the level, and the grantor and covenantor would have all the advantages of the covenant that secured the construction of it, and it would be the greatest injustice to the covenantees. The principle seems to be, in these cases, that something is to be done on the land or estate granted, which is the case here. The case is put of a covenant to cultivate the lands demised in a particular manner. *Cockson v. Cock, Cro. Jac. 125*, and many other cases in point with this case. In *Norman v. Wells, 17 Wend. 146*, the covenant was by the lessor that he would not let or establish any other mill on the same stream for sawing mahogany. It affected the value of the demised premises, and, in the case put by *Judge Cowen*, the covenant of the lessor was to repair the demised premises. *Lattimer v. Livermore, 72 N. Y. 174; Astor v. Miller, 2 Paige, 68, 2 N. Y. Ch. L. ed. 816; Van Rensselaer v. Dennison, 35 N. Y. 398; Thomas v.*

Von Kapf, 6 Gill & J. 372; *Hurst v. Rodney*, 1 Wash. C. C. 875; *Worthington v. Hewes*, 19 Ohio St. 66.

These and other cases cited in the brief of the respondent's counsel establish the same principles of this case. But none of them present so many reasons for the rule as this case. It would be useless to refer to more authorities upon a question on which so much learning and research have been expended. Every case must be brought to the test of the few general principles above stated, and the question can be more satisfactorily determined in that way than by a multiplicity of adjudicated cases, more or less remote in their facts.

The authorities cited by the learned counsel of the appellant appear to be quite inapplicable. The intention of the parties, if it can be ascertained from the agreement, should have weight in cases of doubt, and in this agreement the parties have repeated, in every form, clauses to bind their heirs and assigns, and specifically stipulated that this covenant should "run with the land." But this is no doubtful case. We think the learned circuit court decided the question correctly, and held the present parties liable on the covenant to raise and render the one eighth of the ore granted, and especially to pay for that share of the ore which they have already raised or mined, and converted to their own use. We can find no error in the case.

The judgment of the Circuit Court is affirmed.

Mary SHEEHY, *Reapt.*,

v.

John BLAKE *et al.*, *Appts.*

(.....Wis.....)

1. Where a complaint, which seeks to hold certain persons individually liable for the debts of a voluntary unincorporated association, alleges that at the time of the incurring of such debt and for many years before defendants constituted such association, an admission in the answer that defendants were previous to that time members of, and met at, a certain church and conducted religious exercises according to the rites and doctrines of said church, is equivalent to an admission that defendants were members of the association as charged, and will render proof of such fact unnecessary.

2. Where the trustees of an unincorporated religious society regularly elected for the purpose of managing its financial affairs use money advanced by the pastor, who is also a member of the board of finance, in the erection of a church edifice, and also allow his salary to remain in arrears, which transactions are shown on books of the society regularly kept by its proper officer, and the total amount of indebtedness to the pastor is publicly stated from time to time before the assembled congregation, and finally a committee is appointed to settle the account, which is done and the amount found due stated to the congregation and credited to the pastor on the society's books with no objection on the part of the members, who acquiesce therein for several years, they will be held, in a suit to recover the amount from them individually, to have authorized the settlement

and to have afterwards ratified it so as to be bound thereby.

(September 23, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Fond du Lac County in favor of plaintiff in an action brought to recover the amount alleged to be due on an account stated. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Pinney & Sanborn, for appellants:

If a particular defendant authorized the statement of account, settlement and contract in question, or afterwards ratified the action of the trustees in respect thereto, then he is liable; otherwise not.

Sheehy v. Blake, 73 Wis. 411.

Not only is the question of the liability of members of voluntary associations a question of agency, but such agency is for the plaintiff to establish, and does not arise by inference from the mere fact of membership in the association.

Niblack, Mut. Ben. Societies, §§ 100-106; *Collyer*, Partn. Wood's ed. (1878) § 29; *Asa v. Guis*, 97 Pa. 493, 500; *Fleming v. Hector*, 3 Mees. & W. 173, 188; *Richmond v. Judy*, 6 Mo. App. 465; *Deoos v. Gray*, 23 Ohio St. 169; *Ray v. Powers*, 184 Mass. 22, 25; *Kuyper v. South Parish*, 12 Mass. 185.

In order to amount to a ratification there must have been a meeting of the society, at which the question was presented, and at which an understanding of the matter was had. Here the congregation repudiated the settlement and contract at the very first meeting held after they were made.

Dodge v. McDonell, 14 Wis. 553, 558; *Ladd v. Hildebrandt*, 27 Wis. 185; *Hoffman S. C. Co. v. Cumberland O. & I. Co.* 16 Md. 456; *Gilman, C. etc. R. Co. v. Kelly*, 77 Ill. 426; *Roberts' App.* 92 Pa. 407; *Central City Sav. Bank v. Walker*, 66 N. Y. 429.

There having been no ratification, even if there were a previous authority to the trustees to act in such an unusual matter as settling a disputed claim, and executing a contract under seal, yet their action was utterly informal and void. A voluntary association or corporation has the right to joint action of its trustees or directors. All must either be present or notified of the meeting.

Dennison v. Austin, 15 Wis. 834, 840; *Sun Prairie M. E. Church v. Sherman*, 86 Wis. 404; *United Brethren Church v. Vandusen*, 87 Wis. 64; *Leonard v. Lent*, 43 Wis. 83; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180; *Johnston v. Bingham*, 9 Watts & S. 56; *Kuyper v. South Parish*, 12 Mass. 185; *Boone, Corp.* § 281; *Morawetz, Priv. Corp.* § 532.

Messrs. Gerpheide & McKenna also for appellants.

Messrs. C. E. Shepard and J. H. McCrary for respondent.

Orton, J., delivered the opinion of the court:

The testimony tends to show the following facts: About the year 1860, the society or association of the St. Patrick's Church of Fond du Lac, composed of the congregation of said church, was formed without any incorporation,

as is customary with that church. Its financial and secular affairs were managed by a board of trustees elected from time to time by the congregation, together with the officiating priest, and the secretary and treasurer also so elected from time to time. In about the year 1863, the Rev. James Colton became the priest of said church, and so remained until his health failed, in 1881, when the present priest of said church, the Rev. J. J. Keenan, was appointed to take his place. When the Rev. Mr. Colton took charge of said congregation he found it without any good place of worship, and very poor, and badly in debt, and during the next few years he assisted it in building a large brick church, and advanced for them, from time to time, large sums of money, and allowed much of his salary to remain in arrears. Regular books of the congregation were opened, and kept by the secretary of the society, showing all these transactions and the accounts between the society and said Colton, from that year until March 10, 1883, and all the payments thereon. From time to time said books were balanced, and the exact amount of the indebtedness of the society to said Rev. Mr. Colton clearly shown. At each time of said rests or settlements, the state of said accounts was publicly stated or published, and made known to the congregation assembled in said church, composed of all the then members thereof. It appears that the said Rev. Mr. Colton loaned the society the sum of \$2,000 to aid them in building said new church, in 1865 or 1866, and this loan was placed upon the books as the "Hamilton" indebtedness to conceal the name of said Rev. Mr. Colton, for some reason of his own. This, together with his back salary, and sums of money otherwise advanced by him, remained on interest, by the understanding of the congregation. These balances so found and published, and on the books, or some of them, are as follows: The said Hamilton debt of \$2,000, and other indebtedness of the society to Rev. Mr. Colton of \$1,866.02, in 1870. In 1871, the other indebtedness was \$1,080.81. In 1875, it was \$1,177.02. In 1876, \$715.61. In 1877, the Hamilton debt, with accrued interest, was \$2,291.67, and the other indebtedness, \$906.67. In 1878, the Hamilton debt and interest were \$2,156.66, and the other indebtedness \$865.89. In 1880, the other indebtedness was \$1,286.64. And finally, March 1, 1881, deducting all payments, the total amount of the indebtedness of the society to Rev. Mr. Colton was stated and published at \$3,220.24. The interest is added to the debt, and all the payments are duly credited on the books. The last statements since 1881 appear upon the new books, with the Rev. J. J. Keenan as pastor and treasurer. These statements, since 1871, are signed by the secretary and treasurer as correct. Then on March 10, 1883, a final settlement of these accounts was made by Mr. Duffy, a member of the congregation, as attorney of the Rev. Mr. Colton, by a Mr. Gough, who had been secretary of the society from 1863 to 1870, and A. A. Kelly, an attorney-at-law, and one of the trustees of the society, acting for the congregation, and by the officiating priest, the Rev. J. J. Keenan. On an account stated, the congregation was found to be indebted to the Rev. Mr. Colton in the sum and

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balance of \$3,220.20, and the terms of payment fixed. Since then there has been paid on said indebtedness as so found the sum of \$450. On April 19, 1884, the said Rev. Mr. Colton, being on his death-bed, assigned his said account and settlement to his sister, the plaintiff in this action, and soon after died. The complaint charges individual members of said society with this indebtedness shown upon the books, and so balanced from time to time, and determined and fixed by said settlement, alleging that they were members of said society during such time, and assented to and authorized said indebtedness, and became individually liable for the same. The learned circuit court construed the answer as having admitted the membership of the defendants, except certain ones named therein; but this construction of the answer is contested by the learned counsel of the appellants. We are unable to put any other construction upon some specific admissions of the answer than an admission of their membership. The complaint alleges "that on March 10, 1883, and for many years theretofore, the defendants were, and they still are, a voluntary unincorporated association of persons," etc. The answer is "that said defendants (excepting certain ones named) admit that previous to the year 1883, they were members of and met at a certain church in the City of Fond du Lac, known as 'St. Patrick's Church,' and at such church conducted religious and devotional exercises according to the rites and doctrines of said church, and that the membership of said church was constantly changing by the admission of new members, and by the death and removal of others." The answer then puts in issue the account and settlement, and denies their having empowered anyone to make such settlement, and their assent to such indebtedness. The above admission is as broad as language could make it. For this reason no evidence was adduced by the plaintiff to prove that the defendants named were members of said society at and previous to the year 1883. We think that the learned circuit court was clearly correct in its construction of the answer as an admission of the defendants' membership. The persons so excepted in the answer were omitted in the verdict and judgment.

The only important question on the merits of this case is whether these defendants, as members of the congregation, ever became bound as individuals to pay this indebtedness by their assent to or ratification of it, or by their authorizing others to make such final settlement. There is really no question of law reserved which affects the merits and justice of the plaintiff's claim. The decision of this court in the case, when it was here on demurrer to the complaint (72 Wis. 411), is a final adjudication of the liability of the defendants on the facts stated in the complaint, and comes very near, if not quite, an adjudication of their liability on the facts proved on the trial. In the opinion of the chief justice, "the trustees with the priest had full power to incur debts for the association, which became the joint and several indebtedness of its members. . . . The trustees and parish priest, in incurring the alleged indebtedness, acted merely as the agents of the association and its members, with power to bind them jointly and severally by their

acts. . . . They approved of or participated in contracting it, and subsequently assumed and agreed to pay it through their authorized agents."

The authority of the trustees and the priest is the same according to the facts proved, as in the complaint,—to contract debts for the association, and to settle the same. Cases are cited in the opinion, in which it is held that the authority of agents of unincorporated associations was established on less evidence. In most cases it would be extremely difficult to charge liability on the individual members of such an association, by proof of any personal participation in incurring the indebtedness; and, from necessity, their liability has to be inferred from the manner in which such business was done, and their relation to those who acted directly in incurring it. The members of such an association cannot personally attend to the building of churches, the payment of the minister's salary, the making of contracts, or to the financial affairs generally of the association. If their manner of doing their business was to appoint trustees, and employ a priest to attend to such matters, and to have a secretary to keep their books of account, and to appoint committees, or certain persons, to settle and adjust doubtful or contested claims, it seems plain that they ought to be bound by their action as their agents. It is doubtful if there is any case in the books where there is so much evidence of the assent to or ratification of a claim against the association, or the authority conferred on agents by the members of the association, as in this case. The evidence is overwhelming that the defendants, as members of this association, have for many years known all about this indebtedness to Rev. Mr. Colton, and the exact balance of it, from time to time, through a series of many years, and tacitly assented to it, and ratified it, and knew about the final settlement of it, and approved it. They must have known all the time what their trustees and other agents did in incurring it, and how it was incurred, and for what purpose, and their final settlement of it. If it had been a single and unrepeatd transaction it would require more evidence of their assent, or of the authority given to agents. From 1868 down to 1881 many rests were made in the account, and balances were struck showing the

exact amount of this debt of the association to Rev. Mr. Colton, from time to time, and many times, and they were published or stated publicly to the congregation on the Sabbath, when all the members are supposed to have been present. Is it reasonable to doubt after all these publications of it that there were any members who did not know the amount of this indebtedness, not once only, but many times? All the members must be presumed to take a personal interest in the financial concerns of the association, and to take cognizance of these publications of their trustees and agents on the subject of their own indebtedness, from time to time. They did know the amount of this claim down to the time of the final settlement of 1888, and then the settlement consisted merely in balancing the accounts on the books, and in thus fixing the amount to be paid. They never objected to this claim until after that, and therefore tacitly assented to it. They are presumed to have known of the appointment of the committee to adjust it, and it was their committee. The trustees were their trustees, and those deputed to settle with the Rev. Mr. Colton on the 10th of March, 1888, were deputed by themselves to make the settlement, and why were they not their authorized agents to act for them in doing so? In all other cases such authority would be deemed sufficient. We cannot but think that the assent, ratification and authority conferred were amply proved. It is too plain a case for doubt or cavil. The members stand in the place of a corporation, and act by their own officers and agents. The debt in the first place is their debt, and they are presumed to know all about it. The books kept by their secretary were their books, and they are presumed to know what accounts are on them, and the state of such accounts. But here the evidence, aside from presumptions and inferences, is ample to show ratification as well as the authority of those who made the settlement. The learned counsel of the appellants have cited no case in conflict with these principles, and the law governing this case is elementary, and needs no authorities. It was clearly and correctly stated by the learned circuit judge in his instructions to the jury.

The judgment of the Circuit Court is affirmed.

COLORADO SUPREME COURT.

Loudon MULLIN, *Plff. in Err.*,
v.
PEOPLE OF the State of COLORADO.
(....Colo.....)

1. It is not contempt of court for a defendant petitioning for a change of

venue on account of prejudice on the part of the presiding judge to allege in his petition, which is not read to the court but is handed to the judge in a respectful manner for his perusal, that when the action was about to be called for trial the judge's wife stated that she must see the judge and arrange with him to have plaintiff win the case; at least not if the allegation is true.

NOTE.—Contempt of court.

Where a petition for a change of venue, alleging prejudice of the judge, was not a contempt *per se*, was presented in a respectful manner and there was nothing in the language itself which would constitute a contempt, an unverified information filed against the attorney presenting it, by the district attorney, for the contempt, upon the report 9 L. R. A.

of a committee appointed by the judge to inquire into the matters alleged in the petition, that the charges were a reflection on the court and were recklessly made, is insufficient to confer jurisdiction on the court to issue an attachment. *Thomas v. People (Colo.) post, 569.*

Where an attorney presented a petition for a rehearing, in which he stated that the decision of a

2. An allegation of the falsity of a statement inserted by a defendant in his petition for change of venue because of prejudice on the part of the presiding judge, to the effect that at the time the case was about to be called for trial the judge and his wife were, as petitioner was informed, the guests of plaintiff, will not support a judgment against defendant for contempt where issue upon the statement is taken as to the time only and the fact that defendant had received information as stated is not denied.

3. A statement by a defendant in a petition for change of venue because of prejudice on the part of the presiding judge, that petitioner believes from the rulings and instructions of the judge in a former suit between the same parties that the judge is prejudiced in favor of plaintiff, will not make him guilty of contempt although there is no foundation in fact for such belief, where there is nothing to show that he was guilty of any evil intent.

(September 12, 1890.)

ERROR to the District Court for Gunnison County to review a judgment adjudging defendant guilty of a contempt of court and fining him therefor. *Reversed.*

Statement by *Hart, J.*:

In the court below plaintiff in error was adjudged guilty of willful contempt of court, and fined therefor in the sum of \$150. The alleged contempt consisted in his making and causing to be filed a petition for change of venue in a certain case at the time pending in the District Court of Gunnison County, and to which action plaintiff in error was the real party in interest although not a party to the record. Said petition is in substance as follows:

"*Carrie L. Davis v. John H. Bowman* (No. 824).

"In the District Court of the Seventh Judicial District of the State of Colorado, and for the County of Gunnison. Your petitioner would respectfully represent to the court that he is the real party defendant in interest in the matter in controversy in the above-entitled action; that the defendant John H. Bowman was, at the time the supposed cause of action accrued, the qualified and acting sheriff of Gunnison County; that the said defendant Bowman has no personal interest in the result of this action, and is only a nominal party defendant. Your petitioner says that he fears that he will not

receive a fair trial in this court on account that the judge is prejudiced in favor of the plaintiff herein, and for reason for said fears he says that, at a prior term of this court, when the above-entitled action and another action pending in this court, and before the judge hereof, wherein the above-named plaintiff was plaintiff, and the above-named defendant and others, of which your petitioner was one, were defendants, were about to be called for trial, being cause numbered No. 825, the wife of the judge of this court was at the residence of your petitioner, and, in excuse for her short visit to your petitioner herein, said, in substance, and in presence of your petitioner and his wife, that she must go and see the judge and arrange with him to have Mrs. Davis (meaning the plaintiff herein) to win her case; that at said time, as petitioner was informed, the judge of this court and his wife were boarding in the house and the guests of Mr. and Mrs. Davis. Your petitioner further says that immediately thereafter he informed his attorneys of the foregoing facts, and requested them to make an application for a change of venue, but was advised by them to allow the judge to try one of said causes, and it could then be ascertained whether the judge was in any manner prejudiced in favor of the plaintiff herein. Your petitioner further says that one of said causes was tried by this court, and that Mrs. Davis did win her said cause, and your petitioner believes that, from the rulings of said court, and the instructions of the court to the jury in said cause, this court is prejudiced in favor of the plaintiff herein. Wherefore he prays that the venue in this action be changed.

"Respectfully, Loudon Mullin."

The present proceeding was commenced by the filing of an information by the district attorney of the district in which the court was sitting. The remaining facts necessary to a full understanding of the case appear either in the opinion of the court in the case at bar, or are set forth sufficiently in the report of the case of *Thomas v. People*, 14 Colo.—.

The only difference in the two cases arises from the fact that Thomas was the attorney who prepared and presented the petition for change of venue, while Mullin alone made the affidavit thereto, and, in the former case, the information filed as a basis of the contempt proceedings was not verified, while in the present case the information appears to have been duly verified by the district attorney.

commissioner, confirmed by the court, was wholly contrary to the law and the evidence, and that the commissioner had effectually and substantially ignored and disregarded the uncontradicted testimony of unimpeached witnesses; and that the commissioner, in euphuistic language, had made certain statements which he declares were disingenuous and misleading, substantially and for all the purposes of the investigation untrue and utterly unwarranted by the evidence, and that his opinion is a travesty of the evidence,—he is guilty of contempt of court, which his disavowal of any intention to be disrespectful is insufficient to purge. *McCormick v. Sheridan* (Cal.) Dec. 11, 1888.

An attorney will not be held in contempt of court because of his violent criticism, made in a quarrel with the clerk and another attorney over the entry of a default judgment, in regard to the
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manner in which the court business is transacted, the court not being in session, and the words not being spoken in the judge's presence, or calculated to influence his action or reflect upon his integrity. *Watson v. People*, 11 Colo. 4.

A brief to the Supreme Court of California, containing the following: "The court out of the fullness of his love for a cause, the parties to it or their counsel, or from an over-zealous desire to adjudicate 'all matters, points, arguments and things,' could not with any degree of propriety, under the law, patch up and doctor up the case of the plaintiffs, which perhaps the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever."—will be considered, in its manifest disrespect to the trial judge, as a contempt of the appellate court, and will be stricken from the files. *Sears v. Starbird*, 76 Cal. 91.

Messrs. Thomas Bros. & Wegener and Alexander Gullett, for plaintiff in error:

The language of the petition is not *per se* contemptuous, and there is no charge made in the information but what is consistent with the entire innocence and good faith of the plaintiff in error. No offense is charged in the information. It was necessary to set forth the facts constituting the supposed contempt.

Gandy v. State, 18 Neb. 445; *Young v. Cannon*, 2 Utah, 560.

The only charge in the information was, that the language is contemptuous. If this charge be true, the plaintiff in error would still not be answerable, because it was the language of the attorney. It is contrary to natural justice and the established principles of law to punish one for the act of another.

Wells, Jurisdiction, § 186.

In all cases in courts of law where there is a disavowal of disrespect and no order is violated, there being a negative rather than a positive, and remote rather than direct, infraction, a disavowal will clear the contempt.

Wells, Jurisdiction, § 194.

There was clearly no intention to commit a contempt.

Ex parte Curtis, 8 Minn. 274; *Re Fitton*, 16 How. Pr. 808.

The answer shows that plaintiff in error acted in good faith and upon the advice of counsel.

He therefore cleared himself by his answer, and he should have been discharged.

4 Bl. Com. 288; 20 Am. L. Reg. N. S. 150, and cases cited; *Wells v. Com.* 21 Gratt. 500; *Re Moore*, 68 N. C. 897; *Ex parte Biggs*, 64 N. C. 202; Wells, Jurisdiction, § 194; *State v. Eari*, 41 Ind. 464; *People v. Few*, 2 Johns. 290; *Sanders v. Melhuish*, 6 Mod. 78; *Thomas v. Cummins*, 1 Yeates, 40; *United States v. Dodge*, 2 Gallis, 818.

Messrs. Alvin Marsh, Atty. Gen., and Herschel M. Hogg, Dist. Atty., for the People:

Any publication, whether by parties or strangers relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal or its proceedings, may be resisted as contempt," and it makes no difference that the author of the article disclaims such a purpose if it has the evil tendency.

Re Pryor, 18 Kan. 72, 26 Am. Rep. 747; *People v. Wilson*, 64 Ill. 195; *Hughes v. People*, 5 Colo. 436; 2 Bishop, Crim. Law, 6th ed. § 259.

Hayt, J., delivered the opinion of the court:

As the information in this case is verified, it may properly be allowed to perform the office of the affidavit made necessary by the Statute as the foundation of a proceeding for constructive contempt. The record shows that the petition for a change of venue was presented in a respectful manner; that in fact it was not read to the court, but was handed to the presiding judge for his perusal; and that there was nothing in the petition itself that was regarded, or that could properly have been regarded, as contemptuous. If, therefore, any contempt was committed, it was constructive rather than

direct. This was determined in the cause of *Thomas v. People*, 14 Colo. —.

We will therefore inquire as to whether or not the facts alleged in the verified information are sufficient to constitute a constructive contempt of court. If the facts charged do not show affirmatively that a contempt has been committed, the judgment of the district court against the plaintiff in error must be reversed.

In the case of *Cooper v. People*, 18 Colo. 887, 878, 6 L. R. A. 480, it was said: "When an affidavit is presented as the basis of a proceeding for contempt, the court must, in the first instance, examine the same, and, if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but, if the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere error."

In the case at bar we must assume that the statement set forth in the verified petition for a change of venue as having been made by the wife of the presiding judge was in fact so made, for the reason that, in the affidavit or information filed, it is not denied that such language was used by her. In some jurisdictions, when a change of venue is asked on account of the prejudice of the presiding judge, it is not necessary to set forth in the petition the fact or facts on which the party bases his fears that he will not receive a fair trial in the court wherein the cause is pending. But in this State such facts must be stated, although with not the same particularity as is required in cases in which the application is based upon the alleged prejudice of the inhabitants of the county. *Hughes v. People*, 5 Colo. 436.

Assuming, then, for the purposes of this case, that the wife of the presiding judge made the statement attributed to her, plaintiff in error had the undoubted right to embody such statement in his petition for a change of venue without subjecting himself to being punished for contempt. The principal ground relied upon to sustain this action of the court below therefore fails. Had it been charged that the affidavit was false in this respect, and that such false statements were made willfully and maliciously, as argued, a different case would have been presented.

It is alleged, however, that the charge contained in the following language is false: "That at said time, as petitioner was informed, the judge of this court and his wife were boarding at the house, and the guests of Mr. and Mrs. Davis." Issue upon this statement seems to have been taken upon the time only, and does not deny that plaintiff in error had received information as stated in his affidavit. The judgment cannot, therefore, rest upon this charge.

The only remaining matter contained in said information necessary to be considered is as follows, to wit: "That the charge contained in and written upon said petition for a change of venue and herein set out, to wit, 'And your petitioner believes that from the rulings of said court, and the instructions of the court to the jury in said cause, this court is prejudiced in favor of the plaintiff herein,' is and was made without any foundation in fact for such belief." On account of the rulings and instructions in

the cause previously tried, the plaintiff in error may have concluded that the judge was prejudiced against him, and yet the rulings may have been correct, and the instructions proper. As we have seen, this language is not *per se* contemptuous, and there is no charge made in the information going to show that plaintiff's conduct was not consistent with his entire innocence of evil intent. We must therefore conclude that no contempt is charged in the information. It should therefore have been quashed upon plaintiff's motion.

It is probable that, if the district court had refused to grant the petition for a change of the place of trial of the case of *Davis v. Bowman*, its judgment would not have been disturbed upon appeal. And yet we cannot say from anything charged in this information that plaintiff in error had not the right to present his petition to the district court, and obtain its judgment thereon. We can readily see why a judge, who had enjoyed a long and honorable career upon the bench, might feel that the charge that he could be influenced by the matters set forth in the affidavit was wholly unwarranted, and yet in our opinion the facts stated in the information, if true, will not sustain the judgment for contempt.

The judgment will therefore be reversed, and the cause remanded.

Thornton H. THOMAS, *Plff. in Err.*,
v.
PEOPLE OF the State of COLORADO.

(.....Colo.....)

In the absence of a statement verified by oath, bringing to the knowledge of the judge facts alleged to make the insertion of certain allegations in a petition for change of venue a contempt of court, he has no jurisdiction to issue attachments against, and punish as for contempt, the persons responsible for the filing of the petition under Code Civ. Proc., chap. 31, if neither the language used nor the filing of the petition is *per se* a contempt.

(February 28, 1890.)

ERROR to the District Court for Gunnison County to review a judgment adjudging defendant guilty of a contempt of court and fining him therefor. *Reversed.*

The facts fully appear in the commissioner's opinion.

Messrs. Thomas Bros. & Wegener, F. C. Goudy and Louis Boisot, for plaintiff in error:

It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support.

Batchelder v. Moore, 43 Cal. 414; *Ex parte Robinson*, 71 Cal. 608.

In Ohio and Illinois, under like constitutional provisions, in prosecutions by informa-

tion for misdemeanor, where the informations were unsupported by oath or affirmation, on motion to quash for that purpose, the overruling of said motions was held to be error.

Eichenlaub v. State, 86 Ohio St. 140; *Myers v. People*, 87 Ill. 508; *Carrow v. People*, 118 Ill. 550.

In proceedings against a party for constructive contempt, an attachment warrant, or alternative order to show cause, against the person of the defendant cannot be issued until the proper affidavit has been filed to give the court jurisdiction.

Wilson v. Territory, 1 Wyo. 155; *Gandy v. State*, 18 Neb. 445; *Young v. Cannon*, 2 Utah, 560; *State v. Blackwell*, 10 S. C. 85.

The information must be verified, and no warrant can be legally issued unless the same is supported by oath or affirmation. An affidavit is necessary.

Paschal v. State, 9 Tex. App. 205; *Scott v. State*, Id. 484; *Smith v. State*, Id. 475; *Baranmore v. State*, 4 Ind. 524; *Whittem v. State*, 86 Ind. 197; *State v. Earl*, 41 Ind. 464; *Albany City Bank v. Schermerhorn*, 9 Paige, 872, 4 N. Y. Ch. L. ed. 786, 88 Am. Dec. 551; *Re Judson*, 8 Blatchf. 148; *Jordan v. Wapello County Circ. Ct.* 69 Iowa, 177; *Strait v. Williams*, 18 Nev. 490; *Phillips v. Welch*, 12 Nev. 158; *Casey v. State*, 5 Tex. App. 462; *People v. Kelley*, 1 Am. L. Reg. N. S. 534; *Bate's Case*, 55 N. H. 825.

A direct contempt, which is committed in presence of the court, it will, of its own motion, notice and punish summarily. Those not so committed, as well as constructive contempts, must be brought before the court by affidavits of persons who witnessed them.

20 Am. L. Reg. N. S. 147; 4 Bl. Com. 287; 2 Hawk. P. C. 222; 1 Tidd, Pr. 8d Am. ed. 88; *Re Judson*, *supra*; 6 Dane, Abr. 528, chap. 193, art. 28; 7 Dane, Abr. 807, 808, chap. 220, art. 6; *Com. v. Dandridge*, 2 Va. Cas. 408; *State v. Matthews*, 37 N. H. 450; *Clay's Case*, Sneed, Pr. Dec. (Ky.) 221; *Orow v. State*, 24 Tex. 12. *Mr. H. M. Hogg*, Dist. Atty., for the People.

Pattison, J., delivered the following opinion:

The judgment sought to be reviewed in this case was rendered in a proceeding instituted against plaintiff in error and others for an alleged contempt of court. It appears from the record that prior to July 12, 1886, there were pending in the court below certain actions at law, wherein one Carrie L. Davis was plaintiff, and John H. Bowman, then sheriff of that county, was defendant. Plaintiff in error was one of the attorneys for the defendant in these actions. On the day named he caused a petition, which had theretofore been prepared by him, praying for a change of the place of trial of the actions mentioned, to be presented to the court. The petition was made under section 81 of the Code of Civil Procedure, then in force. This section provided for change of the place of trial whenever a party "shall fear that he will not receive a fair trial in the court in which the action is pending, on account that the judge is interested or prejudiced," etc. The petition alleged prejudice of the judge. In compliance with the requirements of the section, as construed by this court, the facts and

circumstances upon which the allegation of prejudice were predicated were set forth in detail. *Christ v. People*, 8 Colo. 894; *Hughes v. People*, 5 Colo. 486.

It is unnecessary to recite these facts and circumstances. When the petition was presented to the court, it was not read by counsel, but was submitted to the judge for his consideration. Immediately after reading the petition, the judge, upon his own motion, caused an order to be entered, appointing a committee, consisting of three members of the bar, "to inquire into the matters alleged in said petition, with full authority to administer oaths, and send for persons and papers, and to take such action in the premises as they may deem proper." The committee was not required to take the oath of office. Subsequently the committee presented a report, the concluding paragraph of which was as follows: "Your committee would therefore conclude, from the charges presented in said affidavit, as well as from the evidence adduced before us, that such charges are a serious reflection upon the honor, integrity and dignity of this court, and that the same were made recklessly, and without sufficient inquiry as to the truth of the allegations therein contained, so far as they affect the judge of this court, and that the party making, as well as the persons causing, said affidavit and petition to be filed, are in contempt of this honorable court." The report was not verified by the committee, or any one of them. Plaintiff in error was not permitted to participate in the proceedings had before the committee in any manner. When the report was submitted, the court caused the same to be spread upon the minutes of the court, directed the evidence taken to be filed with the clerk and ordered the district attorney of the district to file an information "against all of the parties concerned in filing the said petition." Pursuant to the order, the proceeding now sought to be reviewed was instituted. The information alleged that plaintiff in error and the other parties concerned in the suit in which the petition was filed, in making and presenting the petition, committed gross acts of contempt of the district court, in that they caused the petition to be filed, published, etc. A copy of the petition was set forth in the information. The information was not verified. Upon the filing of the information, the court ordered an attachment for contempt to issue against plaintiff in error and others, returnable forthwith. When the warrant of attachment was returned by the officer, motion to quash the information and warrant was filed, because: "*first*, the said information does not state facts sufficient to constitute a contempt of court; *second*, because the information filed herein is not verified." The motion was overruled. Thereupon plaintiff in error filed his separate answer to the information, in which, among other things, he expressly avers that, by the language contained in the petition for change of venue, he intended no reflection "upon the character or integrity of the court, nor the judge thereof, but he thought he was within the line of professional duty to his client, and at the time thought it necessary to make the allegations contained in the petition." Upon the information and answer, plaintiff in error was adjudged to be

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guilty of contempt, and a fine of \$500 was imposed upon him.

It is only necessary for this court to determine whether the proceedings had prior to the issuance of the warrant of attachment conferred jurisdiction upon the court to issue the process. It is manifest, from the course of the proceedings, that the language of the petition for the change of venue was not deemed to be contempt *per se*; that the contempt, if any, was not regarded as direct, but constructive. The court was correct in its assumption. *Ex parte Curtis*, 8 Minn. 274.

The record clearly shows that the petition was presented in a respectful manner, and that there was nothing in the language of the petition itself which would constitute a contempt, unless it could be established by evidence that it was used either with a reckless disregard of the truth, or with the express intention, not only to establish prejudice within the meaning of the Statute, but also to reflect upon the honor, integrity and character of the judge. It was therefore necessary to inquire and ascertain the meaning and intention of the parties in the premises. The intention of the parties was a material element in the offense. *Rap. Contempt*, § 121.

Investigation was therefore necessary.

At the time this proceeding was instituted, chapter 31 of the Code of Civil Procedure, relating to contempts and their punishments, was in force. The court below should in some measure, at least, have conformed with the rules prescribed by this chapter. The proceeding was instituted under its provisions. Section 848 expressly requires that, when the contempt is not committed in the immediate view and presence of the court, an affidavit shall be presented containing a statement of the facts constituting the contempt. No information is necessary for the reason that it is the office of the affidavit to inform the court of the facts which constitute the foundation of the proceeding. *Worland v. State*, 82 Ind. 49.

In the absence of the affidavit, the court is without the legal information necessary to warrant the issuance of the attachment. The judge cannot act upon mere hearsay statements. Knowledge must be brought home to him by the means prescribed by the Statute. The statement of facts upon which the court may proceed must be verified by an oath. An information is not an affidavit, and cannot be substituted for an affidavit, unless it is duly verified. The report of the committee appointed in this case could by no means perform the office of the affidavit. So far as this proceeding is concerned, the appointment of the committee and its action were extrajudicial. It may not be improper to initiate a proceeding to punish for constructive contempt by information. The affidavit will still be necessary, however, unless the information contains a statement of the facts and circumstances constituting the contempt. In such case, the information simply performs the office of the affidavit prescribed by the Statute. As the affidavit must of necessity be sworn to, it is clear that the information must be verified. In the absence of verification, it is insufficient, and confers no jurisdiction upon the court to issue the attachment. *Gandy v. State*, 13 Neb. 445; *Wilson*

v. Territory, 1 Wyo. 155; *Young v. Cannon*, 2 Utah, 580; *Re Daves*, 81 N.C. 72; *State v. Myers*, 44 Iowa, 580; *Batchelder v. Moore*, 42 Cal. 412; *Whittem v. State*, 86 Ind. 196; *McConnell v. State*, 46 Ind. 298; *Re Judson*, 3 Blatchf. 148.

In the light of these authorities, it is clear that the court erred in overruling the motion to quash the information and the warrant of attachment, for the reason that the information was not verified.

It is unnecessary to consider other questions presented by the record. The judgment is reversed, and plaintiff in error discharged.

Reed and Richmond, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion the judgment is reversed, and the contempt proceeding ordered dismissed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary A. BARNES *et al.*

Thomas D. BOARDMAN, Admr., etc., of
Benjamin G. Boardman, Jr., *et al.*

(....Mass....)

1. Where one of several reversioners of the equity of redemption of real estate in possession of the life tenant, which is worth considerable more than the amount of the mortgage, purchases the interest of the mortgagee, together with all rights which he has acquired under foreclosure proceedings, and, before the foreclosure is complete, acquires the life interest in the property, he is bound, before he can complete the foreclosure as against his co-reversioners, to notify them of the peril to their interests and give them an opportunity to come in and contribute with him towards a redemption from the mortgage; and in case he fails to do so, and gets title to the property under his foreclosure proceedings, they will be entitled to their proportions thereof upon payment of their shares of the mortgage debt.
2. Reversioners have a right to rely on the supposition that, since the life tenant is entitled to possession of the property, they will

be notified if any attempt is made to oust him by which their rights will be affected, and hence records of proceedings against the life tenant alone will not affect them with notice of the facts thereby disclosed.

3. Where a reversioner acquires the life interest in the equity of redemption of real estate after having purchased the interest of the mortgagee in the property, and then forecloses and takes title to the property without notifying his co-reversioners, after which he sells the property to a bona fide purchaser for value, the co-reversioners, upon coming in to redeem, may, if they consent thereto, be given an interest in the fund realized from the sale, instead of in the property.

(October 25, 1890.)

CROSS-APPEALS from a decree of the Superior Court for Essex County dismissing the complainants' bill and overruling the exceptions of both parties to the master's report, in an action brought by reversioners to redeem the property from an incumbrance under which title thereto had been acquired by their co-reversioner. *Judgment for complainants.*

NOTE.—Co-tenant cannot purchase outstanding title or incumbrance for his own benefit.

A joint tenant, co-parcener or tenant in common cannot purchase an outstanding title or incumbrance and set it up as against his co-tenants. Such purchase will inure to the joint benefit of all the co-tenants, upon their contributing to its expense in proportion to their respective interests. *Titzworth v. Stout*, 49 Ill. 78; *Brittin v. Handy*, 20 Ark. 331; *Louville v. Menard*, 6 Ill. 45; *Sullivan v. McLenans*, 2 Iowa, 437; *Lee v. Fox*, 6 Dana, 173; *Sneed v. Atherton*, Id. 276; *Gossom v. Donaldson*, 18 B. Mon. 230; *Funk v. Newcomer*, 10 Md. 301; *Jones v. Stanton*, 11 Mo. 433; *Brown v. Homan*, 1 Neb. 43; *Swinburne v. Swinburne*, 28 N. Y. 593; *Lloyd v. Lynch*, 28 Pa. 419; *Duff v. Wilson*, 73 Pa. 442; *Davis v. King*, 87 Pa. 261; *Tisdale v. Tisdale*, 3 Sneed, 596; *Flagg v. Mann*, 2 Sumr. 493; *Rothwell v. Dewees*, 67 U. S. 2 Black, 613, 17 L. ed. 308; *Levy v. Brush*, 8 Abb. Pr. N. S. 430, 1 Sweeney, 563.

He cannot, before partition, purchase a superior outstanding claim for his own exclusive benefit, much less use it for the expulsion of his co-tenant. *Venable v. Beauchamp*, 3 Dana, 324.

There is no real difference, on the ground of policy and justice, whether he buys up an outstanding incumbrance or an adverse title to dispossess and expel his co-tenant, because it will be against the reciprocal obligation to do nothing to the prejudice of his co-tenant's claim. *Mitchell v. Read*, 61 Barb. 324; *Wood v. Perry*, 1 Barb. 115; *Dickinson v. Codwise*, 1 Sandf. Ch. 214, 7 N. Y. Ch. L. ed. 304.

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The doctrine which makes an outstanding title bought in by one joint tenant or tenant in common, inure to the benefit of his co-tenants, is one of equitable cognizance, and courts of equity will apply it so as to do justice among the tenants. *Bector v. Waugh*, 17 Mo. 27; *Williams v. Morris*, 95 U. S. 455, 24 L. ed. 361.

The doctrine applies to a joint tenant by descent, devise or the same conveyance. *Myers v. Reed*, 17 Fed. Rep. 406; *Wright v. Sperry*, 21 Wis. 331; *Frents v. Klotsch*, 28 Wis. 312.

A co-tenant with other children, while in possession under such conveyance, cannot rightfully redeem or purchase the common property for his exclusive benefit. *Burhans v. Van Zandt*, 7 N. Y. 527; *Holridge v. Gillespie*, 2 Johns. Ch. 30, 1 N. Y. Ch. L. ed. 234. See also *Weller v. Rolason*, 17 N. J. Eq. 19; *Baker v. Humphrey*, 101 U. S. 501, 25 L. ed. 1066; *Phelan v. Kelley*, 25 Wend. 393.

A tenant for life in possession, in the purchase of an incumbrance on the estate, is regarded as having made the purchase for the joint benefit of himself and the remaindermen or reversioners, and cannot hold it for his own benefit. *Davies v. Myers*, 13 B. Mon. 513; *Bowling v. Dobyns*, 5 Dana, 443; *Morgan v. Boone*, 4 T. B. Mon. 297; *Holridge v. Gillespie*, 2 Johns. Ch. 33, 1 N. Y. Ch. L. ed. 236.

A release of a right made to a particular tenant for life, or in tail, shall aid or benefit him or them in remainder. *Hurd v. Hall*, 12 Wis. 137; *Lawton v. Howe*, 14 Wis. 247; *Co. Litt. 33 297b*, 453; *Avery v. Judd*, 21 Wis. 234.

The case sufficiently appears in the opinion. *Messrs. J. P. & E. B. Jones* for plaintiffs. *Messrs. Lewis S. Dabney and Albert D. Bosson* for defendants.

Devens, J., delivered the opinion of the court:

The plaintiffs, or those under whom they claim, were three sons, and with their brother, Benjamin G. Boardman, Jr., the sole heirs-at-law of Benjamin G. Boardman, Sr. By his will Boardman, Sr., had, after various bequests and devises, devised to his wife, Sarah W., all the rest and residue of his estate for life, which residue included the equity of redemption in certain premises concerning which the controversy in the case at bar arises. These premises were subject to a mortgage, the condition of which had for many years been broken. On December 9, 1878, more than fifteen years after the decease of Boardman, Sr., the original mortgagee made an open and peaceable entry to foreclose the mortgage under the provisions of Gen. Stat., chap. 140, which entry was duly recorded. Mrs. Sarah W. Boardman was then alive, and, so far as appears, in possession of the premises. On January 2, 1874, the mortgagee conveyed and assigned his mortgage to Boardman, Jr., together with the debt secured and all interest of the mortgagee in the premises, including all rights under the entry and possession for foreclosure. This assignment was duly recorded and under it Boardman, Jr., continued the formal possession taken by the mortgagee for the full term of three years. On April 10, 1876, the widow, Mrs. Sarah W. Boardman, conveyed to Boardman, Jr., all her interest in any real estate in Boston; this included her life estate in these premises and from this time Boardman, Jr., had been in actual possession of the premises until his lease thereof to the defendants Doherty in January, 1885. Subsequently to this lease a conveyance thereof in fee was made to the Dohertys by Boardman, Jr., for which they paid \$1,000 down and gave a mortgage on the premises for \$15,000. The title of the Dohertys was taken in good faith and without notice of any defect other than, if any, that which might have been obtained by inspection of the records of the registry of deeds and of probate. The property in dispute was "of considerably greater value" than the amount of the mortgage bought by Boardman, Jr., but how much greater does not appear. It is further found that the facts as to the purchase of the mortgage and foreclosure of the same were not communicated to the plaintiffs or those whom they represent, and were not known to them until shortly before bringing these suits. There was no evidence of any intentional concealment on the part of Boardman, Jr., of the assignment, foreclosure or conveyance to him, or any attempt to mislead the parties in interest in regard thereto or in regard to any material fact, unless it is to be inferred from the absence of evidence that he communicated these facts. The rule that when tenants in common are actually in possession or are entitled to immediate possession, a purchase of an incumbrance on the common property will generally be deemed to have been made for the benefit of all if they shall

consent to pay their proportional shares thereof, and that to this extent a certain fiduciary relation exists between the tenants in common, is one that is sustained by many authorities. *Van Horne v. Fonda*, 5 Johns. Ch. 388, 1 N. Y. Ch. L. ed. 1118; *Flagg v. Mann*, 2 Sumn. 522; 4 Kent, Com. 371, and cases cited; *Washb. Real Prop.* § 480, and cases cited; *Hurley v. Hurley*, 148 Mass. 444, 2 L. R. A. 172.

It is the contention of the defendant that it has here no application, and that those who are only entitled together to an estate in reversion having no unity of possession are not within the reason of the rule. We shall not have occasion to consider this question in view of the relation in which Boardman, Jr., stood to his co-heirs and to the property in the reversion to which he was entitled with them by reason of his purchase and ownership of the estate for life when he undertook to complete, and, so far as the record is concerned, did complete, the foreclosure of the equity of redemption of the mortgage on the premises. While Boardman, Jr., did not record the conveyance to him by Mrs. Sarah W. Boardman until April, 1877, it will be observed by the dates heretofore stated that it was some months from the purchase of the life estate included in the conveyance of April, 1876, to him before the three years elapsed after the date of the formal entry by the original mortgagee. He was thus one of the co-reversioners and the sole owner of the life estate. By seeking to avail himself of the entry made by the original mortgagee to complete the foreclosure of the mortgage Boardman, Jr., sought both to destroy the rights of his co-reversioners and the life tenancy which he had acquired by the conveyance of his mother, Mrs. Sarah W. Boardman. It is not necessarily the duty of the life tenant to pay off the incumbrances on the property of which he is life tenant. If he does so voluntarily, or if he is compelled to do so in order to protect his life estate, as the incumbrance is a proper charge alike upon the life estate and the reversion, although in different proportions, it should be deemed that he has done so for the protection of both estates, and each reversioner should be entitled to the benefit of the acquisition on payment of his proper proportion. If, under such circumstances, the reversioner should refuse to pay his proportion, the tenant might well hold it or any rights which might be acquired thereby to secure him for the advances which he had made. But it is the right of the reversioner to have the property at the termination of the life estate without any additional burden from the taxes or other annual charges which may have been assessed thereon or any interest which may have accrued on the incumbrances during the continuance of the life estate. If the life tenant could purchase a mortgage of which he is bound to pay the interest, and then enforce it on his own estate and that of the reversioner, it is obvious that if the property is worth more than the mortgage, and the life estate is thus of value, injustice would be done the reversioners, who would be deprived of their right to have the interest on the mortgage paid until their estate in reversion became one in possession. Both estates are proportionally liable for the payment of the incumbrance and as

between themselves neither has a right to throw the whole burden upon the other. The tenant for life is to contribute in proportion to the benefit he derives from the liquidation of the debt and the consequent cessation of annual payments of interest, taxes, etc., during his life, which of course will depend upon his age and the computation of the value of his life estate. 1 Story, Eq. Jur. 487; 1 Washb. Real Prop. 95, 96; *Davies v. Myers*, 18 B. Mon. 511; *Phelan v. Boylan*, 25 Wis. 679.

"Indeed," says Chancellor Kent, "it is a general principle, pervading the cases, that if a mortgagee, executor, trustee, tenant for life, etc., who have a limited interest, gets an advantage by being in possession or 'behind the back' of the party interested in the subject or by some contrivance in fraud, he shall not retain the same for his own benefit but shall hold it in trust." *Holridge v. Gillespie*, 2 Johns. Ch. 88, 1 N. Y. Ch. L. ed. 268.

In the case at bar it has been found that the property was worth considerably more than the amount of the mortgage. When, before the foreclosure of the mortgage, Boardman, Jr., became the assignee of it and also the owner of the life estate, he owed to his co-reversioners the duties which arose from the purchase of those two claims upon or titles to the property. Before he could complete a foreclosure which should deprive them of their estate, they were entitled to know from him that it was imperiled by his proceeding, and that he was the life tenant, liable, if he would preserve his tenancy, to contribute to the payment of the mortgage. This resulted from the fact that they were co-reversioners and as well as he were entitled not only to redeem from the mortgage and thus protect their property, but to have the aid of the life tenant in so doing. As between him and them, it is for him to show that he has given them the opportunity so to do, by informing them of the purchase of the mortgage by himself and of his ownership of the life estate. This he has failed to do.

Nor can we perceive that the plaintiffs have lost any rights to redeem their proportions of the estate from the mortgage which Boardman, Jr., attempted to foreclose by any laches or lapse of time. Mrs. Boardman, the original owner of the life estate, did not die until March 21, 1884, and the fact of her death was not communicated to the plaintiffs until some time after. It is found that the co-reversioners of Boardman, Jr., had no actual knowledge until after his death of the breach of the mortgage, the entry to foreclose and assignment, and until shortly before the bringing these actions, and that they have been guilty of no laches. This finding is not affected by the fact that there was a record of the entry and of the assignment. They had a right to suppose as the tenant for life was entitled to possession they would be called upon and notified if any attempt was made to oust such tenant by which their rights would be affected.

As between Boardman, Jr., or his representative, by whom the actions are now defended, and the plaintiffs, the plaintiffs would be entitled to redeem on payment of their proportion as co-reversioners in the mortgage; and it is found that the income of the premises since the death of Mrs. Boardman has been sufficient to 9 L. R. A.

pay all proper charges of the mortgagees and the mortgage debt.

There remains the question as to the remedy to which the plaintiffs are entitled. This is deemed by them as of slight practical importance, as, if the title of the Dohertys is held to be good, relief may be afforded them by allowing them to maintain the bill for their share of the proceeds of the sale of the premises for the sum of \$16,000, a mortgage for \$15,000 of which remains in the hands of the administrator of Boardman, Jr. Nor can the defendant, if the plaintiffs are entitled as against Boardman, Jr.'s estate to a remedy, object to this. If it shall be found, as the defendant urges, that the prayer of the bill is not adapted to this remedy, and it shall be so considered when the final decree is to be framed, there can be no reason why the plaintiffs should not be permitted to amend it on proper terms. To the Dohertys, who are conceded to have purchased in good faith and for full and valuable consideration with no knowledge except such as they may be properly charged with, as it could be derived from inspection of the records of the registry of deeds or the court of probate, it may make a serious difference whether the remedy of the plaintiffs shall be upon the estate now in their possession or through the mortgage they have given for the payment of the purchase money. As the plaintiffs are satisfied with the relief afforded in the latter method, and as the rights of purchasers in good faith are thus protected, the decree may be so framed.

Decree for plaintiffs.

George J. KNIGHT *et al.*

v.

Timothy MAHONEY *et al.*, *Appts.*

SAME

v.

Patrick KING, *Appt.*

SAME

v.

James STOTT, *Appt.*

SAME

v.

Patrick JARRETT *et al.*, *Appts.*

SAME

v.

Richard GARLINGTON *et al.*, *Appts.*

(.....Mass.....)

The acceptance by a woman of the provisions of her husband's will, giving her

NOTE.—Devise to widow during widowhood.

A devise by a testator to his wife of an estate to continue during her widowhood only is valid. *Levengood v. Hoople* (Ind.) May 16, 1880.

Such an estate terminates with the second marriage. *Sims v. Gay*, 6 West. Rep. 562, 109 Ind. 501; *Harmon v. Brown*, 58 Ind. 207; *Wood v. Beasley*, 5 West. Rep. 247, 107 Ind. 37. See *note to Myers v. Adler* (D. C.) 1 L. R. A. 423.

the use of his real estate so long as she remains his widow, will cause all her interest in such property to cease when she re-marries, although the will makes no disposition of the property to take effect upon the happening of such event; and in case she sells the property and then re-marries, testator's heirs-at-law may recover it from the possession of the purchasers.

(November, 1890.)

APPEAL by defendants from judgments of the Superior Court for Worcester County in favor of demandants in actions brought to recover possession of certain pieces of real estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Meners. Rice, King & Rice and Andrew J. Bartholomew*, for appellants:

Upon the construction of the whole will, the testator intended to devise to his wife the whole of his real estate in fee simple, although he used no apt words of inheritance in doing it, and, as against the heirs-at-law of the testator, his wife took by his will a valid title to the fee of all his real estate.

Gleason v. Fayerweather, 4 Gray, 350; *Fay v. Fay*, 1 Cush. 93; *Fearing v. Swift*, 97 Mass. 415; *Spencer v. Lovejoy*, 108 Mass. 529; *Willcut v. Calnan*, 98 Mass. 75; *Hall v. Tufts*, 18 Pick. 455.

The words "so long as she remains his widow," constitute a condition subsequent in restraint of marriage without limitation as to time or person, which is against the policy of the law, and therefore void, unless the will itself contains an express valid gift over of the premises devised.

Parsons v. Winslow, 6 Mass. 169; *Otis v. Prince*, 10 Gray, 581, and cases cited therein; *Rogers v. American Board*, 5 Allen, 69.

It does not appear that the mortgagees are or ever have been in possession of the tracts

mortgaged to them, and these suits cannot be maintained against them.

Pub. Stat. chap. 173, §§ 5, 6; *Field v. Hawley*, 126 Mass. 337; *Kerley v. Kerley*, 13 Allen, 286.

Mr. J. M. Cochran, for appellees:

Knight gave his wife an interest in his real estate during her widowhood, and no longer; and when she ceased to be his widow, the estate being an intestate estate, the real estate vested immediately in the heirs-at-law, the plaintiffs.

Dole v. Johnson, 3 Allen, 364; 2 Redfield, Wills, p. 218, § 8; *Luzford v. Cheeke*, 3 Lev. 125; *Gordon v. Adolphus*, 3 Bro. P. C. 306; *Brown v. Outter*, T. Raym. 427.

Field, Ch. J., delivered the opinion of the court:

These suits are writs of entry, and the demandants in each suit are the heirs-at-law of Wheaton T. Knight, who died testate on February 8, 1874, seized of the lands and leaving a widow, Sabra A. Knight, who married again on August 3, 1878, and died on June 6, 1888. The first clause of the will of Wheaton T. Knight is as follows: "I give and bequeath to my beloved wife, Sabra A. Knight, all my real estate and personal property of every kind and description, after paying all my debts and legal charges, and paying out to my children the allowances hereinafter made, so long as she remains my widow." The executors of the will have paid all the debts of the deceased and the legacies given by the will. The will contains no devise of real property except that to the widow which has been cited. We think that the true construction of the will is that the testator intended to give to his wife the use of the real estate only so long as she remained his widow. We consider it unnecessary to discuss the many distinctions which have sometimes been made with reference to conditions

Where a will conveyed to testator's wife all his estate, real and personal, to remain and be hers with full power, right and authority to dispose of the same as to her should seem meet and proper, so long as she should remain his widow, upon the condition that, if she should marry again, all of the estate, or whatever may remain, should go to his surviving children, share and share alike, her estate in the land, and that of her grantees, determined on her subsequent marriage. *Giles v. Little*, 104 U. S. 221, 26 L. ed. 745.

An estate for life embraces an estate for an uncertain period which may continue during a life or lives. Such would be a grant to a woman during widowhood. If she marries, her estate would terminate; but it may endure as long as she lives. *Co. Litt. 42 a*; *Hurd v. Cushing*, 7 Pick. 169; *Jackson v. Myers*, 3 Johns. 388; *Roseboom v. Van Vechten*, 5 Denio, 414; *Hatfield v. Sneden*, 54 N. Y. 235; *Clark v. Owens*, 13 N. Y. 434; *Hewlins v. Shippam*, 5 Barn. & C. 221; 2 Bl. Com. 121.

Where testator gave his property to his wife during widowhood, but provided that in case of death or marriage—in which latter case he gave her only what the law allowed her—the residue should go to his children to be equally divided, the child of any deceased child to take the share which its parent would have taken, the survivorship intended is to be referred to the second marriage or death of the widow, and not to the death of the testator; and the intention was that the residue should vest upon the second marriage or death of the widow. *Francis v. Root*, 8 Cent. Rep. 393, 67 Md. 465.

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A devise of all the testator's property to his wife "so long as she remains my widow; but should she marry or die I will one half of my property to her, or, in case of her death, to her relations, and the remaining half to go to my relations."—passes the fee to the wife to one half of the testator's property. *Mud. J. v. Mullican*, 11 Ky. L. Rep. 412.

A will provided, "I give, devise and bequeath unto my wife all my household goods and furniture; also one third of the income or interest of my estate during her widowhood, in lieu of dower." It was held that "also" was equivalent to "in like manner," and that the gift of the household goods and furniture was during widowhood only. *Morgan v. Morgan*, 4 Cent. Rep. 364, 41 N. J. Eq. 235.

A will giving the widow testator's estate during widowhood, except several bequests to individuals in trust, and devising the realty, in case of her marriage to another, to whom is given a pecuniary bequest and residue of the estate after payment of administration expenses,—gives the widow the entire estate, less so much as is necessary for payment of debts and pecuniary legacies, subject, however, to defeasance by marriage; in which event the realty goes over to the specific devisee, who takes the personality under the residuary clause, and any lapsed legacies. *Squier v. Harvey*, 6 New Eng. Rep. 508, 16 R. L. —.

A widow given the control and benefit of all of the testator's estate, for the support of herself and child, so long as she remains a widow, takes the estate as a trustee; and her election to take under the will is not inconsistent with her claim to an ultimate

and limitations in restraint of marriage, when annexed to gifts by will of realty or of personality or of both together as one gift. *Sabra A. Knight* did not waive the provisions for her in the will, and after the death of her husband and before she married again conveyed in fee to different persons different parcels of the land devised, and all the tenants in the suits claim title in fee from her under these conveyances, and in some of the suits certain mortgagees have been joined as tenants with the owners of the equity of redemption. The suits were brought after the death of *Sabra A. Knight*. The principal question of law is, whether, under the will, *Mrs. Knight* took an estate in fee, or for her life, or during her widowhood. Many of the decisions on this subject are collected in 2 Pom. Eq. Jur., § 933, and notes; 1 Story, Eq. Jur., 18th ed. § 274, note a; 2 Jarman, Wills, 5th ed. by Bigelow, *44, and notes.

The weight of authority is in favor of treating as valid limitations or conditions which are annexed to devises and bequests to the wife of the testator, although they tend to restrain her from marrying again, and although the will does not dispose of the property by a gift over to other persons in the event of her marrying again. This is shown by the opinions in *Loring v. Loring*, 100 Mass. 840; *Dole v. Johnson*, 8 Allen, 864; *White v. Sawyer*, 18 Met. 546, and *Gibbens v. Gibbens*, 140 Mass. 102, 1 New Eng. Rep. 98.

The decision in *Parsons v. Winslow*, 6 Mass. 169, was by a majority of the court, and it was made in reliance upon what was understood to be the state of the English law at that time. The case concerned a bequest of personalty in trust for the wife of the testator during her widowhood. But modern English decisions seem to show that conditions attached to de-

vises and bequests which are in restraint of second marriages are now held valid. *Allen v. Jackson*, L. R. 1 Ch. Div. 899; *Newton v. Marsden*, 2 J. & H. 356. See *Bostick v. Blades*, 59 Md. 231; *Durney v. Schoeffer*, 24 Mo. 170.

In *Otis v. Prince*, 10 Gray, 581, the devise was to a grandson of the testator and was held to be upon condition subsequent and a restraint upon the marriage of the grandson.

Whatever may be true of devises and bequests to other persons, the right of a widow to receive certain portions of the estate of her deceased husband is secured by statutes—if she chooses to avail herself of them. If a widow prefers to take under the will of her husband, and he has chosen by his will to give her the use of property during her widowhood only, intending that if she marry again she should rely thereafter for her support upon her future husband, we think that his intention ought not to be defeated on any ground of public policy, and the decisions on this question do not proceed upon any distinction between a limitation of the duration of the estate given to the widow and a condition subsequent whereby the estate given is devested on her re-marriage.

The question raised in the briefs of the tenants, whether the mortgagees could properly be joined as tenants with the owners of the equity, seems not to have been raised by the pleadings. The Southbridge Savings Bank pleaded only *nul disseisin*, and John Garlington pleaded *nul disseisin* jointly with Richard Garlington. See *Harris v. Finney*, 11 Gray, 511.

Upon the agreed facts the judgment for the demandant in each case is to be affirmed, and the value of the demandant's estate without the improvements is to be ascertained by the Superior Court.

So ordered.

mate share in the estate; and upon her subsequent remarriage she is entitled to one half of the estate remaining undisposed of. *Beshore v. Lytle*, 13 West. Rep. 788, 114 Ind. 8.

A bequest to a wife for life, so long as she remains single, of the absolute use and control of all the residue of the testator's property, for her comfort, and for the support and education, in her discretion, of their children during their minority, and to be divided equally between them, or the survivors of them, upon her decease, confers upon the wife the "use," but not the consumption, of the residue of testator's estate. *Leahy v. Cardwell*, 14 Or. 171.

Under a will by which testator gives to his wife the interest on his property as long as she remains unmarried, with the exception of one legacy, a subsequent clause, by which he directs his executor, as soon as conveniently may be after his decease, to pay to the various legatees a certain proportion of the amount therein named, will be harmonized with the preceding provision, and held to mean that such payment shall be made only after the determination of the wife's interest. *Meyer v. Cahen*, 111 N. Y. 270.

Devise with contingent authority to sell.

In a devise of real estate to a wife the contingent authority to sell for her support during widowhood does not enlarge her estate to a fee; it confers only 9 L. R. A.

a power and not property. *Nash v. Simpson*, 1 New Eng. Rep. 699, 73 Me. 142.

A will giving the wife of testator his lands "to keep for her own use as long as she keeps my name," and giving her power if necessary to sell a part of the land to pay debts, providing that in case of her re-marriage she shall have one half of all his real and personal property for her own use, does not give her a fee in the whole of the real estate, even if it be a gift in fee of half the lands in case of re-marriage. *Long v. Paul*, 127 Pa. 456.

Where a testator devised to his widow all his estate, real, personal and mixed, during her widowhood, the estate to be disposed of agreeably to her directions, in such manner as she may deem most conducive to the welfare and comfortable subsistence of herself and family, and creating a trust for the use of a female seminary; under the circumstances the power to sell must be construed as a power of absolute disposal of the real property to carry out the intention of the testator. *Kauffman v. Breckenridge*, 5 West. Rep. 148, 117 Ill. 805.

A devise of property to testator's wife and heirs, for her to dispose of as she sees best, "That is to say, during the time she lives a widow or in my name, then said land is to be equally divided among the present heirs of [the testator and his wife] or the proceeds of the same as the case may be,"—gives the widow an estate during widowhood. *Levensgood v. Hoople* (Ind.) May 18, 1890.

NEW YORK COURT OF APPEALS (2d Div.)

Joseph N. KOEHLER *et al.*, *Appts.*,

v.

Edward SANDERS, Impleaded, etc., *Reept.*

(....N. Y.....)

1. The word "international" cannot be exclusively appropriated by anyone as part of a trade-name if used in its ordinary sense for the purpose of characterizing the business to which it is applied as pertaining to matters or people of different nations.
2. The name "International Banking Company" cannot be deemed arbitrary or fanciful although applied to a business entirely distinct from that of banking, in connection with which it has never before been used, so as to entitle its originator to its exclusive use as against other persons engaged in the same business.
3. Equity will not aid in the protection of a trade-name which, although descriptive of a business, does not describe the one in which its owner is engaged but another requiring greater financial strength, thus tending to mislead and defraud the public in its dealings with the owner, and to give the latter an advantage which he would not otherwise possess.

(October 7, 1890.)

A PPEAL by plaintiffs from an order of the General Term of the Supreme Court, First Department, reversing a judgment of the New York Special Term entered upon the report of a referee in favor of plaintiffs in an action brought to enjoin an alleged infringement of a trade-name. *Affirmed.*

Statement by Bradley, J.:

Appeal from order of the General Term of the Supreme Court in the First Judicial Department, reversing judgment entered on report of a referee in favor of the plaintiffs, and granting a new trial.

The plaintiffs, partners, doing business in the firm name of the International Banking Company, in the City of New York, brought this action to restrain the defendants from using in their advertisements the name of "International Bank," upon the alleged ground that in doing so the defendants would thereby wrongfully infringe upon the plaintiffs' right to the exclusive use of the name so adopted as their trade-mark. The plaintiffs' firm is the successor of one which commenced business in the City of New York in the same name in 1874. And the defendants commenced business there in 1883, as partners, in the name of Edward Sanders & Co. They first used the name of International Bank in 1887, shortly before the commencement of this action. It was then included in an advertisement pub-

lished in the German language in the New York Staats Zeitung, a German newspaper. The closing words of the publication, embracing those which constitute the alleged infringement, were in English, as translated at the trial, as follows: "All ready for the next drawings, 1st of February and 20th of February. Call on the International Bank of Edward Sanders & Co., 213 Broadway, corner Fulton Street, New York City." The plaintiffs' place of business was 207 Broadway, corner Fulton Street, and their partnership name, of International Banking Company, was in English, while the other portions of their advertising circulars were in German. When the defendants' publication, before mentioned, appeared, the plaintiffs, by letter, charged the defendants with making use of the name "International Bank" in fraud of the public, and to the prejudice of the plaintiffs, and advised them that they would be prosecuted unless they desisted. The defendants, by letter, in answer quite emphatically asserted the right "to use the name International Bank of Edward Sanders & Co." Thereupon this action was commenced.

Mr. Benno Loewy, for appellants:

That the business of the plaintiffs was the sale of foreign government and municipal bonds and securities, and that they styled themselves "the International Banking Company," do not in themselves preclude the plaintiffs from obtaining in a court of equity the relief which they seek. There is no law which prohibits a copartnership from styling itself a corporation, or using a name which may sound like a corporate name, nor is there any law preventing a firm from calling its business a banking business, although in fact they may not be bankers.

Crausford v. Collins, 30 How. Pr. 398; *Gay v. Seibold*, 97 N. Y. 476; *Wright v. Hooker*, 10 N. Y. 51; *Cohn v. Gottschalk*, 16 N. Y. S. R. 818-824.

The use of the name not being illegal, fraud cannot be presumed.

New York O. C. Co. v. Union P. C. Co. 39 Hun, 611.

The plaintiffs, by styling themselves "The International Banking Company," were not guilty of any misrepresentation which would preclude them from relief in a court of equity.

Dizon Crucible Co. v. Guggenheim, 2 Brewst. 841; *Dale v. Smithson*, 12 Abb. Pr. 237; *Stewart v. Smithson*, 1 Hilt. 119; *Ransom v. Ball*, 54 Hun, 636; *Lee v. Haley*, L. R. 5 Ch. App. 155.

The cases in which relief was denied on the ground of misrepresentation by the plaintiffs are all cases in which, by the label or matter sought to be protected, actual fraudulent misrepresentations as to the origin or quality or properties of the merchandise were made of such a character as to deceive the public.

Fetridge v. Wells, 18 How. Pr. 835; *Phalon v. Wright*, 5 Phila. 464; *Hobbs v. Francois*, 19 How. Pr. 567; *Partridge v. Menck*, 8 How. App. Cas. 558; *Leather Cloth Co. v. American Leather Cloth Co.* 11 Jur. N. S. 518; *Perry v. Truefitt*, 6 Beav. 66; *Pidding v. How*, 8 Sim. 477;

NOTE.—Trade-mark and trade-name. See notes to *Rumford Chemical Works v. Muth* (Md.) 1 L. R. A. 44; *Cigar Makers Prot. Union v. Conhaim* (Minn.) 8 L. R. A. 125; *Laughman v. Piper* (Pa.) 5 L. R. A. 599; *Gato v. El Modelo Cigar Mfg. Co. (Fla.)* 6 L. R. A. 823; *Weener v. Brayton* (Mass.) 8 L. R. A. 640; *Alif v. Radam* (Tex.) 9 L. R. A. 145.

Palmer v. Harris, 60 Pa. 156; *Wolfe v. Burke*, 56 N. Y. 115.

A court of equity will enjoin the use by one person of a firm or trade name so similar to that previously used by another as to be likely to deceive the public, irrespective of whether such name is generic and descriptive or not.

New York Cab Co. v. Mooney, 15 Abb. N. C. 152; *Mateell v. Flanagan*, 2 Abb. Pr. N. S. 459, 461; *Potter v. McPherson*, 21 Hun, 559; *Sanders v. Jacob*, 2 West. Rep. 408, 20 Mo. App. 96; *Coats v. Holbrook*, 2 Sandf. Ch. 586, 7 N. Y. L. ed. 713; *Walton v. Crowley*, 8 Blatchf. 440; *Farmers L. & T. Co. v. Farmers L. & T. Co. of Kansas*, 21 Abb. N. C. 104; *United States Mercantile Report. Co. v. United States Mercantile Report. & C. Assn.* 21 Abb. N. C. 115; *Jay v. Ladler*, L. R. 40 Ch. Div. 649; *Boulinois v. Peake*, L. R. 18 Ch. Div. 518, note; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Appolinaris Co. v. Brunler*, N. Y. L. J. Feb. 8, 1890; *Enoch Morgan's Son's Co. v. Troxell*, 89 N. Y. 292.

The words "International Banking Company" are susceptible of appropriation as, and constitute, a valid trade-mark, trade-name and firm name.

Smith v. Stabury, 25 Hun, 282; *Gillott v. Esterbrook*, 48 N. Y. 874; *Newman v. Alford*, 51 N. Y. 159; *Hier v. Abrahams*, 82 N. Y. 519; *Selchow v. Baker*, 93 N. Y. 59; *Enoch Morgan's Son's Co. v. Schwachofer*, 5 Abb. N. C. 265; *Lauferly v. Wheeler*, 11 Abb. N. C. 220; *Hegeman v. O'Byrne*, 9 Daly, 264; *Howard v. Henriques*, 3 Sandf. 725; *Burton v. Stratton*, 12 Fed. Rep. 696, 14 Rep. 425; *Fleischmann v. Schuckmann*, 62 How. Pr. 92; *Braham v. Bustard*, 1 Hem. & M. 447; *Congress & E. S. Co. v. High Rock C. S. Co.* 45 N. Y. 291; *Newman v. Alford*, *Gillott v. Esterbrook* and *Hier v. Abrahams*, *supra*; *O'Rourke v. Central City Soap Co.* 26 Fed. Rep. 576.

The protection asked for by the plaintiffs against infringement has been frequently exercised by courts of equity in cases very similar to that of the plaintiffs.

American Grocer Pub. Assn. v. Grocers Pub. Co. 25 Hun, 398; *Howard v. Henriques*, *supra*; *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 226; *Potter v. McPherson*, 21 Hun, 559.

It is no answer to the present suit that the words "International" or "International Bank" are in common use.

Fleischmann v. Schuckmann, 62 How. Pr. 92; *Messerole v. Tynberg*, 4 Abb. Pr. N. S. 410; *Potter v. McPherson*, *supra*; *Selchow v. Baker*, 93 N. Y. 419.

Mr. Ira Leo Bamberger, for respondent:

A misrepresentation, although innocent of wrongful intention, and essentially harmless in consequences, vitiates all right to redress for infringement.

Siebert v. Abbott, 61 Md. 276; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 998; *Kenny v. Gillet*, 70 Md. 574; *Leather Cloth Co. v. American Leather Cloth Co.* 4 De G. J. & S. 137, 11 H. L. Cas. 523; *Pidding v. How*, 8 Sim. 477; *Perry v. Truitt*, 6 Beav. 66; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Sedbury v. Grosvenor*, 14 Blatchf. 262; *Hobbs v. Francais*, 19 How. Pr. 567; *Connell v. Reed*, 128

Mass. 477; *Palmer v. Harris*, 60 Pa. 156; *Phalon v. Wright*, 5 Pa. 464; *Wolfe v. Burke*, 56 N. Y. 115.

The plaintiffs are not entitled to the exclusive use of the word "International." There can be no exclusive right to the use of words or marks which have no relation to the origin or ownership of the goods, and are only meant to indicate their quality or grade.

Royal Baking Powder Co. v. Sherrell, 98 N. Y. 384, distinguishing *Hier v. Abrahams*, 82 N. Y. 519; *Chojnski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476; *Stokes v. Landgraff*, 17 Barb. 608; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 298; *Selchow v. Baker*, 93 N. Y. 59; *Newman v. Alford*, 35 How. Pr. 108.

Bradley, J., delivered the opinion of the court:

The business of the parties was of like character, and consisted in dealing in foreign government bonds, mainly those of Germany, Austria, Italy, Russia, France and Belgium. They purchased the bonds there, and sold them in this country, where their transactions were mostly had with persons speaking the German language. Among the inducements to purchase of the parties, as represented by their published circulars, were those that payments could be made in small installments, and that there was a chance, by means of a system of lottery drawings in the countries issuing them, to realize something in excess of the amount of the bonds by way of prizes or premiums. It has been held that this was not a lottery scheme within the statutes of this State, and therefore the sales made here were not invalid. *Kohn v. Koehler*, 96 N. Y. 862.

The plaintiffs' claim to relief rests upon the alleged proposition (1) that they had acquired the exclusive right to the use of the term "International Banking Co.," which they had adopted as their firm name; or (2) that the alleged infringement by the defendants was for the purpose of deceiving people, and of inducing them to believe that the defendants' place of business was that of the plaintiffs, to the injury of the latter. The referee found that this name was adopted by the predecessors of the plaintiffs, and to whom the latter succeeded in the business, as "their copartnership trade-mark," which, "by constant advertising for a period of twelve years, has become of great value;" and that in a spirit of rivalry, and to induce the public to believe that the defendants' place of business was that of the plaintiffs, the defendants infringed upon the plaintiffs' right to the exclusive use of the name so adopted by the latter as their trade-mark, by causing to be inserted in the *New York Staats Zeitung* an advertisement of securities sold by them, which were also sold by the plaintiffs, in the manner and form of their advertisements, and containing at the end the words in the German language, which, translated into English, meant, "Inquire at the International Bank of Edward Sanders & Co., 212 Broadway, Corner of Fulton Street, New York City."

In the strict sense of the term, a trade-mark is applicable only to a vendible article upon which it is in some manner affixed or repre-

sented as a symbol to indicate the origin or ownership of the article on which it is placed; but the same rules for the protection against infringement are extended to names applied to other callings, or to places of business, as to technical trade marks. *Howard v. Henriquez*, 3 Sandf. 725; *Glenn & H. Mfg. Co. v. Hall*, 61 N. Y. 226.

In referring to the principles relating to trade-marks, and upon which their efficiency as such depends, it may be observed that there is no exclusive right to represent by them an idea, nor can there be an exclusive appropriation of that which is descriptive of the articles to which they are attached, or that which indicates their ingredients, mode of composition, characteristic properties, quality or nature. *Enoch Morgan's Son's Co. v. Trozell*, 80 N. Y. 292; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Caswell v. Davis*, 58 N. Y. 228.

The word "international" is a generic term, pertaining to relations between nations, and when applied to business or to transactions of private character it imports dealings of some sort in matters or with people of different nations, or which have some relation to them. It is in common use, and in its nature it is descriptive, and ordinarily characterizes the business to which it pertains, rather than its origin or proprietorship; and, so treated, the use of it cannot be exclusively appropriated by any party. This partnership name taken by the plaintiffs is apparently descriptive of a banking business, and indicates that it is in some sense international, and presumptively the name denotes the nature of the business. In that view it cannot have the character essential to a trade-mark or to its exclusive use analogously to it. *Taylor v. Gillies*, 59 N. Y. 821; *Royal Baking-Powder Co. v. Sherrell*, 93 N. Y. 831; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 998; *Choyaki v. Cohen*, 39 Cal. 501; *Burke v. Cassin*, 45 Cal. 467.

The well-known use of this word, as commonly used in its application to business, is such as to render it *publici juris*; but it is urged that the business of the parties is not banking, and, although this term taken by the plaintiffs into their partnership name is generic, and descriptively applicable to a class or classes of business, it may in its use by them be deemed "arbitrary"; and therefore, as against any person engaged in a similar enterprise to that in which they are employed, the plaintiffs are entitled to the protection of its exclusive use. And in support of this proposition reference is made to the fact found by the referee that the name "International Banking Company" was never used by any other person or corporation in connection with business similar to that in which the plaintiffs were engaged. That may be so, yet the word "international" is not arbitrary or fanciful in its application to banking, but is descriptive of the character suggested by it of that business, and it may be deemed to have been intended to have such effect. *Taylor v. Gillies*, 69 N. Y. 331.

The cases cited by counsel do not support his contention in that respect. The word "congress," as applied to a spring of water, in *Congress & E. S. Co. v. High Rock C. S. Co.*, 45 N. Y. 291, was arbitrary.

In *Smith v. Sixbury*, 25 Hun, 232, the term

"Magnetic Balm" was sustained as a trade-mark, not only for the reason that the liquid contained no magnetism or electricity, but because the word "magnetic" was not descriptive of any quality of a liquid compound. In *Gillott v. Esterbrook*, 48 N. Y. 374, and *Selchow v. Baker*, 93 N. Y. 59, the trade-marks sustained were arbitrary figures and terms, not suggestive of the nature of the article to which they were affixed; and the same remark is applicable to *Hier v. Abrahams*, 82 N. Y. 519, as explained in 93 N. Y. 336.

The fact that a person may use his name as a trade-mark, and that a corporation may do likewise, is not necessarily applicable to a partnership name, which merely indicates a business in which the firm purports by it to be engaged. The use by one person of his name as a trade-mark would not deny to another having the same name the right to use his in good faith for such purpose in a similar business, or to mark similar vendible articles. And there are cases where the right to use a name to designate a product is so qualifiedly exclusive that the right to the protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. This may be applicable to a geographical name designating a locality or district, and which has been adopted by one as a trade-mark, and afterwards deceptively used by another upon similar articles. *Newman v. Alvord*, 51 N. Y. 189; *Laughman's App.* 128 Pa. 1, 5 L. R. A. 599; *Delaware & H. C. Co. v. Clark*, 80 U. S. 13 Wall. 811 [20 L. ed. 581].

The application of this principle is not necessarily dependent upon a proprietary right in a name, or the exclusive right to its use; but when another resorts to the use of it fraudulently as an artifice or contrivance to represent his goods or his business as that of the person so previously using it, and to induce the public to so believe, the court may as against him afford relief to the party injured. *Berry v. Armistead*, 2 Keen, 221; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Jay v. Ladler*, L. R. 40 Ch. Div. 649; *Meneely v. Meneely*, 62 N. Y. 427.

And, on the other hand, the consideration of good faith to the public is so far deemed due from a party taking a name or trade-mark for his business or goods that equity will not grant relief for the protection of the exclusive use of a misrepresentation by means of such name or trade-mark, when it may tend to deceive and mislead the public, or to impose upon and induce persons to become his patrons. In other words, a party successfully seeking equitable relief in such case must come into court with clean hands. Assuming that the defendants had the legal right to use in good faith the name in question, there is no support for the action upon the ground merely that they sought by fraudulent means to palm off upon the public their business, or the place where they conducted it, as that of the plaintiffs. There was no evidence of such intent other than what appeared in the advertising circular which the defendants caused to be published, and in that they distinctly used their own firm name of Edward Sanders & Co. The finding of the referee upon that subject was based upon the assumption that the firm name of the

plaintiffs was their trade-mark, in which they had the proprietary right to the exclusive use. In that view, such inference might arise from a misleading assimilation, against which good faith in its use would be no defense; and in that view only can such finding be sustained against the exception taken to it. But assuming, as contended on the part of the plaintiffs, that their business was in no sense banking, and treating the firm name as to it arbitrary or fanciful, in fact, although not apparently so, then arises the difficulty to support their claim to equitable relief, in the fact that the name taken by them is a false representation of the nature of their occupation. The name points to the business of their company as that of banking, of which it is distinctly descriptive. Banking is a well-known business, and is ordinarily supposed to require for its support some financial strength. The use of this name would naturally induce the public to understand that such was the business of the company, and thus the plaintiffs might derive from its use confidence to their advantage, which they otherwise would not possess; and so far as this should be accomplished it would be the result of the untrue designation of the name, or of the deception caused by it. Their busi-

ness is to some extent conducted by means of communication through the mails between them and those dealing with the company, and this is done by the latter upon their faith and confidence in the fidelity of the company, and its financial ability to consummate that which it assumes, or undertakes to do. This confidence may, in fact, be justly due to the plaintiffs in both those respects. The application of the rule now under consideration does not depend upon the question of actual injury to others in any particular case, but is founded upon the salutary principle that equitable relief will not be given in support of misrepresentation in fraud of the public, and by which they may be misled or deceived. This is the situation of the plaintiffs in respect to the remedy they sought by this action. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218 [27 L. ed. 706]; *Wolfe v. Burke*, 56 N. Y. 115; *Connell v. Reed*, 128 Mass. 477; *Siegert v. Abbott*, 61 Md. 276; *Palmer v. Harris*, 60 Pa. 156; *Leather Cloth Co. v. American Leather Cloth Co.* 4 DeG. J. & S. 186.

These views lead to the conclusion that *the order should be affirmed, and judgment absolute directed for the defendants.*

All concur, except Vann, J., not sitting.

NEW YORK COURT OF APPEALS.

Sherman S. ROGERS, *Respt.*,

v.

COMMON COUNCIL OF the City of
BUFFALO *et al.*, and Ceric Diebold,
Appt.

(.....N. Y.....)

1. The fact that a statute authorizing the appointment of a state board of commissioners to consist of three members provides that not more than two of them shall be adherents of the same political party does not render it void under a constitutional provision which declares that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," notwithstanding that after two commissioners have been appointed from one party all other members of that party are ineligible to the vacant commissionerhip.

2. A provision in a statute which establishes an appointive state board of commissioners to consist of three members, that not more than two members shall be adherents of the same political party, is not violative of a constitutional provision that no person shall be deprived of life, liberty or property without due process of law, even when giving the word "liberty" a definition wide enough to include the right to be eligible to hold office, and considering that after two members of the commission have been appointed from one political party all other members of the same party are ineligible to the vacant commissionerhip.

3. A statute which requires the mayor of a city to prepare rules for the selection of the city officers whose appointment has been delegated by the Constitution to the municipal authorities, which must be approved by the State Civil Service Commission before they can go into effect, does not subordinate the power

of the local authorities to that of the state authorities in violation of the constitutional provision delegating the appointing power to the municipal authorities.

4. The imposing of a test by means of which to secure qualifications in a candidate for an appointive office of a nature to enable him to properly and intelligently perform the duties of such office is not prohibited by a constitutional provision that no "oath, declaration or test shall be required as a qualification for any office of public trust."

(October 7, 1890.)

APPEAL by defendant Diebold from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Erie Special Term in favor of plaintiff in an action brought to restrain Diebold from accepting, and the other defendants from paying, compensation for services performed by him for the City of Buffalo. *Affirmed.*

The case is fully stated in the opinion.

Messrs. Tabor, Sheehan & Coatsworth for appellant.

Mr. Ansley Wilcox, with *Messrs. Almy & Keep*, for respondent.

Peckham, J., delivered the opinion of the court:

Long prior to the passage of the first so-called "Civil Service Reform Act" by the Federal Congress, the condition of that service, and the method of appointment thereto, had become the subject of most serious thought on the part of many upright, intelligent and experienced men. The semi-barbarous maxim that "to the victor belongs the spoils" had been the foundation stone upon which the system of appointments to the civil service of the nation had been placed for a number of years. The system had grown to such proportions under the

necessary enlargement of the service, and it had become in practice so entirely the creature of political chiefs, that the appointing power was regarded merely as a formal means of registering and legalizing the appointments to office which had already been substantially made by them. Such a system took from the officer who was to make the appointment all sense of personal or official responsibility to the people of the country, and substituted in its stead the feeling that he was responsible only to his party to make such appointments to office as the leading men therein should choose to ask for. It is not to be wondered at that as the numbers of offices increased, and the numbers of applicants therefor increased in even greater proportion, a general scramble for office became the accompaniment of every change of administration; and to such an extent was it carried that the officers of the government had really not the time to spare for the discharge of the other duties pertaining to their office, because of the constant demand upon their time and attention made by office seekers and their supporters. The chief reason for an appointment was the political work done by the applicant, and his supposed power to do more, and thus an appointment to an office in the civil list was regarded as a fit and proper reward for purely political and partisan service. No one can believe that such a system was calculated to produce a service fit for the only purpose for which offices are created, viz., the discharge of duties necessary to be performed in order that the public business may be properly and efficiently transacted. The continuous and systematic filling of all the offices of a great and industrious nation by such means became conclusive proof, in the minds of many intelligent and influential men, that the nation itself had not in such matters emerged from the semi-barbarous state, and that it had failed to obtain the full benefits arising from an advanced and refined civilization. The government, it was said, in such case, where public offices are thus filled, is looked upon as an enemy's country, fit to be raided and conquered; and to obtain possession of it is a desirable thing, because all the offices within the gift of those who administer it are lawful spoil of war, and to be parceled out by the chiefs of the victorious party to their faithful followers, in recognition of past political services, or in expectation of future support of the same nature. Possession of office is to be the reward of party fidelity and party service. Contests between political parties under such circumstances, it was claimed by the opponents of this method of appointment to office, must, in the absence of some great and exceptional question, degenerate into mere struggles for the possession of the spoils of office. Struggles of this nature necessarily bring out every low, selfish and sordid quality of the participants therein; and corruption and fraud at the elections become the usual accessories thereto. In these contests all principle is lost sight of, and a victory is regarded as a simple means by which to obtain or retain possession of office. Views of this nature were held by numbers of earnest and unselfish men long before any legislation upon the subject had become possible. The

prevailing system finally became, as was alleged, so subversive of every right principle upon which the business of the public ought to be conducted that the attention of Congress was at length so far drawn to it as to result in the passage by Congress of the first statute upon the subject. It is not claimed that the federal legislation in regard to civil service reform has as yet proceeded very far, but it is a step in the direction of a change to another, and, as is thought by many, a much better, system of filling the public offices.

Legislation in the same direction as that contained in the Act of Congress was soon inaugurated in this State. It had been with us precisely as it had been with the federal authorities, and we were in no manner behind them in a practical, prompt and thorough adhesion to the truth of the maxim already quoted. The same force which had operated in the National Congress, and had caused the federal civil service legislation, appeared in our state capitol; and legislation looking substantially to the same end as that of the Acts of Congress was enacted by our Legislature. The fact must be fully recognized that the duties connected with the vast majority of offices in both the federal and state governments are in no sense political, and that a proper performance of those duties would give no one the least idea whether the incumbent of the office was a member of one political party or another. It was announced, by its adherents and promoters as one of the most important of the principles of this new system of filling the civil offices that where the political views of the incumbent of public office could not rightfully affect, or in any manner determine, the means or method of the performance of his official duties, and where he stood in no confidential position toward a superior, in such case his appointment to, or his tenure of, such office should in no way depend upon or be affected by his "politics." Instead of the old method of obtaining an appointment, a new one was proclaimed, which was to be based solely upon merit, to be proved by an open, public and competitive examination, free to all candidates; and the person who was the best qualified, all proper circumstances being considered, should be appointed. Legislation looking to this end was enacted in New York. The full benefits of such a system have not yet, it is said, been given by the legislation in question because it does not go far enough; but it is claimed that even such as has been enacted tends to give permanency of tenure to the appointee, and thus to relieve him from constant anxieties as to his future means of livelihood, and to give him on that account more inclination and ambition to discharge his duties well and efficiently. As to the appointing power, it is also said it would leave him at leisure to attend to the important duties of his own office, without a constant drain upon his time and his temper in attending to the claims of office seekers. If the system were to be carried out to its fullest extent by appropriate legislation, and if the laws thus enacted were to be enforced bona fide and with cordial heartiness by the men to whose hands it would necessarily be confined, it has been confidently predicted that the improvements in our entire civil service

would be such that no unprejudiced citizen would ever give his consent to return to the old order of things.

I have stated in a somewhat summary manner the system which was in active operation concerning the appointment to civil office in the State and nation prior to the enactment of recent legislation upon the subject. That the former system was bad, very bad indeed, is a fact regarding which it is almost impossible to dispute. All intelligent, unprejudiced and disinterested opinion runs most strongly in that direction. Legislation of the character of that under discussion is in this country, and as yet, somewhat experimental in its results. It is experimental because it has been so little tried up to this time; but that the results, if the legislation be fairly carried out, will be immeasurably superior to those obtained under the old system, is a prediction most confidently made by those whose knowledge upon the subject is the greatest. It is somewhat difficult to imagine a worse than the old system of appointments to civil office. That a letter carrier should lose his position because his views upon the question of the tariff were not in accordance with the ruling powers seems to be the very height of absurdity. An earnest desire for the general welfare would seem to suggest a fair trial of this new system. A strict and full enforcement of the legislation already enacted in this State on that subject would be the only means of making the experiment. But the defendant Diebold challenges the legislation in question, and asserts that it is unconstitutional, on several alleged grounds; and if in error as to that, he asserts that there are other reasons why it is inapplicable to his case. If the Legislative Acts under consideration violate in any particular the Constitution of our State, it is the duty of this court to so decide, without regard to consequences. In determining that question, however, we must be guided in the discussion by the rules of construction which are so well known, and which should control all courts. The Act of the Legislature must be plainly at variance with some provision of the Constitution before a court will so declare it. Doubtful questions will be resolved in favor of the validity of the Legislative Act.

The defendant alleges that the Acts are unconstitutional, because, among other reasons, they provide for the appointment by the governor, and for the confirmation by the Senate, of three persons as state civil service commissioners, not more than two of whom shall be adherents of the same party. This last provision, preventing the formation of the civil service board of commissioners from one political party, is cited as a violation of article 1, section 1, of our Constitution, which declares that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The provision is also claimed to be a violation of that part of section 6, article 1, which declares that no person shall be "deprived of life, liberty or property without due process of law." Provisions of a nature similar to this Act are contained in numerous statutes which have been enacted since the adoption of our Constitution. Among the latest are those

creating the state railroad commission and the state board of arbitration. In appointing such commissioners, the governor is not permitted to take them all from one party. None of these statutes have been held unconstitutional on the ground taken here, and, so far as I can discover, this provision has never even been assailed as a violation of the Constitution. It is not conclusive, of course, yet the fact that up to this time no such claim has been made in any legal discussion, while statutes containing provisions of this kind have been frequent, is something of an argument in favor of their validity. We feel quite clear that such provisions are not in violation of the first section, article 1, of the Constitution. A citizen is not, within the meaning of this section, in such case disfranchised; nor is he deprived of any right or privilege secured to any other citizen of the State. No definition that could be given would probably include all the cases that such section might cover, and it is never well to attempt a general definition in matters of this nature. It is enough to say as each case presents itself that it is or is not included within the section.

The claim of defendant upon the facts of this case is, that after two persons have been appointed from one political party, the Legislature has no right to direct that, in appointing a third as one of three commissioners, such appointment must be made from some other than the same political party that furnished the other two. It is urged that the Legislature has no such right, because the applicant for the third appointment might be a member of the same political party as the two already appointed, and that he has a constitutional right to be eligible for such appointment; and any statute which stands in the way of such right, save as a punishment for crime, or as a consequence of a conviction thereof, must deprive him of the franchise or privilege of eligibility to office, and therefore amounts to his proscription to that extent, and is for that reason a violation of the Constitution. We think not. The appellant bases his argument upon the proposition that every citizen has a right, which is protected by the Constitution, to be regarded as eligible to hold any office, unless the Constitution has itself prescribed certain qualifications for such holding. He then asserts that the Statute in question violates this constitutional right. It is not necessary, in the view we take of this Statute, to decide upon the correctness of the claim as to the eligibility of the citizen to hold office, as made by the appellant, under the provisions of the Constitution. We will simply, for the purpose of this discussion, assume it to be correct; but we do not think that this Statute violates any constitutional right of the individual. We think his right to be regarded as eligible to hold office under this Statute is fully recognized when he stands on an equal footing with others of his class, all of whom are eligible. Where there are two offices which members of the same party may fill, if he, being a member of such party, is equally eligible with any other member of that party to fill either, his constitutional privilege to hold office is fully recognized and vindicated. It must be remembered that there is nothing in this Statute which compels the appointment of even one member of any political

party. It simply prevents the appointment of more than two from such party. With the appointment of the third, another condition arises, and that condition prevents the selection being made from the ranks of the same political party from which the other two appointments have been made. Having been a member of the eligible class from which the other two persons were selected, and having thus had his constitutional chance of appointment equally with all others of that class, all being eligible, we cannot think that while two others from his class have been taken, and consequently he has been omitted in the two appointments, his eligibility for holding office extends, by virtue of this section of the Constitution, to the right of appointment as a third member of such commission, in spite of the condition limiting the appointment to two from any one political party. In such case it cannot be truly said that eligibility to hold office depends upon party affiliation. The purpose of the provision is of course plain. It seeks to secure the appointment of persons who are not all of the same political views, and thus to provide for a representation in the body so appointed of different and probably conflicting interests in the State. We cannot believe that the section in question does or was intended to operate so as to prevent the execution of such a purpose so carried out.

The case of *Barker v. People*, 3 Cow. 686, has been cited by counsel. That case holds that the Act to suppress dueling, which provided as a punishment for sending a challenge that the person so sending should on conviction be disqualified from holding any public office, was constitutional. The chancellor, in the course of his opinion, said he thought it entirely clear that the Legislature could not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution had not required. What he meant by such expressions is rendered clear by the examples he gives. Legislation would be an infringement upon the Constitution, he thought, which should enact that all physicians, or all persons of a particular religious sect, should be ineligible to hold office, or that all persons not possessing a certain amount of property should be excluded, or that a member of Assembly must be a freeholder, or any such regulation. But in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not, in any just sense, amount to an arbitrary exclusion from office, nor to a general regulation requiring qualifications not mentioned in the Constitution. The "qualifications" which were in the mind of the learned chancellor were obviously those which were, as he said, arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health, and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon, be arbitrary or unconstitutional, as an illegal exclusion from office? I think not.

9 L. R. A.

The purpose of the Statute must be looked at, and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the State, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purpose, it will be difficult to say what constitutional provision is violated, or wherein its spirit is set at naught. The case is entirely different from that of *Atty-Gen. v. Detroit C. Councilmen*, 58 Mich. 213. The provision in that case was for the appointment of election inspectors consisting of two persons from each of the two leading political parties; and it was held to be in violation of the Constitution of Michigan. There the law recognized but two political parties, and made it a necessity for the appointments to be made from and confined to members of those parties. An individual not a member of either was not eligible to appointment. In the case before us, there is not a citizen in the State, otherwise capable, who would not be eligible in the first instance to one of these appointments; and it is not until two have been made from one party that a member of such party is not eligible for appointment to the third place. There is no provision making it necessary to appoint two from the same party, or making it necessary to appoint some one who has been known up to that time as a member of any particular party. The legislation is in the direction of making the body thus appointed more representative of different and diverse interests than might otherwise be the case. The legislative power, generally speaking, is unlimited, save as the Constitution has set bounds to it. It is difficult to see any constitutional objection to the legislation in question, so far as the section under consideration is concerned. No man's right to be regarded as eligible to hold office is, as we think, infringed upon by legislation which prohibits the taking of more than a certain number of the class to which he belongs, for the purpose of filling a commission, composed of more than one individual. This is not the case of an attempt to restrict the right to vote for all officers that are elective by the people, so that what is termed "minority representation" might be attained even in purely elective offices. There is a constitutional provision which gives to every male citizen, qualified as therein specified, by age and residence, the right to vote for all officers that now are, or hereafter may be, elective by the people. What is the correct construction of that section of the Constitution, and how far it applies in the direction of limiting the power of the Legislature in regard to provisions for voting, are questions not now before us. There is of course no analogy between the cases of elective offices and those where the office is to be filled by appointment; and no argument which rests for its foundation upon the constitutional provision for voting for elective officers gives us any light upon the question under discussion. In our judgment there is nothing in the first section of article 1 which invalidates this legislation. It is equally apparent that the Statute does not violate the provisions of section 6 of the same article, prohibiting any person from being deprived of life, liberty or property without due process of law. He is not deprived of

his life or his property by this Statute. Giving the widest definition to the word "liberty," as including the right to be eligible to hold office, the discussion already had shows that it has not been disregarded under this law.

Another objection to the validity of the Statute is stated by the appellant. He says the Statute violates article 10, section 2, which provides that "all city, town and village officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of such cities, towns and villages, or of such division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose." His argument runs in this manner: The Statute provides that the mayor shall prepare general rules under which city officers are to be selected, which shall go into effect when approved by the state civil service commission. The powers of the local authorities to select city officers are therefore, as he argues, subordinated to the power of the state authorities. We think the proposition cannot be maintained. The powers of the local authorities to select city officers, within the meaning of this section of the Constitution, are not subordinated to those of the state authorities by the mere necessity for the submission of the regulations concerning their appointment to the state board. The Statute provides that the mayor is to prescribe such regulations for the admission into the civil service as will best promote the efficiency thereof, and ascertain the fitness of candidates in respect to character, knowledge and ability for the branch of the service into which they seek to enter. These regulations are to take effect upon the approval of the state commission. The mayor has, in the first instance, the sole right to prescribe regulations, but they are to be such as shall best promote the efficiency of the service, and ascertain the fitness of the candidates. The submission of such regulations to a state board before they are to take effect does not interfere with the general powers of the local authorities to appoint to office. The state board cannot itself make the regulations or alter them. The regulations themselves can only be for the purpose of establishing efficiency, and ascertaining the fitness of candidates. The same local authorities are to make the appointments that did so before the Statute was passed. Means are simply taken to insure the appointment of fit and capable persons. The general plan provided in the Statute would seem to be a fit and appropriate one for the purpose of accomplishing that result. It is not denied that illegal or improper regulations may possibly be prescribed by the mayor, and approved by the commission. This fact does not affect the validity of the Statute. The rule or regulation which is alleged to be invalid may be brought before the court by some person whose rights have been affected thereby, and judgment may be thus given in regard to such validity. The defendant Diebold does not show that he has lost any right, or that any right of his has been injuriously affected, by any regulation adopted by the mayor, and approved by the state commission; and he cannot therefore be heard upon a question which is as to him a mere abstraction.

Still another ground of invalidity is alleged

by the appellant. He says that the Statute conflicts with article 12, which provides for the taking of an oath of office by members of the Legislature and all officers, executive and judicial, before they enter on the duties of their respective offices, which oath is therein set forth; and it is there stated that "no other oath, declaration or test shall be required as a qualification for any office of public trust." The Statute by which an applicant for appointment to a position in a public office is made to show his fitness therefor, is claimed to constitute an illegal test within the meaning of this section. It is said that the Legislature has no right to enact that a person who shall be appointed to a public office shall have the qualifications necessary to enable him to discharge the duties of such office, nor to provide that the fact that he does possess such qualifications shall be ascertained by a fair, open and proper examination. Nothing but the bare oath mentioned in the Constitution can be asked of any applicant for an appointive office, is the claim of the appellant. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense, we are quite sure that the framers of our Organic Law never intended to oppose a constitutional barrier to the right of the people, through their Legislature, to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power. The idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether particular candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office, are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people. Most, if not all, of the provisions in the Federal and State Constitutions which are of the nature of a bill of rights, were placed therein with reference to English history and the struggles for liberty which such history recorded. Declarations, oaths and tests, as a condition for holding office, had been frequently resorted to by the Parliament of Great Britain for the purpose of promoting the prosperity of one religion or insuring the downfall of another. In 1673, during the reign of Charles the Second of England, public opinion therein was highly excited. The King had therefore chosen to issue a declaration of indulgence, which in substance dispensed with the execution of the penal laws against the Roman Catholics. Upon the re-assembling of

Parliament in that year, the House of Commons denied the King's right to dispense with penal statutes in matters ecclesiastical; and, unless the King renounced that right, the House gave him to understand that it would grant no supply for the Dutch war. After much debate and negotiation the King yielded, canceled the declaration, and promised that it should never be drawn into a precedent. The Commons then extorted from the King his assent to what Macaulay has termed "a celebrated law," which continued in force down to the reign of George the Fourth. The law was known as the "Test Act," and it provided that all persons holding any office, civil or military, should take the oath of supremacy, should subscribe a declaration against transubstantiation, and should publicly receive the sacrament according to the rites of the Church of England. Some years prior to this; the Parliament of 1662 had enacted a statute known as the "Corporation Act." Under this Act, all magistrates had to disclaim the obligation of the covenant, and to declare their belief that it was not lawful upon any pretense to resist the King, and their abhorrence of the traitorous position of taking arms by the King's authority against his person. The Act of Uniformity as to religion had also been passed, and every clergyman was bound to declare his assent to everything in the Book of Common Prayer, and was ordered to take an oath abjuring the solemn league and covenant and renouncing the principle of taking arms against the King. This brief statement is taken from Macaulay's History of England, chap. 2, and

Hume's History of England, vol. 5, p. 462, etc. It cannot be doubted that the facts mentioned in these histories were present to the minds of the framers of our original Constitution, from which this provision is extracted. They meant that no such oaths, declarations or tests as above described, nor any other of a like nature, should be ordained as a condition for the holding of any public office. The Federal Constitution has declared that "no religious test shall ever be required as a qualification to any office of public trust under the United States." That provision undoubtedly was inserted for the same reasons which led to the insertion of the somewhat similar one of our State Constitution, and now under discussion. Its meaning has not been judicially stated that I am aware of, but we have the opinion of *Mr. Justice Story* that it was aimed to prevent the tests prescribed by such English statutes as I have above referred to. 2 Story, Const. §§ 1847, 1849. In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our Constitution.

Some other grounds have been urged for a reversal of this judgment, but after a careful examination of them we think they are not tenable, for the reasons already sufficiently stated in the opinions of the courts below.

The judgment herein should be affirmed, with costs.

All concur, *Ruger, Ch. J.*, in the result.

INDIANA SUPREME COURT.

William E. DAVIDSON *et al.*, *Appts.*,
v.

Joseph COON

(....Ind....)

1. A legatee who seeks to charge the payment of his legacy upon land spe-

cifically devised, must, in case the will does not expressly or impliedly make the legacy a charge upon the land, show that the testator did not, at the time of the execution of the will, have personal property out of which the legacy could be paid. Such fact need not be shown, however, where the land is not specifically devised and the legacy is made a charge thereon.

2. A legacy is made a charge upon the

NOTE.—Testamentary charge on land, how created.

A testamentary charge upon land can only be created by direct expression or plain implication. The declaration must be so plain or the manifestation so clear as to leave no doubt upon the mind; the inference must be so strong that no doubt remains. *Montgomery v. McElroy*, 8 Watts & S. 370; *Hackadorn's App.* 11 Pa. 83; *Reynolds v. Reynolds*, 16 N. Y. 269; *Lupton v. Lupton*, 2 Johns. Ch. 614, 1 N. Y. Ch. L. ed. 512.

A charge upon the real estate may be made, by the testator, either by express directions to that effect contained in the will, or the intention thus to charge it may be implied from the whole will taken together. *Reynolds v. Reynolds*, 16 N. Y. 267, 269; *Nash v. Taylor*, 38 Ind. 349; *Heeslop v. Gatton*, 71 Ill. 530; *Harris v. Fly*, 7 Paige, 421, 4 N. Y. Ch. L. ed. 218; *Ripple v. Ripple*, 1 Rawle, 386; *Davis' App.* 33 Pa. 343; *Gilbert's App.* 85 Pa. 347; *Quincy v. Frost*, 61 Me. 77; *Lindsey v. Lindsey*, 45 Ind. 552; *Stevens v. Gregg*, 10 Gill & J. 143; *Warren v. Davies*, 3 Myl. & K. 49; *Lupton v. Lupton*, *supra*.

While recognizing the rule that legacies and

debts are primarily to be paid out of the personal estate, when the realty is devised to the person who by will is directed to pay the legacy, it is an equitable charge on the realty, although the devisee may also be made the executor and residuary legatee of the personality. *Farra v. Adams*, 12 Bush, 521; *Brown v. Knapp*, 79 N. Y. 143; *Towner v. Tooley*, 38 Barb. 601; *McLachlan v. McLachlan*, 9 Paige, 534, 4 N. Y. Ch. L. ed. 305; *Wiltzie v. Shaw*, 29 Hun, 197.

Directions in will.

A direction that certain legacies be set off in real estate, by disinterested persons, will be upheld. *Gafney v. Kenison*, 5 New Eng. Rep. 51, 64 N. H. 354.

The rule is the same when the legacy is directed to be paid by the executor, who is the devisee of real estate. *Brown v. Knapp*, 79 N. Y. 143; *Williams v. Nichol*, 47 Ark. 233; 3 Pom. Eq. Jur. 244; *Harris v. Fly*, 7 Paige, 421, 4 N. Y. Ch. L. ed. 213; *Mensch v. Mensch*, 2 Lane. 235; *Wood v. Wood*, 28 Barb. 354; *Dodge v. Manning*, 1 N. Y. 298; *Reynolds v. Reynolds*, 16 N. Y. 267; *Gridley v. Gridley*, 24 N. Y. 120; *Olmstead v. Brush*, 27 Conn. 530; *Martin v. Ballou*,

whole residuary estate including land by a will which gives the legacy and directs that it shall be made out of testator's estate and then proceeds: "When the above amount of money shall have been paid, I direct that the remainder of my whole estate shall be equally divided among my heirs."

3. Payment of legacies may be enforced out of land, devised by a residuary clause and upon which they are made a charge, even after final settlement of the estate, where, upon such settlement, there is no personal property applicable thereto.

4. A complaint which states facts constituting a prima facie case is good as against a demurrer, although it lacks symmetry and precision and states the facts somewhat vaguely and obscurely.

5. Although a voluntary partition of lands made by tenants in common and evidenced by quitclaim deeds does not imply a warranty, yet if a legatee whose legacy is made a charge upon lands of which he is also one of the residuary devisees, unites in a partition, accepts grants, executes conveyances, receives all the benefits of a co-tenant and acquiesces in the partition for almost twenty years, he will not be permitted to charge his legacy on the land in the hands of third persons.

(October 28, 1890.)

A PPEAL by defendants from a judgment of the Circuit Court for Hancock County in favor of plaintiff in an action brought to enforce payment of a legacy out of lands upon which it was alleged to have been made a charge. *Reversed.*

13 Barb. 137; Glen v. Fisher, 6 Johns. Ch. 33, 2 N.Y. Ch. L. ed. 45; McLachlan v. McLachlan, 9 Paige, 534, 4 N.Y. Ch. L. ed. 805.

But a mere direction to pay is not sufficient. Hamilton v. Porter, 63 Pa. 332; Pennsylvania Co's App. 1 Cent. Rep. 551, 109 Pa. 323.

Where the will provides that in case the devisee died without issue the estate should go to certain other devisees named, and that they should fulfill the conditions imposed on the original devisee, the legacies were charged on the land. Vanderzee v. Slingerland, 4 Cent. Rep. 170, 103 N.Y. 58.

The provision of the will which required the defendant to pay the plaintiff \$200 within one year after the death of the testator creates a charge upon the lands devised to the defendant for the payment thereof. Powers v. Powers, 28 Wis. 361; Clyde v. Simpson, 4 Ohio St. 445; Field's App. 36 Pa. 11; Nellons v. Truax, 6 Ohio St. 97.

Where the devise of the real estate, though not appointed executor, is positively directed to pay legacies, especially if such direction is contained in the same sentence with the devise, or appears to be given in consideration thereof, it has been held sufficient to create a charge on the real estate. Thayer v. Finnegan, 134 Mass. 65; Sands v. Champ-lin, 1 Story, 376; Merrill v. Bickford, 65 Me. 118; Luckett v. White, 10 Gill & J. 480; Bank v. Donaldson, 6 Pa. 179.

Effect of acceptance of devise.

When lands are devised to one who by the will is directed to pay a legacy it is a charge upon the lands devised, and the devisee is also personally liable where he accepts the legacy. Porter v. Jackson, 95 Ind. 215; Elwood v. Deifendorf, 5 Barb. 306; Fuller v. McEwen, 17 Ohio St. 288; Dodge v. 9 L. R. A.

The facts are fully stated in the opinion.

Messrs. T. B. Redding and Marsh & Cook for appellants.

Messrs. James A. New, David S. Gooding and Marshall B. Gooding for appellee.

Elliott, J., delivered the opinion of the court:

The appellee's complaint contains these allegations: that Conrad Coon died the owner of real estate of the value of \$5,000; that he died testate, having executed a will, and that his will was probated in due course of law; that the will contains this provision: "After the death of my wife I direct that my estate shall be divided in the following manner: First, I give to my son, Joseph Coon, the sum of \$800 in money to be made out of my estate, and I also direct that my son Joshua shall have \$800, also to be made out of my estate, after the death or marriage of my wife. When the above amounts of money shall have been paid, I direct that the remainder of my whole estate shall be equally divided among my heirs."

The legacy bequeathed to the appellee, Joseph Coon, is wholly unpaid. That since the testator's death the real estate has been conveyed to the appellants; that all of the debts of the testator's estate have been paid, except the legacies bequeathed by him to the legatees named in the will; that "the estate has been finally settled, and that there was not then, nor is there now, any personal property with which the legacy could or can be paid."

The general rule is that the personal estate

Manuing, 11 Paige, 334, 5 N.Y. Ch. L. ed. 155; Langstroth v. Golding, 3 Cent. Rep. 104, 41 N. J. Eq. 49; Burch v. Burch, 52 Ind. 137; Lindsey v. Lindsey, 45 Ind. 552.

The personal liability of the devisee, however, will not exonerate the real estate from the charge. Such charge will continue a lien on the premises not only in the hands of the devisee, but also in the hands of his grantees. Elwood v. Deifendorf, 5 Barb. 412.

A legacy charged on land, unpaid at the legatee's death, and by him bequeathed for life to the devisee of the land, and after his death to his children absolutely, remains a first lien, to the amount of principal and interest unpaid when last bequeathed. Wood's App. (Pa.) 9 Cent. Rep. 375.

Upon a sheriff's sale of land upon which a legacy is made a charge, it is proper for the court to direct the purchaser to retain out of the proceeds the corpus of the legacy, and to declare him a trustee to pay the interest on the legacy to the devisee for life, and the principal to his children. *Id.*

The proper circuit court had jurisdiction to enforce the trust by a sale of the land for the payment of the same with interest. Wier v. Simmons, 55 Wis. 644; Clyde v. Simpson, 4 Ohio St. 445; Nellons v. Truax, 6 Ohio St. 97; Hill v. Huston, 15 Gratt. 360; Bugbee v. Sargent, 23 Me. 230; Kightley v. Kightley, 2 Vea. Jr. 331; Lupton v. Lupton, 2 Johns. Ch. 623, 1 N.Y. Ch. L. ed. 517; Rogers v. Ross, 4 Johns. Ch. 404, 1 N.Y. Ch. L. ed. 833; Kelsey v. Deyo, 3 Cow. 133; Luckett v. White, 10 Gill & J. 480.

A devise of land to one, with direction to support another, creates a charge upon the land. Halstead v. Westervelt, 3 Cent. Rep. 466, 41 N. J. Eq. 100.

When real estate is devised upon condition that devisee shall pay a certain annuity, the annuity

supplies the fund out of which legacies are to be paid. *Duncan v. Wallace*, 114 Ind. 169, 18 West. Rep. 894.

Where a specific devise of land is made and a general legacy is bequeathed without charging the legacy upon the land devised, then it is incumbent upon the legatee who seeks to charge the land to show that the testator had no personal estate, at the time the will was executed, out of which the legacy could be paid. The reason for this rule is that where there is a specific devise of land to one and the bequest of a general legacy to another, but no express words charging the land, there must be such facts as authorize the implication that the testator intended to charge the land. Where there is no personal property out of which the legacy can be paid, there is reason for inferring that the testator meant to charge the land specifically devised, otherwise the bequest would be a mere mockery. *Duncan v. Wallace*, *supra*; *Hoyt v. Hoyt*, 85 N. Y. 142; *McCorn v. McCorn*, 100 N. Y. 511, 1 Cent. Rep. 726; *Corvine v. Corvine*, 24 N. J. Eq. 579; *Lypet v. Carter*, 1 Ves. Sr. 499; *Cross v. Kennington*, 9 Beav. 150; *Elliot v. Hancock*, 2 Vern. 143.

But where there is personal property at the time of the execution of the will, although it

may be afterwards wasted, there is no ground for implying an intention on the part of the testator to charge the land specifically devised. The general rule is that where the provisions of the will can be given effect without burdening the land specifically devised it will be done; and this implies that where there is a specific devise of land and a general bequest of money, and no express charge upon the land, the land is not burdened unless it appears that the testator impliedly intended that the land should be charged, and where he has personal estate no such intention can be implied as against the specific devisee.

If the will before us is to be regarded as specifically devising land without charging it, by implication, with the general legacy, then the complaint is fatally defective because it does not show that the testator did not have personal estate out of which the legacies could be paid. The question hinges upon the construction to be given to the peculiar provisions of the will. The will does not specifically devise the real estate to the heirs of the testator, but the devise is a residuary one. The general rule respecting such devises is that "nothing is given by residuary clause except upon the condition that something remains after all para-

becomes a charge upon the estate devised, which equity will enforce by a sale thereof. The costs and expenses thereof, the amount of all annuities due and unpaid, with interest, and a sum sufficient to produce the annuity in the future, will be taken from the proceeds, and the residue will be paid to devisee or his grantee. *Merritt v. Bucknam*, 3 New Eng. Rep. 269, 78 Me. 504.

Where a will devised land to a son, W, with a pecuniary legacy to a daughter made an express charge on it, and another tract of land was devised to another son, C, and a pecuniary legacy to another daughter, I, which was not made an express charge on the land, but the will provided that W should manage the entire estate until the legatees and devisees arrived at full age, and should pay the legacy to I by installments, this legacy was a charge on the land devised to C. *Carter v. Worrell*, 96 N. C. 368.

Directions for sale of the land.

Legacies payable out of the proceeds of land directed to be sold are governed by the rules of construction to bequests of personal estate, and by those relating to legacies charged upon land. *Re Hart's Trusts*, 3 DeG. & J. 195; *Roberts v. Brinker*, 4 Dana, 571; *Hawkins, Wills*, 236.

Where a direction is made to sell land for the payment of legacies there is a charge upon the land, and the rents and profits should be applied to the payment of the legacies. *Lyon v. Church of the Redeemer*, 3 Cent. Rep. 478, 41 N. J. Eq. 389.

The language in a will: "To my son Henry Springer I bequeath the farm on which I now live. . . . Further, I will that my two sons, Henry and Joseph, pay to my wife, delivered in the bushel, one third of all the grain they raise on their farms during her lifetime,"—was construed and held to create a charge upon the land, to the extent necessary for paying the bequest to the wife. *Springer's App.* 2 Cent. Rep. 235, 111 Pa. 228.

Where testator, after giving to his wife the use of \$10,000, to be paid to her annually during life in lieu of dower, and to each of four grandchildren the sum of \$4,000, to be paid at the age of twenty-one years, gave all the rest of his estate to his only son, whom with two others he appointed executors,

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and empowered them to sell all his real estate, and the personal estate, never sufficient to satisfy the bequests, was some of it lost by the residuary legatee while acting as executor, the legacies were charged upon the real estate, which the sole surviving executor had power to sell to provide a fund from which to pay them. *Anderson v. Davison*, 42 Hun, 431.

Legacy chargeable on residuary estate.

A devise and bequest of all the rest, residue and remainder of the real and personal estate creates a charge of the legacies on the real estate. *Rafferty v. Clark*, 1 Bradf. 475; *Cole v. Turner*, 4 Russ. 376; *Mirehouse v. Soaffe*, 2 Myl. & C. 695.

When real and personal estate are mingled in one mass, and so are devised to a residuary devisee and legatee, the legacies are charged on the realty. *Stoddard v. Johnson*, 13 Hun, 610; *Tracy v. Tracy*, 15 Barb. 504; *Roman Catholic German Church v. Wachter*, 42 Barb. 43; *Lewis v. Darling*, 57 U. S. 16 How. 1, 14 L. ed. 819.

A residuary clause coming after a bequest of legacies, and disposing of both real and personal estate together and by one form of expression, will not alone justify a construction that the legacies are charged upon the land, unless it appears in addition, from extrinsic facts, that there was an intention to so charge them. *Briggs v. Carroll*, 117 N. Y. 288.

Where the residuary clause contained the additional words, "after payment of all my debts, legacies and funeral expenses, and other charges and deductions as aforesaid," the real estate was properly held charged. *Re Rochester*, 46 Hun, 656; *Myers v. Eddy*, 47 Barb. 271; *Towner v. Tooley*, 38 Barb. 601; *Harris v. Fly*, 7 Paige, 421, 4 N. Y. Ch. L. ed. 213.

Where a will gives pecuniary legacies, without designating a fund from which they are to be paid, a residue of the estate, both real and personal, thereafter given, is chargeable with payment of the legacies. *Newson v. Thornton*, 33 Ala. 402. See *Scott v. Stebbins*, 91 N. Y. 611.

General pecuniary legacies are not chargeable upon specific devises of land, although in the residuary clause. *Belcher v. Belcher*, 5 New Eng. Rep. 677, 16 R. L. —.

amount claims upon the testator's estate are satisfied." *Tomlinson v. Bury*, 145 Mass. 346, 5 New Eng. Rep. 254.

The will we are considering does, by its terms, make the legacies a paramount claim, inasmuch as there is no specific devise of the land, and there is manifested a clear intention to devise only what remains after the payment of the legacies. This intention is exhibited in the provision that the legacies shall be made out of the estate, and by the use of the words that follow the bequests, which are: "I direct that the remainder of my whole estate shall be divided among my heirs." These words clearly evince an intention to vest in the heirs the estate remaining after the payment of the legacies, and the antecedent provisions, taken in connection with this language, express an intention to charge the whole estate with the payment of the legacies. *Wilson v. Piper*, 77 Ind. 437; *Lofton v. Moore*, 83 Ind. 112; *Castor v. Jones*, 86 Ind. 239; *Porter v. Jackson*, 95 Ind. 210.

As the will does not specifically devise the land, and does, by its terms, bequeath a legacy to the appellee and make it a charge upon the land, it was not necessary, in order to have the

lien of the charge established, that the complaint should allege that the testator had not sufficient personal estate to satisfy the legacy at the time he executed the will.

The authority of *Reynolds v. Bond*, 83 Ind. 86, and *McCoy v. Payne*, 68 Ind. 827, is invoked to sustain the proposition that as the estate has been finally settled the action will not lie. These cases are not influential, for the reason that the heirs took by a residuary clause of the will, and acquired their interest subject to the legacies charged upon the land; and, as there was no personal estate upon final settlement, the legatees had a right to establish against the land the equitable lien created by the will. As we understand the cases of *Reynolds v. Bond*, *supra*, and *Gould v. Steyer*, 75 Ind. 50, they assert that the lien created by a legacy charged upon the land may be established after final settlement. No other rule can be sound, for if, after final settlement, there is no personal estate, the charge fixes upon the land, and the equitable lien may be established. The executor, to be sure, is the person primarily bound to pay a general legacy, but he is only bound where there are personal assets in his hands and

A devise of land in satisfaction of a debt due from testator is preferred to general pecuniary legacies. *Ibid.*

Legacies charged generally upon real estate will not be charged upon land specifically devised. *Kitchell v. Young*, 13 N. J. L. J. 175.

Exoneration of personality.

A testator has a general power by will to charge his estate. Subject to the superior rights of creditors he may charge one portion of his estate or fund and exonerate another; such exoneration and operation may be implied when not expressed in words. *Clark v. Hornthal*, 47 Miss. 457.

A testator may exonerate his personality entirely from the payment of legacies and subject his real estate alone to the burden; and if it appears clearly from the whole will that such was the testator's intention, the real estate will be the primary fund. *Boylan v. Meeker*, 28 N. J. L. 800; *Harris v. Douglas*, 64 Ill. 472; *McLarin v. Knox*, 6 S. C. 27; *Livingston v. Newkirk*, 3 Johns. Ch. 319, 1 N. Y. Ch. L. ed. 633; 1 Story, Eq. Jur. 572; *White v. Olden*, 4 N. J. Eq. 343; *Fenwick v. Chapman*, 84 U. S. 9 Pet. 461, 9 L. ed. 193; *Dunn v. Keeling*, 2 Dev. L. 285; *Shallcross v. Finden*, 8 Ves. Jr. 738; *Williams v. Chitty*, 3 Ves. Jr. 545; *Walker v. Jackson*, 2 Atk. 624; *Trott v. Vernon*, 2 Vern. 708.

Intention of testator to govern.

Real estate is not charged with the payment of legacies, unless such intention of the testator is expressly declared or can be fairly and satisfactorily inferred from the language of the will. *Kitchell v. Young*, 13 N. J. L. J. 175.

To charge lands devised with the payment of a legacy or debts, it must appear that such was the intention of the testator, to be gathered from the whole will. Authorities cited in *Thompson's App.* (Pa.) 9 Cent. Rep. 733.

Where the testator blends his real and personal estate, he thereby charges his lands with the payment of legacies. *Ibid.*

A bequest of the balance of testator's estate to A, he to pay all the debts, etc., creates a charge for the payment of the debts upon the lands in his hands. *Ibid.*

The question is to be determined by contents of § 9 L. R. A.

will, and parol evidence of intent is admissible. *Rafferty v. Clark*, 1 Bradf. 474.

Where it was evident from the whole tenor of the will that the testator intended to charge devisee with the payment of legacies in case of the acceptance of the devise, the real estate is in equity chargeable with the payment of the legacies. *Wambaugh v. Gates*, How. App. Cas. 299.

If sufficient was manifested by the terms of the will to exhibit it to be testator's intention and expectation that the legacies were to be charged on the lands devised to the persons required to pay them, the charge would be created, although the testator had observed greater care and particularity in providing for the security of the annuity. *Salisbury v. Mors*, 7 Lans. 363.

Where the testator disposed of his personality so that it could not be made available for the payment of legacies, the presumption is that he intended to charge his land with their payment. *Duncan v. Wallace*, 13 West. Rep. 394, 114 Ind. 169.

Where a testator whose debts greatly exceed the value of his personal property devises, after all his just and lawful debts have been paid and discharged, the residue and remainder of his property, both real and personal, to certain persons named in the will, and confers upon his executor full power and authority to sell, mortgage or lease any of the property, and to invest it as to him may seem judicious, he will be held to have intended to make his debts a charge upon his real estate. *Re Rochester*, 46 Hun, 651.

Formerly it was understood that a legacy could not be declared a charge upon real estate unless by virtue of express word or by the language and dispositions of the will from which such an intent could be clearly inferred; but even then extrinsic facts or surrounding circumstances, whatever such expressions may be held to mean, might be resorted to in ascertaining the intent. *McCorn v. McCorn*, 30 Hun, 172; *Myers v. Eddy*, 47 Barb. 263.

Where the testator devised \$1,000 to a widow in lieu of dower, and gave her all his estate for life, and at his death he was not, nor had he ever been, possessed of sufficient personality to pay this legacy, it was his intention that it should be charged upon the real estate; and the legacy became payable one year after his death. *Gedney v. Rogers*, 10 Cent. Rep. 239, 107 N. Y. 625.

no charge upon the land. The cases of *Lovering v. King*, 97 Ind. 180, and *Carr v. Huettle*, 78 Ind. 378, are not relevant to the point here in dispute. The point in dispute in those cases concerned the rights of creditors, while here the point in dispute concerns the right of a legatee whose legacy is a charge upon land.

While the complaint is lacking in symmetry and precision, it is good as against a demurrer, for it states, although somewhat vaguely and obscurely, facts constituting a *prima facie* case.

The facts contained in the special finding, shortly stated, are these: Conrad Coon executed the will filed with the complaint; he died the owner of the land in controversy, and the will was probated on the 11th of November, 1861. The personal property of which Conrad Coon died the owner was taken by his widow and applied to the payment of the debts of his estate. Numerous conveyances were made by the heirs, some from one to another, and some to third persons. The conveyances to which Joseph Coon was a party are these: one executed on the 30th of May, 1862, in which he appears as a grantee; three executed on the 9th of April, 1864, in two of which he was one of the grantors, and in one of which he was a grantee; one on the 16th day of February, 1866, in which he was a grantee; one on the 26th day of February, 1876, in which he was one of the grantors, and one on the 13th day of January, 1876, in which he was one of the grantors. All of the deeds referred to except that of February 26, 1876, executed to Washington Jackson, were quitclaim deeds. The deeds of April 9, 1864, were executed simply to partition the lands described among the parties. In executing those deeds the appellee's legacy was not considered, nor has he ever been paid any part of it. The appellant Davidson purchased the land from the grantees of the heirs of Conrad Coon, as appears from the deeds referred to in the special finding.

The rule established by the decisions of the American courts is that a voluntary partition of lands made by tenants in common, although evidenced by quitclaim deeds, does not imply a warranty. *Weiser v. Weiser*, 5 Watts, 280, 80 Am. Dec. 813; *Picot v. Page*, 26 Mo. 422; *Dawson v. Lawrence*, 13 Ohio, 546, 42 Am. Dec. 210; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 322, 5 N. Y. Ch. L. ed. 660; *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193; *Rountree v. Denson*, 59 Wis. 522.

This rule has been asserted in cases where there has been a failure of title and one of the co-tenants has demanded compensation from another, or where there has been an attempt to estop one of the co-tenants from asserting an after-acquired title. It is very evident that no such case is before us. Here no warranty is invoked, no failure of title is asserted, nor any effort made to defeat an after-acquired title. In this instance all the title and interest the appellee had existed when the partition was made and the deeds executed. He united in the partition, accepted grants and executed conveyances. He was treated as a co-tenant,

and, for aught that appears, he reaped all the benefits of that position. He acquiesced in the partition for almost twenty years. In our judgment he is not now in a situation to assert that the legacy bequeathed to him by the ancestor, who was the source of title, is a charge upon the land. The reason of the rule that there is no warranty in case of voluntary partition completely fails in such a case as this. Ordinarily a quitclaim deed conveys all the existing interest of the grantor in the land described, but does not affect an after-acquired title. Title passes as effectually by a quitclaim deed as by any other. *Hastings v. Brockner*, 98 Ind. 158; *Rowe v. Beckett*, 80 Ind. 184; *McConnel v. Reed*, 5 Ill. 117; *Fash v. Blake*, 53 Ill. 863; *Graff v. Middleton*, 43 Cal. 341; *Hull v. Ashby*, 9 Ohio, 96, 84 Am. Dec. 424; *Hunt v. Hunt*, 14 Pick. 374; *Smith v. Pendell*, 19 Conn. 107, 48 Am. Dec. 146.

Our Statute sets this question at rest, for it declares that "a deed of release or quitclaim shall pass all the estate which the grantor could convey by a deed of bargain and sale." Rev. Stat. § 2924.

If the appellee was not a tenant in common, his deed would, beyond controversy, convey all the estate he had in the land at the time of its execution. If the legal effect of the deed is changed, it is solely because it was executed by him in the capacity of a tenant in common in order to effect a partition of the land. We are not inclined to rule that the position he occupied completely changed the effect which the law so emphatically affixes to his deed; but if we were inclined to so rule, it would give the appellee no comfort.

The appellee is in this dilemma. If his deed is to have its usual effect it conveys his interest in the land and releases his lien; if it is not to have its usual effect it is because it was executed by him as one of several owners in common; but if it was executed by him as one of several owners he cannot assert his lien, since that was barred or merged in his character of an owner. We are not unmindful of the doctrine that equity will not suffer a merger to take place where injustice would result, but that doctrine the appellee, after having voluntarily assumed the position of a tenant in common, is in no plight to invoke. Equity almost imperiously demands that his lien shall be merged. for no other course will promote justice. At law, where the estate of a lienor meets that of the owner in one person, the lien is merged. That rule must govern here, for there is no equity to break its force. The appellee having by unequivocal acts asserted that he was one of several tenants in common, claiming under the same ancestor, and having for so many years deported himself as an owner, is in no situation to cast aside that character and enforce a lien by taking upon himself the character of a lienholder.

Upon the facts contained in the special finding, the law is with the appellants.

Judgment reversed, with instructions to restate conclusions of law and enter judgment in favor of the appellants.

MICHIGAN SUPREME COURT.

William W. FERGUSON, *Appt.*,

v.

Edward G. GIES.

(.....Mich.....)

1. No discrimination between persons can be made by a restaurant keeper in serving customers on account of color alone, under a statute which declares that all persons shall be entitled to the full and equal accommodations, advantages, facilities and privileges of restaurants, etc. The terms "full and equal" require identical accommodations for all; offering colored people substantially the same accommodation as that offered white people is not sufficient if the former in fact differs from the latter.
2. One who violates the law making it a misdemeanor for a restaurant keeper to discriminate against colored persons in serving customers becomes liable to an action for civil damages at the suit of a person injured by the discrimination; and it is not necessary in such action to declare upon or in any way refer to the penal statute.

:(October 10, 1890.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for defendant's refusal to give plaintiff certain accommodations for obtaining supper in defendant's restaurant. *Reversed.*

The facts are fully stated in the opinion.

Mr. D. Augustus Straker, for plaintiff in error:

The defendant's place of business was a "restaurant and saloon;" and the business was that of a "victimaller," and is governed by the common-law rules governing such business.

See 2 Bl. Com. Sherwood's 6th ed. *166.

The common law makes no reservation or discrimination, and its only reservation is a per-

son coming in a situation in which he is fit to be received.

See 2 Kent, Com. p. 789.

The 13th, 14th and 15th Amendments to the Constitution of the United States were enacted by Congress and ratified by the people, to prohibit discrimination in legal rights among the citizens of the government, and any act or acts done either by State or individual, in contravention of these Amendments, can find no support in law. The law forbids discrimination in such public places as the defendant herein kept, on account of color; and while the defendant had a right to make proper and reasonable rules, he had no right, in law, to discriminate between patrons on account of color, and in so doing his act was not a regulation of business, but a discrimination in the rights of patrons on account of color.

Mich. Act, No. 180, 1885; *Bowlin v. Lyon*, 67 Iowa, 536; *Rez v. Ivens*, 7 Car. & P. 213; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185; *Coger v. Northwest U. Pack. Co.* 87 Iowa, 145; *Messenger v. State*, 25 Neb. 674; *Baylies v. Curry*, 128 Ill. 287.

Messrs. William Look and H. F. Chipman for defendant in error.

Morse, J., delivered the opinion of the court:

The defendant, at and before the time this suit was brought, was the manager of a public restaurant in the City of Detroit, and was licensed by that municipality to conduct such public restaurant. It was to all intents and purposes a public place. On the 15th of August, 1887, the plaintiff, a colored man, in company with a friend, entered this restaurant, and sitting down at one of the tables provided for that purpose, ordered supper. The plaintiff claims, in substance, that the restaurant was divided in two parts, not separate rooms, but one side or part of the room was

NOTE.—Civil rights; guarantees without discrimination.

All legislation which discriminates against any particular race or class of persons is in violation of the Constitution of the United States; as state taxation for purposes of education (*Dawson v. Lee*, 88 Ky. 50; *Markham v. Manning*, 96 N. C. 132); or an Act excluding negroes from the public schools. *State v. Dugan*, 3 New Eng. Rep. 137, 15 R. I. 403.

The inhibition contained in the Fourteenth Amendment of the Federal Constitution has exclusive reference to state action; it means that no agency of the State, its officers or agents shall deny to any person within her jurisdiction the equal protection of the laws. *Ex parte Virginia*, 100 U. S. 336, 25 L. ed. 676; *Strauder v. West Virginia*, 100 U. S. 336, 25 L. ed. 664.

It was intended to secure to a recently emancipated race all the civil rights that the superior race enjoy. *Ex parte Virginia*, 100 U. S. 333, 25 L. ed. 667; *Strauder v. West Virginia*, *supra*.

Its main purpose was the security and perpetuation of freedom to the African race and their protection from oppression. *Butchers Ben. Assn. v. Crescent City L. S. L. & S. H. Co.* 83 U. S. 18 Wall. 36, 21 L. ed. 304.

9 L. R. A.

An Act granting privileges to a railroad company in the District of Columbia providing that no person shall be excluded from its cars on account of color, is a prohibition of discrimination. *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445, 21 L. ed. 676.

The Fourteenth Amendment does not prohibit state legislation limited as to objects or territory, but merely that all persons subject to it shall be treated alike under like circumstances and conditions. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 673.

Special legislation is not obnoxious to this Amendment if all persons subject to it are treated alike. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109.

Whenever the law operates alike upon all persons and property similarly situated equal protection cannot be said to be denied. *Walston v. Nevin*, 123 U. S. 573, 32 L. ed. 544.

Civil-rights legislation, which makes it an offense to exclude any citizen of the State from any place of amusement, etc., by reason of race or color or previous condition of servitude, is constitutional. *People v. King*, 1 L. R. A. 233, 110 N. Y. 418.

Protection of civil rights of colored citizens. See note to *People v. King* (N. Y.) 1 L. R. A. 233.

known as the "restaurant side," and the other as the "saloon side." The restaurant side was furnished with tables covered with tablecloths. Glasses were on the tables, with napkins in them, and there was an electric fan over the tables. The tables had a very neat appearance. The tables on the saloon side were furnished with beer glasses, and were beer tables such as are usually found in saloons. The plaintiff testifies that he and his friend sat down on the restaurant side at the first table from the last in the second row, and called for a lunch. The waiter said: "I can't wait on you here." Ferguson said: "What do you mean by that?" The waiter replied: "We cannot serve you kind of people here. It is against the rules of the house to serve colored people in the restaurant. If you want anything to eat, you will have to go on the other side of the house." After waiting a few minutes Ferguson went to the office, and said to the defendant: "Mr. Gies, I came into your restaurant with a friend, and I have been insulted by one of your waiters," and told him what the waiter had said. Gies replied: "That is all right. That is the rule of this house, if you want anything to eat." They had some conversation, which ended by defendant saying to plaintiff that he would get nothing to eat unless he went on the other side. Plaintiff asked if he could not sit at the table adjoining, or at any of the tables behind him, which were empty, but the defendant refused to serve him at any of the tables on that side of the room. Plaintiff went away without eating anything. While he was sitting at the table several white persons came in, sat down, and had refreshments at different tables on the restaurant side of the house. The defendant admits that he refused to serve refreshments of any kind to the plaintiff at the table where he sat, for no other reason than that Ferguson was a colored man, and that he said to him: "That is the rule of the house. We cannot serve colored people right at those certain tables." But he testifies that he further said: "Ferguson, there is no use in your waiting here. We cannot serve you at these tables. If you will sit over at the next table in the other row, I will see that you are served there all right, the same as any other person will be." Ferguson said, "No." There was about six feet between the two rows of tables. Defendant admits also that there was a difference in the tables, being of different shape; that the tables at which he told Ferguson he might be served were at the time uncovered; and that the covers were taken off to accommodate the crowd that came in for beer; but testifies that he told plaintiff he would cover the table, and furnish it the same as the one he was sitting at, and that he should be waited upon and served the same as those on the other side of the room. Defendant denies that this was in the saloon part of his place. He says it was a part of the restaurant, but situated in a more private place, as the bar would hide them from the view of those in the front part of the place. There was no partition between the tables. They were in the same room, and divided only by space. Colored people were not permitted to sit except in one part of the room, but white men were served wherever they liked. The

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Circuit Judge, Hon. George Gartner, instructed the jury that the plaintiff was entitled, under the law, to full and equal accommodations at this restaurant with all other citizens; that "all citizens under the law have the same rights and privileges, and are entitled to the same immunities—it makes no difference whether white or colored. A different idea or principle than this never rested in reason.

"The reasoning of *Chief Justice Taney* in his opinion in the *Dred Scott Case*, 60 U. S. 19 How. 893 [15 L. ed. 691], is now largely and almost universally regarded as fallacious and contrary to the principles of law then claimed to exist. The emancipation of the slaves followed, and then the 15th Amendment placed the colored citizen upon an equal footing in all respects with the white citizen. Since then, in many of the States, laws have been enacted to modify and overcome the prejudices entertained by many of the white race against the colored race, and to place the latter upon an equal footing with the former, with the same rights and privileges. Thus, the Legislature of this State in 1885 passed a law with that object and for that purpose; and in certain instances a denial of such rights is made a crime under the law of this State." He further said to the jury that, if they found that the plaintiff was denied full and equal accommodations, the defendant was liable in damages for such denial. So far the learned judge was eminently sound in his reasoning, and correct in his law, but in his application of the law to this particular case he was in error. The jury, under the defendant's own version of the transaction, should have been instructed to find a verdict for the plaintiff.

In his definition of "full and equal accommodations," the court said: "It is claimed by the defendant that he did not refuse to serve the plaintiff, but told him substantially that he would not serve him on that side of the house, but that, if he would go over and take a seat at a table on the other side of the room in the restaurant, he would then serve him in precisely the same manner in which he would be served at the table at which plaintiff had seated himself; and that the rule of the house was not to serve colored persons on that side of the house. Now, gentlemen, the defendant would not have the right to refuse to serve the plaintiff in the restaurant proper; but it is claimed by the defendant that the saloon portion is divided from the restaurant, and that the table at which he requested the defendant to sit was in the restaurant. While the defendant had no right to make a rule providing for an unjust discrimination, still he would have the right, under the law, to make proper and reasonable rules for the conduct of his business, and governing the conduct of his patrons; and whether this was a reasonable rule I will submit to you for determination. Thus, the defendant has the right to reserve certain portions of his business for ladies, and other portions for gentlemen, while he may also reserve other portions for his regular patrons or boarders. He might also, under the law, reserve certain tables for white men, and others where colored men would be served, providing there be no unjust discrimination. And this brings me to an explanation of the term which I have used,

viz., 'full and equal accommodations.' By this term 'full and equal' is not meant identical accommodations, but by it is meant substantially the same accommodation. A guest at a restaurant has no more right to insist upon sitting at a particular table than a guest at a hotel has the right to demand a particular room, as long as the accommodations offered are substantially the same. This is all the law demands and requires, and if you find from the evidence in this case that the defendant offered to serve the plaintiff in one part of the restaurant proper in the same manner as guests were served in other parts, and that he offered the plaintiff full and equal, although not identical, accommodations, and if you find that the rule made by the defendant did not make an unjust discrimination, but was reasonable, then your verdict must be for the defendant." Under this charge, the jury found for the defendant. The fault of this instruction is that it permits a discrimination on account of color alone, which cannot be made under the law with any justice. As far as it relates to the right of a restaurant-keeper to make rules and regulations based upon other considerations, the charge is of no concern in this case, and we shall not express any opinion as to its correctness. But in Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that are denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction. We have been cited to a large number of cases upholding the doctrine enunciated by the trial judge. It has been held that separate schools may be provided for colored children, if they are reasonably accessible and afford substantially equal educational advantages with those provided for white children. *State v. McCann*, 21 Ohio St. 198; *Bertonneau v. Board of Directors*, 3 Woods, 177; *Ward v. Flood*, 48 Cal. 88, 45; *Cory v. Carter*, 48 Ind. 327; *Roberts v. Boston*, 5 Cush. 198; *People v. Easton*, 13 Abb. Pr. N. S. 159; *Dallas v. Foodick*, 40 How. Pr. 249; *United States v. Buntin*, 10 Fed. Rep. 730; *People v. Gallagher*, 93 N. Y. 438.

It has also been held that common carriers may provide different cars or separate seats for white and colored persons, if such cars or seats are equal in comfort and safety one with the other. *West Chester & P. R. Co. v. Miles*, 55 Pa. 209; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis & C. R. Co.* 23 Fed. Rep. 818; *Chesapeake, O. & A. R. Co. v. Wells*, 85 Tenn. 613; *Murphy v. Western & A. R. Co.* 23 Fed. Rep. 637, 640; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185.

In *Day v. Owen*, 5 Mich. 520, this same principle was recognized; but it must be remembered that the decision, as in the case of *Roberts v. Boston*, 5 Cush. 198, was made in the ante-bellum days, before the colored man was a citizen, and when, in nearly one half of the Union, he was but a chattel. It cannot now serve as a precedent. It is but a reminder of

the injustice and prejudice of the time in which it was delivered. The negro is now, by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship. But this is not all. In 1885 the Legislature of this State enacted: "Section 1. That all persons within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, eating-houses, barber-shops, public conveyances on land and water, theaters and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens. § 2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not to exceed \$100, or shall be imprisoned not more than thirty days, or both."

Section 3 provides that there shall be no discrimination on account of race or color in the selection of grand and petit jurors. This Statute exemplifies the changed feeling of our people toward the African race, and places the colored man upon a perfect equality with all others, before the law in this State. Under it, no line can be drawn in the streets, public parks or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor can such a line of separation be drawn in any of the public places or conveyances mentioned in this Act. See Pub. Acts 1885, pp. 181, 182.

But it is claimed by the defendant's counsel that this Statute gives no right of action for civil damages; that it is a penal statute; and that the right of the plaintiff under it is confined to a criminal prosecution. The general rule, however, is that where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the Statute was intended to prevent; nor is it necessary in such a case as this to declare upon or refer to the Statute. The common law as it existed in this State before the passage of this Statute, and before the colored man became a citizen under our Constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that, when this suit was planted, the colored man, under the law of this State, was entitled to the same rights and privileges in public places as the white man, and must be treated the same there; and that his right of action for any injuries arising from an unjust discrimination against him is just as perfect and sacred

in the courts as that of any other citizen. This Statute is only declaratory of the common law, as I understand it to now exist in this State.

Any discrimination founded upon the race or color of the citizen is unjust and cruel, and can have no sanction in the law of this State. The cases which permit in other States the separation of the African and the white races in public places can only be justified on the principle that God made a difference between them, which difference renders the African inferior to the white, and naturally engenders a prejudice against the African, which makes it necessary for the peace and safety of the public that the two races be separated in public places and conveyances. This doctrine which runs through and taints justice in all these cases is perhaps as clearly and ably stated in 55 Pa., *supra*, as anywhere. In that case Judge Agnew says: "If a negro takes his seat beside a white man, or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge in the feeling, human infirmity is not always proof against it. . . . To assert separateness is not to declare inferiority in either. It is not to declare one a slave and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine providence, human authority ought not to compel these widely-separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of races established by the Creator Himself, and not to compel them to intermix contrary to their instincts." This reasoning does not commend itself either to the heart or judgment. The negro is here, and brought here by the white man. He must be treated as a freeman or a slave; as a man or a brute. The humane and enlightened judgment of our people has decided—although it cost blood and treasure to so determine—that the negro is a man, a freeman, a citizen and entitled to equal rights before the law with the white man. This decision was a just one. Because it was Divinely ordained that the skin of one man should not be as white as that of another furnishes no more reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed or otherwise deformed. The law, as I understand it, will never permit a color or misfortune, that God has fastened upon a man from his birth, to be punished by the law unless the misfortune leads to some contagion or criminal act; nor while he is sane and honest can he have less privileges than his more fortunate brothers. The law is tender, rather than harsh, toward all infirmity; and if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life.

The prejudice against association in public places with the negro, which does exist, to some extent, in all communities, less now than formerly,

is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable. Nor shall I ever be willing to deny to any man any rights and privileges that belong in law to any other man, simply because the Creator colored him differently from others, or made him less handsome than his fellows—for something that he could not help in the first instance, or ever afterward remove by the best of life and human conduct. And I should have but little respect or love for the Deity if I could for one moment admit that the color was designed by Him to be forever a badge of inferiority, which would authorize the human law to drive the colored man from public places, or give him less rights than the white man enjoys. Such is not the true theory of either the Divine or human law to be put in practice in a republican form of government, when the proud boast is that "all men are equal before the law." The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice, or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he shall step aside when he appears. All citizens who conform to the law have the same rights in such places, without regard to race, color or condition of birth or wealth. The enforcement of the principles of the Michigan Civil Rights Act of 1885 interferes with the social rights of no man, but it clearly emphasizes the legal rights of all men in public places. This idea of the equality of the races before the law was also shown in the Legislation of 1867, relative to the public schools, which declared that "all residents of any district shall have an equal right to attend any school therein." Laws of 1867, p. 43. This legislation was construed by this court as an Act to prevent the exclusion of colored children from any public schools in the State, although separate schools for the education of blacks and whites might exist where the accommodations and advantages of learning were fully equal one with the other. *People v. Board of Education*, 18 Mich. 400.

Our holding in the present case is also supported by the following authorities: *Coger v. Northwest U. Pack. Co.* 37 Iowa, 146; *Clark v. Board of Directors*, 24 Iowa, 267; *People v. Board of Education*, 101 Ill. 808; *Chase v. Stephenson*, 71 Ill. 383; *Messenger v. State*, 25 Neb. 674; *Baylies v. Curry*, 128 Ill. 287; *Board of Education v. Tinnon*, 26 Kan. 1; *Central R. Co. v. Green*, 86 Pa. 421; *Donnell v. State*, 48 Miss. 680; *Decuir v. Benson*, 27 La. Ann. 1.

See also the able dissenting opinion of Danforth, J., in *People v. Gallagher*, 98 N. Y. 458-466 inclusive.

Under the circumstances, as admitted by the defendant upon this record, the only question to have been properly submitted to the jury was the amount of the plaintiff's damages.

The judgment is reversed, and a new trial granted with costs of both courts.

The other Justices concurred.

NEW YORK COURT OF APPEALS (2d Div.).

Peter SUAU, *Resp.*,
v.
George CAFFE *et al.*, *Appts.*

(....N. Y....)

When a husband and wife carry on a business as partners and contract debts in the course of it, the wife cannot escape liability on the ground of coverture.

(*Haight, Potter and Bradley, JJ., dissent.*)

(October 14, 1890.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of plaintiff in an action to recover back money loaned. *Affirmed.*

Statement by Follett, *Ch. J.*:

On the 29th of January, 1881, the defendants, then and now husband and wife, executed, and, on June 1, 1881, recorded in the office of the Clerk of the City and County of New York, a certificate by which they assumed to form a limited partnership, pursuant to the Revised Statutes, for the purpose of importing and dealing in foreign goods at the City of New York under the firm name of "George Caffe," which was to continue from February 1, 1881, to February 1, 1886. The husband was the general and the wife the special partner, she contributing \$25,000. Thereafter they carried on a business of the kind specified, at the City of New York, under the firm name selected, until after the debt to the plaintiff was contracted. Between May 23, 1882, and December 6, 1883, the plaintiff loaned money to "George Caffe" on account of which the defendants conceded that there was due the plaintiff January 1, 1884, \$26,799.98, to recover which this action was brought. The defendants interposed two defenses: 1. That the partnership or business relation, whatever it was, which had existed between them before May 16, 1882, was on that day dissolved, with

the knowledge of the plaintiff. 2. That a husband and wife cannot, under the law of this State, be partners in business, and that although they agree to become so, transact business and incur liabilities as such, the wife is not liable to the creditors of the firm.

The first question, an issue of fact, was contested before a jury and determined in favor of the plaintiff. The second question, an issue of law, was decided in favor of the plaintiff at the circuit, which ruling was affirmed at the general term. From this judgment the defendants appealed to this court.

Mr. William Tharp, for defendants, appellants:

A married woman cannot bind herself by contract, unless in or about carrying on her trade or business, or the contract relates to her separate estate, or intention to charge the separate estate is expressed in the instrument, or the debt was created for property purchased by her.

Saratoga County Bank v. Pruyn, 90 N. Y. 250, and cases cited.

There can be no valid business partnership in this State between husband and wife.

Chambovet v. Cagney, 3 Jones & S. 474; *Zimmerman v. Erhard*, 58 How. Pr. 11, 8 Daly, 811; *Schultz v. Schultz*, 27 Hun, 26, reversed, 89 N. Y. 644; *Fairles v. Bloomingdale*, 67 How. Pr. 292, 14 Abb. N. C. 341; *Jacquin v. Jacquin*, 15 Abb. N. C. 408, *note*.

At common law, a business copartnership between husband and wife was impossible. They were regarded as one person, and no contract could be made between them.

Bertles v. Nunan, 92 N. Y. 157, 158; *Coleman v. Burr*, 98 N. Y. 24; *Johnson v. Rogers*, 35 Hun, 270.

A married woman may deal with persons other than her husband, with regard to her separate estate, or separate business, as if she was a *feme sole*.

Savage v. O'Neil, 42 Barb. 374; *White v. Wager*, 25 N. Y. 328; *Aultman v. Obermeyer*, 6 Neb. 260; *Hoker v. Boggs*, 63 Ill. 161; *Bogert v. Gulick*, 65 Barb. 322; *Bertles v. Nunan*, *supra*; *Plumer v. Lord*, 5 Allen, 462.

NOTE.—Husband and wife cannot bear relation of partners.

Prior to the legislation of 1884, a married woman had not capacity to enter into partnership with her husband. *Payne v. Thompson*, 3 West. Rep. 152, 44 Ohio St. 192.

A married woman is not liable, on a contract made by her husband, for a partnership consisting of himself and wife, because they cannot enter into partnership. *Bowker v. Bradford*, 1 New Eng. Rep. 457, 140 Mass. 521.

A married woman is not empowered to make a contract of partnership with her husband, by the Statute giving her the right to acquire and hold property separate from her husband. *Artman v. Ferguson*, 2 L. R. A. 343, and *note*, 73 Mich. 146.

A married woman cannot, by becoming a partner with her husband (a relation which cannot legally exist), purchase goods on credit in the partnership name, to the advantage of her separate estate, without incurring liability. *Noel v. Kinney*, 3 Cent. Rep. 53, 106 N. Y. 74.

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Where the wife was the sole owner of property, and she and her husband were doing business in a joint firm name, she is liable for a debt contracted by him, although, as between her and her husband, no partnership could exist. *Ibid.*

A married woman who, in secret trust for her husband, becomes a member of a copartnership, is to be regarded as the owner of the interest she represents, and can maintain an action for the dissolution of the copartnership and for an accounting. *Ibid.*

If the arrangement which led to the use of her husband's name with hers was beyond her power to enter into, and if by reason of any technical incapacity they could not contract together as a firm, she is liable upon a contract made in such firm name by her husband as her agent. *Ibid.*

The property of the wife of a partner cannot be charged with moneys drawn by the husband from the firm's funds with knowledge of the other partner, and used in improving her property. *Sharp v. Hibbins*, 7 Cent. Rep. 912, 43 N. J. Eq. 542.

In Massachusetts, the Married Woman's Enabling Acts are very similar to those of our State.

Cushman v. Henry, 75 N. Y. 114.

The Massachusetts courts have held that the above provisions do not authorize or empower a partnership between husband and wife.

Lord v. Parker, 3 Allen, 127; *Lord v. Davison*, Id. 131; *Edwards v. Stevens*, Id. 315; *Plumer v. Lord*, *supra*.

Although the money may have been advanced by the plaintiff, relying in part on the credit of the wife, yet the wife is not liable.

Manhattan Brass Mfg. Co. v. Thompson, 58 N. Y. 80; *Baker v. Lamb*, 11 Hun, 519; *Second Nat. Bank v. Miller*, 68 N. Y. 639; *Saratoga County Bank v. Pruyn*, 90 N. Y. 250; *White v. McNett*, 33 N. Y. 371.

Under the law of this State a husband and wife cannot enter into a commercial partnership.

Nash v. Mitchell, 71 N. Y. 199, 204; *Fairlee v. Bloomingdale*, 14 Abb. N. C. 341; *Noel v. Kinney*, 15 Abb. N. C. 403.

Mr. Abram Kling, for plaintiff, responded:

The defendant Adele was liable as to creditors of the firm of George Caffee as a partner, though not liable as between her husband and self.

Bitter v. Rathman, 61 N. Y. 512; *Scott v. Conway*, 58 N. Y. 619; *Noel v. Kinney*, 8 Cent. Rep. 58, 106 N. Y. 74; *Hamilton v. Douglas*, 46 N. Y. 218; *Graff v. Kinney*, 37 Hun, 405; *Armitage v. Mace*, 96 N. Y. 535.

Follett, Ch. J., delivered the opinion of the court:

But a single question is involved in this appeal, which is whether a married woman who contracts a debt with her husband in a business carried on for their joint benefit can avoid liability for it on the ground of coverture. The second section of chapter 90 of the Laws of 1860 provides that "a married woman may . . . carry on any trade or business . . . on her sole and separate account." It is urged that this language is not broad enough to authorize married women to engage in business as partners, or jointly with others, or at least with their husbands, but that the Statute simply confers power on them to contract by themselves and apart from others. This construction is too narrow and fails to express the evident intent of the Legislature, which was not to prescribe the mode in which married women should carry on their business, but to free them from the restraints of the common law and permit them to engage in business in their own behalf as free from the control of their husbands as though unmarried. Before this Statute the profits of their business belonged to their husbands, and the words "sole and separate account" were intended to convey the idea that the beneficial interest of any business in which they might engage belonged to them and not to their husbands. Since the enactment of this Statute it has been held that husbands and wives may legally contract with each other in reference to their separate estates (*Owen v. Cawley*, 86 N. Y. 600; *Bodine v. Killen*, 53 N. Y. 98); that they may become agents for each other (*Knapp v. Smith*, 27 N. 9 L. R. A.

Y. 277), and that a husband may assign to his wife a chose in action. *Seymour v. Fellows*, 77 N. Y. 178.

In *Frecking v. Rolland*, 53 N. Y. 422, it was held that a wife could not escape liability on a joint promissory note given by herself and her husband in payment for property purchased by her by reason of her coverture, nor by reason of the fact that she contracted jointly with her husband.

In *Scott v. Conway*, 58 N. Y. 619, the defendant and her husband were engaged in running a theatre under the name of "Mrs. F. B. Conway's Brooklyn Theatre," pursuant to a contract by which the profits and losses were to be equally shared between them. To an action, brought for the recovery of the value of goods sold, the wife interposed the defense that she was not liable for the debt because it was not contracted in any trade or business carried on for her sole or separate account or benefit, but for the benefit of a business carried on by herself and husband for their joint benefit. This defense was overruled in the supreme court and in the court of appeals.

Bitter v. Rathman, 61 N. Y. 512, was an action for an accounting between partners. The plaintiff, a married woman, had been engaged in business with the defendant under the name of H. Rathman & Co. The trial court found "that the plaintiff, in secret trust for her husband, was the partner of the defendant," and that "in respect to the public" she was to be regarded as the real partner, and ordered an accounting as to the partnership affairs. Gray, *Commissioner*, said: "Yet she, having suffered herself to be regarded by the public as a partner, was liable, as such, to the creditors of the ostensible firm; and having thus exposed herself to such liabilities, if any should be found to exist, she had to such extent the right, as against either the defendant or her husband, to be protected out of the share which would belong to her in her capacity as trustee for her husband, at whose instance she undertook the trust." This case does not decide that a wife may or may not be a partner in business with her husband, but it, in effect, decides that a married woman may be a partner with a third person, and that her husband may act as her agent in the business of the firm.

In *Noel v. Kinney*, 106 N. Y. 74, 8 Cent. Rep. 58 (reversing 15 Abb. N. C. 403), an action was brought against the husband and wife on a note signed "J. P. Kinney & Co." and payable to the plaintiff. The complaint charged that the defendants were liable as partners under the name signed to the note. The husband made default, but the wife answered that she was a married woman and that the note was executed by her husband. On the trial the plaintiff put the note in evidence and it appeared that the defendants were husband and wife, and there was evidence that the note was given for mirrors placed in houses owned by the wife. A motion to dismiss the complaint on the ground that the note on its face showed that it was not given in respect to her separate business or her estate was overruled. In considering this question Danforth, *J.*, speaking for a unanimous court, said: "In the case cited (*Frecking v. Rolland*, 53 N. Y. 422), she became a joint contractor with her husband

but she was as much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her joint contractor was her husband. It was not necessary to inquire in that case whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case both undertook to pay the creditor. Can it make a difference in the measure of liability that in one case the married woman entered in her own name and her husband in his name in the execution of a joint obligation, and in the other case adopted a name which represents a joint liability, which may in effect also be several? Partners are at once principals and agents—each represents the other, and if in the relation of partnership there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promisor to fulfill her promise."

Partners are the agents of each other, and are jointly and severally liable for the debts of the firm,—these being two of the essential elements of a contract of partnership. It being settled that husbands and wives may be the agents of each other, and that they may bind themselves by joint contracts entered into with third persons, we see no warrant in the Statute for exempting them from liability to creditors for debts incurred by firms of which they are members. It has been so held in *Graff v. Kinney*, 37 Hun, 405, which affirms 15 Abb. N. C. 897; *Zimmerman v. Erhard*, 8 Daly, 811, affirmed, 88 N. Y. 74; opposed to these are *Chambovet v. Cagney*, 3 Jones & S. 474; *Kaufman v. Schoeffel*, 37 Hun, 140. *Fairies v. Bloomingtondale*, 67 How. Pr. 292, 14 Abb. N. C. 841, was reversed in 38 Hun, 280.

Upon principle and authority, we think that when a husband and wife assume to carry on a business as partners and contract debts in the course of it, the wife cannot escape liability on the ground of coverture.

The judgment should be affirmed, with costs.

Vann, Parker and Brown, JJ., concur.

Haight, J., dissenting:

The complaint alleges that the defendants were copartners in trade, doing business under the firm name and style of "George Caffé," and that the plaintiff loaned and advanced to them as copartners the money sought to be recovered in this action. The defendants were husband and wife. They answered separately, each denying the copartnership, and that any money was loaned to them as copartners, and the defendant Adele Marie alleged her marriage to the defendant George and that she was during the time mentioned in the complaint his lawful wife. The question as to the existence of the copartnership was controverted upon the trial. The verdict was in favor of the plaintiff, thus disposing of that question. The entire business was transacted by the defendant George Caffé, and the loans were made by him, the defendant Adele Marie taking no part. The plaintiff is the brother of the defendant Adele Marie, and knew of the relation existing between the defendants. He was at

work, as he claims, for the firm upon a salary at the time the loans were made. There is no evidence constituting an estoppel on the part of the wife, and the sole question left for our determination is whether a wife can lawfully engage in a business copartnership with her husband and be bound by the contracts made by him as a copartner.

This question was considered in the case of *Kaufman v. Schoeffel*, 37 Hun, 140, in which it was held by the General Term of the Fifth Department that the Statute enabling a married woman to enter into contracts and to carry on any trade or business and perform any labor or services on her sole and separate account, did not authorize or empower her to enter into a copartnership with her husband for the purpose of carrying on a trade or business.

The question was also considered at about the same time in the case of *Graff v. Kinney*, 37 Hun, 405, in which the General Term of the Second Department reached the opposite conclusion, affirming 15 Abb. N. C. 897.

In the case under consideration, Davis, P. J., of the First Department, in disposing of the case, says: "In my individual opinion the decision in *Kaufman v. Schoeffel*, *supra*, is a correct determination of the law, as I think the contrary ruling is adverse to the spirit and intention of the Married Woman's Acts, which were to separate the estate of a married woman from that of her husband, and to completely establish its separate character during coverture and not enable her to so commingle it in copartnership as to clothe him with the power and title which copartners possess in law." 25 W. D. 296.

The question was previously considered in the case of *Chambovet v. Cagney*, 3 Jones & S. 474, in which Sedgwick, J., says, that "the law has made such rules in respect of the relations of man and wife that it would be inconsistent with those that they should become partners in business. There is no doubt that the various Acts for the protection of a married woman's property have left her in many respects as the common law placed her, under the control and in the power of her husband. . . . Such a dominion and control cannot be exercised by one partner in business over another without a change of those legal relations which have formed the important characteristic of a partnership. In case a wife has a separate property, although domestic circumstances may keep her home or she may be kept there by the lawful exercise of the husband's power over her in a proper contingency, he will not have power to dispose of that property. If they are business partners he might legally keep her home and legally dispose of the partnership property at the place of business. I do not believe that the Legislature contemplated such an incongruity of rights and duties which accompany the formation of business partnerships between husband and wife."

In the case of *Zimmerman v. Erhard*, 58 How. Pr. 11, Beach, J., in the New York Common Pleas, reached the conclusion that the wife may contract with her husband a valid business copartnership. His opinion, however, does not appear to have been concurred in by the remaining members of the court. Van Brunt, J.,

says, in disposing of the case, that he does not think it necessary to pass upon the question whether or not if a married woman enters into a copartnership with her husband she can avail herself of the defense of coverture, for the reason that such defense is personal to her and she may avail herself of it or not as she sees fit. Larremore, *J.*, concurred in the result, but evidently not upon this question, for, in the case of *Jacquin v. Jacquin*, he reached the conclusion that the common-law relation of husband and wife had not been changed so as to permit a business copartnership between them. See note to *Noel v. Kinney*, 15 Abb. N. C. 408.

The question was again examined in the case of *Fairlee v. Bloomingdale*, 67 How. Pr. 292, in which Westbrook, *J.*, in special term, considers the question in an elaborate opinion, reaching the conclusion that business partnerships between husband and wife are not authorized by the Statute, and that the conclusion of Beach, *J.*, in the case of *Zimmerman v. Erhard*, *supra*, cannot be sustained and should not be followed. And to the same effect is the decision of the General Term of the City Court of Brooklyn in the case of *Noel v. Kinney*, 15 Abb. N. C. 408.

In the case of *Bitter v. Rathman*, 61 N. Y. 512, the plaintiff was a married woman and had been engaged in business as a copartner with the defendant under the firm name of Rathman & Co. It was found that she was engaged as such copartner in secret trust for her husband, although she had furnished from her separate property the funds with which the copartnership business was carried on. A disagreement having arisen as between the copartners she brought an action for a dissolution and an accounting. The defendant claimed that under the Statute authorizing a married woman to carry on any trade or business and perform any labor and services for her sole and separate account she was not empowered to enter into a partnership business in which she had no interest other than as trustee for another. The court in answer to that claim says: "All this may be conceded so far as it regards her husband and his creditors. As to the creditors of her husband, he and not she would doubtless be regarded the real partner. Yet having suffered herself to be regarded by the public as a partner she was liable as such to the creditors of the ostensible firm, and having thus exposed herself to such liabilities, if any should be found to exist, she had to such extent the right, as against either the defendant or her husband, to be protected."

In the case of *Noel v. Kinney*, 106 N. Y. 74, 8 Cent. Rep. 58, it was held that the defense of coverture did not protect the wife for a debt contracted for the improving of her real and separate estate and for which she was bound to the same extent as if a *feme sole*; that she was estopped by her acts and declarations in the matter. Danforth, *J.*, in delivering the opinion of the court, says: "There was evidence from which the jury might have found that she was the owner of improved real estate in the City of Brooklyn; that the consideration of the note was the purchase price of mirrors placed in houses built upon her land and that the mirrors were unpaid for. The note was fairly taken and the consideration delivered upon the representation by the husband that the wife was

the sole owner of the property, and that the name of J. P. Kinney & Co. was used as mere matter of convenience in transacting her business. It does not appear that there was any business except in relation to the houses. No question was made as to the authority of the defendant's husband to execute the note nor as to the truth of his representations." In this case the question under consideration was held not to be involved, and the court expressly states that it is not decided. But in the case of *Hendricks v. Isaacs*, 117 N. Y. 411, 6 L. R. A. 559, it does appear to us that the question was decided. Andrews, *J.*, in delivering the opinion of the court, says: "The point on this appeal respects the right of the plaintiff to have the contract made with his wife enforced against her estate. The contract was void at law. The common-law doctrine that husband and wife could not contract with each other has not been changed in this State by legislation respecting the rights of married women. The entire and absolute disability of married women to enter into any legal contract, which was a stubborn and inflexible principle of the common law, has, indeed, in some respects, been modified. She may now, under our laws, purchase real and personal property and carry on business on her own account, and, as incident to these rights, she may enter into contracts with third persons for the purchase and sale of property, or in the prosecution of her separate business, enforceable in a legal action to the same extent as though she was a *feme sole*. But the disability to deal with her husband, or to make a binding contract with him, remains unchanged. Contracts between husband and wife are invalid as contracts in the eye of a court of law to the same extent now as before the recent legislation." See also *Yale v. Deacrer*, 18 N. Y. 265; *White v. Wager*, 25 N. Y. 328.

In other States, where the statute is similar to our own, it has been held that a husband and wife cannot enter into a business copartnership. *Lord v. Parker*, 8 Allen, 127; *Lord v. Davison*, Id. 181; *Edwards v. Stevens*, Id. 815; *Plumer v. Lord*, 5 Allen, 460-463; *Plumer v. Lord*, 7 Allen, 481; *Bovker v. Bradford*, 140 Mass. 521, 1 New Eng. Rep. 459; *Payne v. Thompson*, 44 Ohio St. 192, 3 West. Rep. 153; *Haas v. Shaw*, 91 Ind. 384-390; *Scarlett v. Snodgrass*, 92 Ind. 262; *Bassett v. Shepardson*, 52 Mich. 8; *Artman v. Ferguson*, 73 Mich. 146, 2 L. R. A. 848.

So much for the authorities bearing upon the question. The Statute provides that a married woman may bargain, sell, assign and transfer her separate personal property and carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name. Laws 1860, chap. 90, § 2.

The question is as to the construction of this Statute, for at common law a husband and wife could not contract together a business copartnership. The disabilities of a married woman to contract are general and her capabilities are created by statute. They are few in number and limited. Her general engagements are void unless authorized. *Nash v. Mitchell*, 71

N. Y. 199-204; *Bertles v. Nunan*, 93 N. Y. 152-160.

Prior to the Act of 1884, to which we shall subsequently allude, she could not bind herself by contract unless the obligation was created by her in or about carrying on her trade or business; or the contract relates to or is made for the benefit of her separate estate; or intention to charge the separate estate is expressed in the instrument or contract by which the liability is created; or the debt was created for property purchased by her. *Saratoga County Bank v. Pruyn*, 90 N. Y. 250-254.

The Statute alluded to does not absolve her from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station in life. It was the purpose of the Statute to secure to the married woman, free from the control of her husband, the earnings and profits of her own business and her own labor and services carried on and performed on her own and separate account, which at common law would have belonged to her husband. *Coleman v. Burr*, 93 N. Y. 17-24; *Johnson v. Rogers*, 85 Hun, 270.

The words "on her sole and separate account," appearing in the Statute, must be held to limit and qualify the words "trade or business," as well as the words "labor or services." The words "trade or business" are connected with the words "labor or services" by the conjunction "and;" and the phrase "on her sole and separate account" evidently was intended to refer back and qualify the words "trade or business." So that the meaning is the same as if it read that a married woman may carry on any trade or business on her sole and separate account, and perform any labor or services on her sole and separate account. The section preceding the one under consideration provides that the property which a married woman acquires "by her trade, business, labor or services, carried on or performed on her sole and separate account," etc., shall be and remain her sole and separate property. The phrase "on her sole and separate account" in this section unquestionably refers back and limits or qualifies the words "trade, business, labor or services," and this is evidenced from the phrase "carry on or perform." The words "carry on" refer to her trade or business, and the word "perform" to her labor or services. To the same effect is the concluding portion of the sentence which follows that under consideration.

Whether or not a married woman may engage in copartnership business with a person other than her husband it is not necessary now to consider. If disqualified, it is by reason of the existence of her husband. By her marriage, her person became united with that of her husband, so that in law they were regarded as one person. If the husband should die, or the marriage be dissolved, her disabilities would be removed. In using the words "sole and separate" the Legislature doubtless had in mind the husband, and these words were evidently intended to refer to him.

We are consequently of the opinion that the common-law disability of a married woman to engage in a business copartnership with her husband still continues, and has not been re-

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moved by the Statute. This view appears to be sustained by the more recent legislation on the subject. By chapter 881 of the Laws of 1884, it is provided: "A married woman may contract to the same extent, with like effect and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary. This Act shall not affect or apply to any contract that shall be made between husband and wife,"—thus specially excepting from the provisions of the Act any right of the wife to contract with her husband. It consequently appears to us that the motion made at the close of the plaintiff's case to dismiss the complaint as to the defendant Adele Marie Caffé should have been granted, and that the exception to such refusal is well taken.

The judgment as to the defendant Adele Marie Caffé should be reversed and a new trial granted, with costs to abide the event; but the judgment as to the defendant George Caffé should be affirmed, with costs.

Potter and Bradley, JJ., concur.

Edward STAMM, *Respt.*,

George H. BOSTWICK, *Appt.*

(.....N. Y.....)

The word "purchase" includes an acquisition by devise in Laws 1875, chap. 88, providing that if a citizen or alien resident who shall purchase and take a conveyance of real estate within the State shall die intestate leaving persons who, according to the Statutes, would answer the description of heirs to him, such persons, although aliens, shall be capable of taking and holding as heirs all the real estate owned by him at the time of his death.

(October 7, 1890.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of plaintiff in an action brought to determine the title to a certain piece of real estate. *Affirmed.*

Statement by **Brown, J.:**

This action was brought to determine the title to real estate in the City of New York. Eliza Anderson, a native-born citizen of the United States, died, in the year 1867, seised and possessed of the property in question, leaving a last will and testament by which she devised the said premises to her niece, Eliza Anderson, for the term of her natural life, remainder in fee to her lawful issue. Eliza Anderson, the niece, was a native citizen, and, at the time of her aunt's death, was the wife of the plaintiff. The only issue of the niece was Elizabeth Stamm, who survived her mother. Upon the death of her mother Elizabeth entered into possession of the premises, and continued in the actual possession thereof until her death in September, 1881. She was a native citizen of the United States, and died intestate, unmarried

and without issue, leaving her father, the plaintiff, surviving her. Upon her death, the plaintiff took possession of the premises, and occupied them until the commencement of this action. The plaintiff was born in the Electorate of Hesse, in 1846. He came to the United States in 1860, and has since resided here. He filed his declaration to become a citizen in October, 1881, and was naturalized in 1884. The defendant is a brother of the plaintiff's wife, a native citizen and of full age, and was entitled to said premises as heir-at-law of said Elizabeth Stamm, unless the plaintiff has the capacity to inherit and hold real estate within the State.

Messrs. Lewis Johnson, Edward W. S. Johnson and Tilton, for appellant:

The plaintiff has no right or title in or to the lands in question under the Act of 1845, as amended by Laws 1875, chap. 88, because Elizabeth Stamm, his daughter, did not "purchase and take a conveyance" thereof within the meaning of that Act.

Smith v. New York, 47 How. Pr. 280; *Goodrich v. Russell*, 42 N. Y. 182; *Haney v. Brooklyn Benev. Soc.* 39 N. Y. 333; *Luhre v. Eimer*, 15 Hun, 899, affirmed, 80 N. Y. 171.

The capacity to take by descent must exist at the time the descent happens.

People v. Conklin, 2 Hill, 67.

The Statute in question, being in derogation of the common law, is to be construed strictly. The intention of the Legislature evidently was to limit the contravention of the common law to cases of ordinary commercial purchases and conveyances.

Durando v. Durando, 28 N. Y. 331; *McCartee v. Orphan Asylum Soc.* 9 Cow. 437.

Messrs. Coudert Brothers, with **Mr. Paul Fuller**, for respondent:

Elizabeth Stamm took this property by purchase. She took by the devise under the will of her great aunt, Eliza Anderson.

Hall v. Hall, 81 N. Y. 184.

Brown, J., delivered the opinion of the court:

The single question involved in this appeal is whether a resident alien, who, according to the statutes of this State, would answer the description of heir of a deceased citizen, can inherit and hold real estate owned and held by such deceased citizen at the time of his death. By chap. 88, Laws 1875, it is provided as follows: "If any alien resident of this State, or any naturalized or native citizen of the United States, who has purchased and taken, or who hereafter shall purchase and take, a conveyance of real estate within this State, has died, or shall hereafter die, leaving persons who, according to the statutes of this State, would answer the description of heirs of such deceased person, . . . such persons so answering the description of heirs . . . of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs . . . of such deceased person, as if they were citizens of the United States, the land and real estate owned and held by such deceased alien or citizen at the time of his death."

The appellant contends that this Statute has no application, inasmuch as Elizabeth Stamm, 9 L. R. A.

the decedent, had not purchased and taken a deed of the lands in question, but acquired them as devisee under her mother's will. The popular and commercial meaning of the words "to purchase" is, doubtless, "to buy," but in general, in law, the words have a more extended meaning, and include every mode of acquiring land except by descent. "There are two modes, only, regarded as 'classes,' of acquiring a title to land, namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir on the death of an ancestor becomes substituted in his place as owner by the act of the law." 8 Washb. Real Prop. 290; *James v. Morey*, 2 Cow. 246; *McCartee v. Orphan Asylum Soc.* 9 Cow. 437-507; *Hoyt v. Van Alstyne*, 15 Barb. 569-572.

Many cases could be cited where courts have given the restricted meaning to the word, in the construction of statutes, and to carry out the intent of the Legislature, but we are of the opinion that in this case the intention of the Legislature is best effectuated by giving to the word its most extensive signification. The Act of 1875 was an amendment of chapter 261, Laws 1874, which amended section 4, chap. 115, Laws 1845. In the principal Act, the Legislature dealt with the acquisition and disposition of real property by resident aliens. The Act is entitled "An Act to Enable Resident Aliens to Hold and Convey Real Estate, and for Other Purposes." Section 1 empowered resident aliens to hold real estate acquired by grant or devise. Section 2 gave dower to wives of such aliens. Section 3 gave dower to alien wives of citizens. Section 5 confirmed grants and devises made by resident aliens, and section 6 empowered such aliens who had acquired or who should thereafter acquire real estate by grant or devise to grant and devise the same to any citizen or resident alien. These and other sections of the Act indicate clearly the scheme of the Legislature. Resident aliens, who made and filed the deposition required by the first section of the Act, were made capable of taking and holding real estate, and disposing of it in the manner stated, the same as if they were citizens. Every mode of acquisition and disposition of land of resident aliens was provided for, except that by descent. We find that covered by the 4th section of the Act. If, however, the appellant's construction of that section is to prevail, alien heirs would not inherit, unless the intestate had acquired some or all of his property by deed. If the intestate's land had come to him by devise the 4th section of the Statute would be inoperative. On the other hand, if he had, at some time during his life, acquired some land by deed, then all the land owned at the time of his death—that which he held by devise as well as that held by deed—would pass under section 4, and it would be no bar to the operation of the Statute that the land acquired by deed was not owned at the time of his death. A purchase by deed of some land, no matter how insignificant the quantity, or how remote from the time of the ancestor's decease, would be in the nature of a condition precedent to inheritance by alien heirs. There is certainly no public policy which dictates such a reading of the Statute, and no reason is ap-

parent why the Legislature, intending as it did that aliens should inherit and hold real estate within the State, should have made the inheritance depend upon a purchase by deed by the ancestor, a fact which, in the general operation of the Statute, would be of no importance. The intention of the Legislature is clearly expressed that resident aliens may grant and devise all land that they are made capable of holding by the Act in question, and I think it was equally the intention that, if they failed to dispose of it by deed or will, it should, by section 4, pass to those there made capable of taking and holding it. There is no particular signification in the expression "take a conveyance," as the term "conveyance" is as applicable to the will in the case of a devise as it is to a deed in a case of a grant. These views

require that the word "purchase" should be given its broadest meaning, which would include all land acquired by devise. The Act of 1874 added naturalized and native citizens to the class of persons from whom aliens might inherit, and the Act of 1875 permits aliens to take as devisees as well as heirs. Our conclusion is that Elizabeth Stamm held the land in question as purchaser, and the plaintiff had the capacity to inherit as her heir. As against every person, except the State, he could hold the land without making the deposition required by the 1st section of the Act; and whether or not his title was good against the State is a question with which the defendant has no concern.

The judgment should be affirmed, with costs.
All concur.

KENTUCKY COURT OF APPEALS.

D. C. HAYCRAFT, Admr., etc., of Henry Bland, Deceased, *Appt.*,

v.

Evarts U. BLAND *et al.*

(....Ky.....)

A declaration in a will establishing a trust fund, the income of which is to be paid annually to a certain person for life, that such income shall not be subject to the debts of the beneficiary, and that if any attempt is made to subject it to such debts it shall be added to the principal and the beneficiary shall receive no part of it, will not take it out of the operation of a statute making trust estates subject to the debts of those to whose use they are held, where the beneficiary is given power to dispose of the principal by will.

(September 20, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Hardin County in favor of defendants in an action brought to subject a trust fund held to the use of defendants to the payment of their debts. *Reversed.*

The facts are fully stated in the opinion.

Mr. J. P. Hobson for appellant.

Messrs. Bush & Robertson and *E. D. Walker* for appellees.

Holt, C. J., delivered the opinion of the court:

The administrator of Henry Bland having obtained a judgment and a return of *nulla bona* against the appellees, E. U. and J. H. Bland, brought this action to subject to the payment of his debt property, or the profits thereof, which he claims is held in trust for them under the will of their sister, Maria Bland. The question is whether, under its provisions, they own any estate or interest which can be subjected by suit to the payment of the debt. The will provides: "(1) I bequeath and devise to the trustee hereinafter named all the property not otherwise disposed of that I may possess and own at my death, real, personal and mixed, in trust, and for the following purposes: It is my will, if it can be effectuated, that my broth-

ers Evarts and James shall each annually, or at shorter periods, in discretion of said trustee, receive from said trustee the rents, interests, dividends and profits of my estate, each one half thereof. It is also my desire that their interest, and that of each alone, in the rents, etc., of my estate, shall in no manner, directly or indirectly, be subject to the debts of my said brothers, or either of them, which now exist, or which they may hereafter create; and, being advised that, if the right of my said brothers or either of them, in and to said rents, etc., is made absolute, certain and indivisible, their creditors, contrary to my wish and will, may possibly subject the said rents, dividends, etc., to their claims: Now, therefore, to meet this state of case, I declare the right of my said brothers to receive said rents, profits, etc., shall only accrue annually, and that the same shall be paid, one half to each, by my said trustee for their own—their present or future—use, or for their voluntary disposition thereof, and if, by any legal proceedings against said trustee, or my said brothers, or either, the said rents, etc., shall be attempted to be subjected to the debts of my said brothers, or either, then the rents, interest, dividends or profits for that of both, or of the one whose interest is sought to be subjected, shall be added to the fund referred to in the next item, and my said brothers shall receive no part thereof, or, at least, the one for whose debt it is sought to be subjected. (2) It is my wish that the principal of my estate shall be so invested and kept invested as that it may produce a fair and reasonable profit and dividend. It is also my wish that so much of the profit, etc., of my estate as shall not, under the preceding item, be paid to my said brothers shall be treated thereafter as principal of my estate to be invested in such way as to yield profit. (3) If either of my said brothers Evarts or James shall die unmarried and childless, then the provisions of item one shall be for the benefit of the survivor during his life, but the one so dying first may, by will, devise one half the principal of my said estate to whom he so ever desires, but such devise not to take effect until the death of the surviving brother, who, meantime, shall receive the entire profits, etc.

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subject to conditions of item 1, if creditors attempt to intervene, and the survivor, Everts or James, may dispose of the other half of my estate then remaining by will, as he desires. But, if either or both of my said brothers Everts or James shall die intestate, then the one half of my estate, which he might have disposed of by will, shall pass to his children, if any he has; or, if none, then to the children of his surviving brother, jointly with my sister Lavina, and brother Strother, or their heirs or devisees."

By subsequent clauses it is provided that if Everts and James, or either of them, at any time become free of debt, then one half the estate is to be conveyed absolutely to the one so free; and in the event both become free, or die, the trust is to terminate; also, if the trusteeship should be vacant, the county court may, upon their motion, or that of the survivor, appoint a trustee; also that the trustee may, with their consent, or that of the survivor, make investments, or sell the property and re-invest the proceeds, but all to be held as principal of the estate; or, instead of renting the real estate, the trustee may permit them to occupy it, or part thereof, a fair rent to be charged and enforced as a lien upon the crop, if their creditors attempt to subject it; also that the trustee may make all necessary improvements or repairs, with their consent, or that of the survivor, and they may agree upon his compensation.

It is manifest the purpose of the testatrix was to give to these two brothers her estate without its being liable for their debts. The policy of our law, and in fact its express provision, forbids the creation of any trust by which this may be accomplished. Section 21, art. 1, chap. 68, of the General Statutes, says: "Estates of every kind, held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof." Accordingly, this court has always subjected property held in trust to the payment of the debts of the *cestui que trust* unless a discretionary power was given to the trustee to withhold all payment or benefit from him. In such a case, there exists no ownership by the *cestui que trust* in the use of the property. He has no beneficial interest. The ownership is in the trustee, with the power to give or not, as he may please. There exists no claim which the *cestui que trust* can enforce against the trustee, and therefore no right exists in the debtor which the creditor may, by substitution, enforce. The will of Maria Bland, however, creates no such trust, but one is created in the profits of the estate, which the will provides shall be forfeited in case the creditors of the *cestui que trust* attempt to subject them to the payment of their debts. This having been done by the institution of this suit, it is now claimed that *ipso facto* they have been divested of all interest in the estate. It is contended that the testatrix had a right to annex a condition to the bounty; that she had a right to say it should be defeasible in a certain event; and that this cannot be said to be in fraud of

any creditor of the *cestui que trust*. Trusts created by will are to be regarded according to the intention of the testator, unless it be contrary to law or public policy. He cannot so execute his will that a compliance with it will result in a violation of law. He cannot override the Statute. The power to make the will comes from it. The Statute, *supra*, however, only subjects trust estates of every description to the debts of the *cestui que trust*; and it is said that here, by the happening of the contingency named in the will, which was to work a forfeiture, no trust exists. Conceding this to be true, yet it will be noticed the intended forfeiture relates alone to the profits of the estate; and in the event they do not go to the conditional *cestui que trust*, they are to become a part of the principal of the estate. The case is unlike that of *Marshall v. Raab*, 87 Ky. 116, because there the portion of the *cestui que trust* was given to him absolutely, but with discretion in the trustee, in whom the control or title was vested, to pay to him such portions of the profits, and in such manner, as he might think best. This was but giving him a reasonable discretion in the matter; one which he was bound to exercise in good faith, and the reasonable exercise of which a court would compel for the benefit of the beneficiary. In that case both the estate and the right to the profits belonged to the *cestui que trust*, the title and control being vested in the trustee. There was no question of forfeiture in the case, or of the existence or nonexistence of an estate in the debtor, and it was properly subjected to the payment of his debts. The Statute applied in that case. It will not do to say that the intention of the testator must be executed without regard to the existing law. Suppose he were to give a fund in trust and merely provide that it should not be liable for the debts of the *cestui que trust*. To subject it to them would violate the testator's intention; and yet no one will claim that it could not be done. The testator must, in making his will, conform to the existing law.

Upon the other hand, the case of *White v. Thomas*, 8 Bush, 664, relied upon by the other side, is not like this case. There the *cestui que trust* had no power to dispose of the estate.

The property was devised to an executor in trust for a person with permission to the executor of affording to another party the use or the value of the use of a part of it; and the creditor of the latter attempted to subject this use to the payment of his debt. The mere use was given, it to terminate if any sale should be attempted by the donee or any creditor.

In this case, however, the provision of the will relative to forfeiture relates merely to the profits of the estate, and it is provided that, in the event of the happening of the condition of the forfeiture, they are to become a part of the principal of the estate.

Undoubtedly a testator is under no obligation to provide for the payment of the debts of the devisee. It is of course no fraud upon the creditors if he does not do so. He may condition his bounty as suits him, if he violates no rule of law. He may provide that it shall cease upon the bankruptcy of the donee, and go to another; also that this shall take place upon the filing of a creditor's suit to sub-

ject the estate to the debt of the first donee. *Bramhall v. Ferris*, 4 Kern. 41.

He cannot, however, substantially give the estate to the debtor, and at the same time place it beyond the reach of his creditors.

Here the testatrix gives to her two brothers the absolute power of disposing by will of the estate.

It is not a mere power of disposition to some particular person, or for some particular purpose; but they may by will dispose of it in any way they desire. This unlimited power of disposal is utterly inconsistent with the idea that the party possessing it has no interest in the property.

It is only in cases where the happening of the event has divested the devisee of all interest in the property, that the courts have said there was nothing that could be reached by his creditors. As careful an examination as we have been able to make shows this to be the fact.

In this instance, by the happening of the event named in the will the profits, instead of being paid to the *cestuis que trust*, became a part of the principal of the estate, with the power in them to dispose of it all by will as they please.

It can hardly be said there was any forfeiture of the profits as to them; and while the case is undoubtedly of a character warranting

discussion *pro et con.*, yet regarding all the provisions of the will the property is substantially that of E. U. and James H. Bland.

The testatrix desired to so provide that their creditors could not reach it; this she evidently attempted to do; but she also undoubtedly thought, and intended, that even after the happening of the event, which would add the profits to the principal of the estate, and stop their payment by the trustee to her two brothers, they would still be the real beneficiaries of the estate. This being her intention, and this being the real effect of the will, the property is liable to their debts. The law regards the substance rather than the form; and persons disposing of their property by will cannot be permitted to really make a debtor the beneficiary of their bounty, and by evasion defeat the Statute for the protection of the creditor.

The judgment sustaining the demurrer to the petition, and dismissing the action, is reversed, with direction to the lower court, in the event no valid defense is presented to the appellant's debt, to apply to its payment the personality of the estate, and, if need be, rent out the realty for this purpose; and if this will not satisfy it within a reasonable time, then a sale of so much of the realty as may be necessary will be ordered; and for all further necessary proceedings consistent with this opinion.

ALABAMA SUPREME COURT.

Aubin L. BOULWARE, Receiver of Piedmont & Arlington Life Insurance Co.,
Appl.,

v.

Sophie L. DAVIS *et al.*

(....Ala....)

1. A bill to foreclose a mortgage given to a corporation to secure the payment of a bond is not subject to demurrer for simply failing to show affirmatively the capacity of the corporation to make the contract, since the contracts of corporations are *prima facie* valid.

2. Although a receiver has no legal right to sue in the courts of a State other than that of his appointment, yet courts may, in the absence of statutory regulations, recognize the

appointment and title of a foreign receiver and take jurisdiction of his suits unless such suits work injustice to the citizens of their State or contravene the policy of its laws.

3. A court will take jurisdiction of a suit brought by a foreign receiver of an insolvent corporation for the purpose of gathering its assets for equal distribution among creditors, where only the parties litigant are interested, no domestic creditor appearing to assert rights adverse to those of the receiver, although it is eight years since the receiver was appointed.

4. Section 1180, Rev. Code, prohibiting the agent of any foreign insurance company from transacting any insurance business without first procuring a certificate of authority from the auditor, does not prohibit the transaction within the State by a foreign insur-

NOTE.—Foreign receivers, authority restricted.

A receiver in a creditors' bill cannot sue out of the State in which he was appointed; and consequently one appointed in New York cannot sue in the Circuit Court for the District of Columbia. *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164. See *notes* to *Humphreys v. Hopkins* (Cal.) 6 L. R. A. 792; *Catlin v. Wilcox Silver Plate Co.* (Ind.) 3 L. R. A. 62.

State regulation of business of foreign insurance companies.

Statutes have been passed in several of the States requiring the agent or agents of any insurance company organized under the laws of another State to first take out a certificate of authorization before it can legally transact business within the State. *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 35 Ill. 85; *Aetna Ins. Co. v. Harvey*, 11 Wis. 394; 9 L. R. A.

Hoffman v. Banks, 41 Ind. 1; *Union Cent. L. Ins. Co. v. Thomas*, 46 Ind. 44; *Walter A. Wood Mowing Mach. Co. v. Caldwell*, 54 Ind. 273; *National Mutual Fire Ins. Co. v. Pursell*, 10 Allen, 232; *Williams v. Cheney*, 3 Gray, 215; *Jones v. Smith*, 3 Gray, 500; *Roche v. Ladd*, 1 Allen, 441; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

A State may prescribe the terms upon which a foreign corporation shall be allowed to carry on its business within the State. *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 75 U. S. 8 Wall. 164, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 730, 28 L. ed. 1138.

It has been held, however, that the doing of isolated acts of business within a State is not "doing business" within such prohibition. *D. S. Morgan v. White*, 101 Ind. 415; *Cooper Mfg. Co. v. Ferguson*, *supra*.

ance company of business generally not in the line of insurance business.

(June 19, 1890.)

APPEAL by plaintiff from a decree of the Chancery Court for Madison County sustaining a demurrer to his bill brought to foreclose a mortgage. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Humes, Walker & Sheffey for appellant.

Mr. D. D. Shelby, for appellees:

The powers of a receiver are co-extensive only with the jurisdiction of the court making his appointment. He has no extraterritorial power of official action. He cannot sue in a foreign court upon principles of comity.

Rorer, *Inter-State Law*, p. 295; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; Beach, *Receivers*, §§ 680, 681; High, *Receivers*, p. 156, §§ 239-244; Story, *Conf. L.* ed. 1857, p. 841, § 513; *Hatchett v. Berney*, 65 Ala. 46; Kerr, *Receivers*, ed. 1877, p. 168, *note*, p. 206, *note 1*; Edw. *Receivers*, ed. 1857, p. 8.

The receiver cannot maintain this suit, having been appointed in another jurisdiction.

Day v. Postal Teleg. Co. 66 Md. 360; *Booth v. Clark*, *supra*; *Walt, Insolv. Corp.* § 234; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Hatchett v. Berney*, *supra*; *Harvey v. Varney*, 104 Mass. 496; *Hazard v. Durant*, 19 Fed. Rep. 471; *Moseby v. Burrow*, 62 Tex. 896; *Graydon v. Church*, 7 Mich. 86; *Brigham v. Luddington*, 12 Blatchf. 237; *Hope Mut. L. Ins. Co. v. Taylor*, 2 Robt. 278, 11 U. S. Dig. 1st series, p. 599, § 130; *Farmers & M. Ins. Co. v. Benneson*, 52 Mo. 17; *Second Nat. Bank v. New York S. Mfg. Co.* 11 Fed. Rep. 535; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Bartlett v. Wilbur*, 53 Md. 485; *Holmes v. Sherwood*, 16 Fed. Rep. 725.

An examination of the cases apparently in conflict with the position taken here will show generally the reason for the departure from the current of authority. For example, in some cases it will be found that the receiver was made assignee before he became receiver, and had a title on which to base his suit.

See *Bidlack v. Mason*, 26 N. J. Eq. 230.

A United States court in the State of Virginia has no jurisdiction out of that State, and no distinction is made by the text-books and cases between federal courts and state courts in this question.

Beach, *Receivers*, §§ 20, 681; *Battle v. Davis*, 66 N. C. 252.

Clopton, J., delivered the opinion of the court:

Appellant, who was appointed receiver of the Piedmont & Arlington Life Insurance Company by the Circuit Court of the United States for the Eastern District of Virginia, seeks by the bill the foreclosure of a mortgage on real property situated in this State, executed to the Company, July 29, 1872, by Sophie L. Davis and Nicholas Davis, to secure the payment of a bond made by them on the same day for the sum of \$1,646.14, payable five years after date. The appeal is taken from a decree of the chancellor sustaining three of the several grounds of demurrer interposed by defendants. We shall consider them in the order assigned for error.

¶ L. R. A.

The assignment of demurrer first in order relates to the want of averments showing that the power to loan money and take mortgages was conferred on the corporation by the charter, and is based on an exercise of power not appearing from the allegations of the bill. It merely sets forth copies of the bond and mortgage, and avers the execution of both, without stating the consideration for which the bond was given. The bond is evidence of the debt, and that it was made on a valuable consideration. The bill avers that the Company was incorporated under the laws of Virginia, but does not set out its charter, or its purposes and objects, except as they may be inferred from the name of the corporation. As the bill does not affirmatively disclose that the contract is *ultra vires*, in order to sustain this ground of demurrer the court must presume not only a want of express power, but also that the contract was not necessary and proper to accomplish the purposes of the creation of the corporation,—a want of incidental power.

Prima facie, the contracts of corporations are valid. There is no presumption of excess of power attaching to them, and the burden of showing they should be avoided is on the impeaching party. The bill is not subject to demurrer for failing to show affirmatively the capacity of the corporation to make the contract. *Alabama Gold Life Ins. Co. v. Central Agr. & M. Asso.* 54 Ala. 78.

The second assignment is that the court appointing the receiver had no jurisdiction or power to authorize him to sue in the courts of this State. The demurrer admits that complainant was duly appointed by a court of competent jurisdiction, and, as such, has possession of the bond and mortgage. By the order of appointment he is clothed with authority to bring suits, whenever necessary or proper, for the recovery of the assets and property of the corporation. Its language is "to use the name of the company or his own name as receiver in the prosecution of all such actions as he may find it necessary to bring, maintain or defend, for the recovery or defense of the estate of which he is appointed receiver." Unquestionably, the great weight of authority maintains the doctrine that the powers of a receiver are co-extensive only with the jurisdiction of the court from which he obtains his appointment. His functions and powers in respect to litigation are limited to the courts of the State of his appointment; and he cannot, as matter of right, institute suits in the courts of another State for the recovery of choses in action or property of the corporation or individual whose estate is subject to his receivership. High, *Receivers*, § 239.

This rule was emphatically declared in *Booth v. Clark*, 58 U. S. 17 How. 322 [15 L. ed. 164], where it is said: "He has no extraterritorial power of official action; none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principles of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done where his debtor may be amenable to the tribunal which the creditor may seek."

The rule that a receiver has no right to sue in the courts of another State has not been, and cannot be, seriously questioned. But while the courts have with great unanimity denied the capacity of a receiver to bring suits in foreign jurisdictions as a question of right, the rigor of the rule has been much relaxed, and the privilege or permission to sue is ordinarily accorded as matter of comity—not as obligatory, but a favor of courtesy, which may be extended or withheld. In the absence of statutory regulations, the appointment and title of a receiver may be recognized, and he may sue in the courts of another State, unless such suit works injustice or detriment to the citizens thereof, or contravenes the policy of its laws. *Pugh v. Hurtt*, 52 How. Pr. 22; *Chandler v. Siddle*, 8 Dill. 477.

In *Hurd v. Elizabeth*, 41 N. J. L. 4, Beasley, Ch. J., says: "Conceding that the officer is invested with this fullness of authority [to collect the assets at home and abroad], it would appear to be in harmony with those legal principles by which the intercourse of foreign States is regulated for every government, when its tribunals are appealed to, to render every assistance in their power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced, or the rights of its own citizens invaded or impaired. After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided." And in 6 Am. St. Rep. 189, note, the learned annotator, after reviewing the authorities, remarks: "We deduce, therefore, from a thorough examination of the cases and text-books upon the subject, that the great weight of authority is and should be in keeping with the decision rendered by Mr. Justice Wayne, in *Booth v. Clark*, supra, that a foreign receiver has no right to sue in another State, but that, on the ground of comity, the court will, in the just and proper exercise of a sound legal discretion, permit such suits to be maintained for the purpose of thereby doing justice, where the good of a larger number would demand it, by recognizing the orders and judgments of the courts of a sister State. But in none of the cases is such right to sue conceded, or the suit permitted to be maintained by the foreign receiver where the claim sought to be enforced conflicts with the rights of citizens or creditors in the State where the suit is brought." The exception to the rule denying to a receiver the right to bring suits in foreign jurisdictions, it has been said, may be regarded quite as firmly established as the rule itself, and that the constant tendency of the courts is towards a more enlarged and liberal policy. High, Receivers, § 241; Beach, Receivers, § 682.

The corporation became insolvent, and the receiver was appointed in 1880. The bill was filed January 20, 1888. During this long period of time, the creditors, if there are any in this State, have had ample opportunity to as-

sert their rights, and to institute proceedings to have the property located in this State subjected to their demands by its courts. No creditor having appeared or asserted any rights, it may be reasonably presumed that there are none, or, if any, they have preferred to assert their claims in the court appointing the receiver rather than waste the estate by the costs and expenses of multiplied litigation and different receiverships. When no creditor is complaining or asserting rights after the lapse of so long a time, when only the parties litigant are interested, and the purpose of the suit is to gather the assets of the insolvent corporation in order to render them available for equal distribution among the creditors in one proceeding, we can see no reasonable objection against allowing the foreign receiver to sue.

The third ground of demurrer is that it does not appear from the bill that the corporation had, before or at the time of making the contract, complied with the requirements of section 1180 of the Revised Code, corresponding with section 1209 of Code of 1886. The Statute provides that no agent of any foreign fire, river, marine or life insurance company shall, directly or indirectly, take any risk or transact any business of insurance in this State, without first procuring a certificate of authority from the auditor, and declares the violation of the provisions of the Statute a misdemeanor. The prohibition is directed to, and the penalties of a violation are visited upon, the agent. The Statute prohibits taking risk or transacting business of insurance. It does not prohibit the transaction of business generally, not in the line of business of insurance. The bill does not show that the bond and mortgage were made in the course of transacting any business of insurance in this State; it simply shows a debt owing to the corporation for which security was given. The observations made in reference to the first cause of demurrer apply also to this. The case does not fall within the principle settled in *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, and the subsequent cases.

Counsel for appellee, in his argument, suggests questions involving the construction of the declaration of trust executed by Nicholas Davis several years before the making of the mortgage, the nature and extent of the right or estate of Mrs. Davis, and their children, and the power of herself and husband to make a valid mortgage of the land. These are important and serious questions, which will require careful and full investigation and consideration when properly raised, but they are not presented by the assignments of error, and could not have been.

No assignment was made to complainant as receiver by the corporation. The legal title to the land is in the company. Is not the company an indispensable party, so as to have the legal title before the court? We suggest this for the consideration of counsel.

Reversed and remanded.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN R. CO., *Appt.*,

F. T. YONLY *et al.*

(....Ark....)

A railroad company cannot be held liable for injuries resulting to adjoining property owners from the negligent performance by a third person of his contract to burn the brush growing upon its right of way, when such burning, if carefully done, would have caused no injury.

(November 8, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiffs in an action brought to recover damages for injuries to plaintiffs' property alleged to have resulted from the negligent burning of brush on defendant's right of way. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. J. M. Moore for appellant.

Messrs. Ratcliff & Fletcher, for appellees.

The Railway Company could not shield itself from damages occasioned by reason of the

clearing and burning off the right of way by letting the contract therefor to another.

See *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Mechem*, Ag. § 747, p. 596; *Ohio South R. Co. v. Morey*, 7 L. R. A. 701, 47 Ohio St. —.

The law imposes the duty upon railway companies to keep their tracks and contiguous land free from inflammable matter.

Tilley v. St. Louis & S. F. R. Co. 49 Ark. 542; 8 Am. & Eng. Encyclop. Law, p. 14.

It would seem illogical and contrary to the rules of justice to hold that while the Company would have been liable had the right of way caught on fire by spark from an engine and destroyed the property of appellees, it can cause the same to be set on fire by a contractor and thus shield itself from liability.

Pollock, Torts, *64.

When the thing the contractor does is one which it is the duty of the employer to do, either personally or through an agent, the employer is liable for the contractor's negligence.

Whart. Neg. p. 185; *Wood, Mast. and Serv.* § 816.

Hemingway, J., delivered the opinion of the court:

The appellee brought suit against the appel-

NOTE—*Railroad company not liable for negligence of independent contractor.*

Where work is done for a railroad company under a contract the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though it employs its own surveyor to superintend and direct the work. *Steel v. South Eastern R. Co.* 16 C. B. 550.

It is a rule of very general application that where work is let out by contract, the employer to have no control over the person with whom the contract is made as to the mode or manner of its performance, he will not be responsible for injuries caused by such contractor or his servant in the performance of the work. *Burke v. Norwich & W. R. Co.* 34 Conn. 474; *West v. St. Louis, V. & T. H. R. Co.* 63 Ill. 545; *Camp v. Church Wardens*, 7 La. Ann. 321; *Eaton v. European & N. A. R. Co.* 59 Me. 520; *Forsyth v. Hooper*, 11 Allen, 419; *Hilliard v. Richardson*, 8 Gray, 349; *Linton v. Smith*, 8 Gray, 147; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24; *Morgan v. Bowman*, 22 Mo. 538; *Barry v. St. Louis*, 17 Mo. 121; *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Wright v. Holbrook*, 52 N. H. 120; *Carter v. Berlin Mills Co.* 58 N. H. 52; *Blake v. Ferris*, 5 N. Y. 48; *Stores v. Utica*, 17 N. Y. 104; *Slater v. Mersereau*, 64 N. Y. 138; *Barratt v. Singer Mfg. Co.* 1 Sweeney, 545; *Pack v. Mayor*, 8 N. Y. 222; *Gourdier v. Conmack*, 2 E. D. Smith, 254; *Vanderpool v. Husson*, 23 Barb. 198; *Norton v. Wiswall*, 23 Barb. 618; *Young v. New York Cent. R. Co.* 30 Barb. 229; *Schular v. Hudson River R. Co.* 38 Barb. 653; *Weyant v. N. Y. & H. R. Co.* 3 Duer, 390; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399; *Painter v. Pittsburgh*, 46 Pa. 213; *Hunt v. Pennsylvania R. Co.* 51 Pa. 475; *Cunningham v. International R. Co.* 51 Tex. 503; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 366; *Murray v. Currie*, L. R. 6 C. P. 24; *Murphy v. Caralli*, 3 Hurlst. & C. 426; *Hobbit v. London & N. W. R. Co.* 4 Exch. 256; *Milligan v. Wedge*, 12 Ad. & El. 737.

Where works over a line of railway are intrusted to contractors entirely independent of the company, its directors are not held to take precautions 9 L. R. A.

against possible negligence of such contractors. *Daniel v. Metropolitan R. Co.* L. R. 5 App. Cas. 45.

The company is not liable for the negligent operation of a train by a contractor in control of the train. *Cunningham v. International R. Co.* 51 Tex. 503.

A principal using due care in the selection of a contractor, who undertakes to accomplish a certain work as an independent employment, with liberty to select his own means and methods, is not responsible for the negligence of such contractor, or that of his servants or agents, in the performance of the work. *Myer v. Hobbs*, 57 Ala. 175; *Boswell v. Laird*, 8 Cal. 499; *Bennett v. Truebody*, 66 Cal. 508; *Kellogg v. Payne*, 21 Iowa, 575; *Ryan v. Curran*, 64 Ind. 845; *McCarthy v. Second Parish*, 71 Me. 318; *Hilliard v. Richardson*, 3 Gray, 349; *Linton v. Smith*, 8 Gray, 147; *Wood v. Cobb*, 13 Allen, 58; *De Forrest v. Wright*, 2 Mich. 370; *St. Paul v. Seitz*, 3 Minn. 297; *Barry v. St. Louis*, 17 Mo. 121; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17; *Hexamer v. Webb*, 2 Cent. Rep. 459, 101 N. Y. 377; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178; *King v. New York Cent. & H. R. Co.* 66 N. Y. 136; *Clark v. Fry*, 8 Ohio St. 363; *Hass v. Philadelphia & S. M. S. R. Co.* 83 Pa. 269; *Harrison v. Collins*, 86 Pa. 156; *Bailey v. Troy & B. R. Co.* 37 Vt. 232.

A railroad company is not responsible where the injury does not result necessarily from the work contracted to be done, but from the negligent manner in which it was done. *McCafferty v. Spuyten Duyvil & P. M. R. Co. supra*; *Tibbetts v. Knox & L. R. Co.* 62 Me. 437; *Cunningham v. International R. Co.* 51 Tex. 503.

The company is not liable for injuries caused by the negligence of the workmen of an independent contractor, although it had reserved to itself the power of dismissing any of the contractor's workmen for incompetency. *Reedie v. London & N. W. R. Co.* 4 Exch. 244; *Hobbit v. London & N. W. R. Co.* 6 Eng. R. & Corp. Cas. 188; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 574; *Pawlet v. Rutland & W. R. Co.* 28 Vt. 237; *Allen v. Willard*, 57 Pa. 374; *Kelly v. Mayor*, 11 N. Y. 432.

tant to recover the damage sustained by reason of the burning of a bridge which belonged to appellee and was situate near the appellant's right of way.

The complaint alleged "that the appellant, through its officers, agents and employes, caused the timber, grass and stubble along its right of way and near the bridge to be set on fire at different places, everything at the time being very dry and in a very combustible condition, and so carelessly, negligently and recklessly fired the same, and carelessly, negligently and recklessly managed the same, after the fire was started, that fire was communicated thereby to said bridge, and the same was totally destroyed."

The answer denied that the fire was set out by the officers, agents or servants of the appellant, or that the burning was caused by negligent conduct on the part of its officers, agents or employes.

From a judgment in favor of the plaintiff the defendant prosecutes this appeal.

The cause was submitted at the last term of this court, and upon consideration we rendered a judgment of reversal; but upon a motion for rehearing we set aside the judgment for the further consideration of matters not discussed in the former opinion.

We then held that the party who set out the fire which it was claimed caused the injury was an independent contractor, and not an officer, agent or employé of the appellant. No exception is now urged to that ruling.

But it is contended that the appellant is liable for the injury for two reasons, to wit: (1) because the law imposes upon a railway company the duty to keep its right of way and track free of such matter as is liable to be ignited by sparks or cinders from its engines, and that it cannot delegate to another the performance of that duty; (2) because the setting out of fire necessarily endangered the property of plaintiff, and the company having caused it to be set out would be liable whether it was set out by an independent contractor, or by its agents.

If the injury complained of had arisen from the escape of sparks from a passing engine, and the negligence charged had been in permitting inflammable matter to remain on the track or right of way, and if the defendant had sought to escape liability for the injury by showing that it had made a contract to have the matter cleared off, and that its presence was due to the negligence of the contractor—then the first position taken by counsel would be strong and receive support from the authorities they cite. But the injury is charged to have arisen, not because of the failure to keep the right of way clear, but by reason of the clearing of it in a negligent, careless and reckless manner. If the Railway Company had even discharged its duty, there is nothing to indicate that the plaintiff would have been injured. It is required to keep its track and right of way clear of inflammable matter, upon the principle *sic utere tuo ut alienum non lædas*. In order that it may discharge its duty, it is authorized to employ means to that end. If individual proprietors could employ

independent contractors to burn inflammable matter on their premises, without liability under the rule *respondet superior* for injury resulting therefrom, a railway company, under similar circumstances, would enjoy the same immunity. Mr. Cooley says: "In general it is entirely competent for one having any particular work to be performed to enter into agreement with an independent contractor to take charge of and do the whole work, employing his own assistants, and being responsible only for the completion of the work as agreed. The exceptions to this statement are the following: He must not contract for that, the necessary or probable effect of which would be to injure others, and he cannot, by any contract, relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance and therefore an invasion of the rights of others."

Whether a proprietor may contract to have his premises burned off, without being liable for injury thereby done, is to be determined by the second question argued by counsel.

2. If one employs another to perform a work which from its nature is necessarily dangerous to the property of a third person, the employer cannot escape liability for the injury thereby done. In such cases the injury flows from the doing of the act as its natural consequence, and not from the manner in which the act is done. *Mechem, Ag. § 647; Cooley, Torts, p. 648; Bower v. Peate, L. R. 1 Q. B. Div. 321; Eaton v. European & N. A. R. Co. 59 Me. 520; Bailey v. Troy & B. R. Co. 57 Vt. 252, 52 Am. Rep. 129; Atchison, T. & S. F. R. Co. v. Dennis, 38 Kan. 424; Callahan v. Burlington & M. R. R. Co. 23 Iowa, 562.*

In this case the complaint does not allege that the burning of the brush was in itself an act dangerous to the appellee's property, but avers that the damage resulted because the act was carelessly done. The loss is not charged to have been occasioned by the act itself, but by the improper manner of its performance. In the charge to the jury the right of recovery was hypothecated upon the negligent manner in which the work was done. This was error. The right of recovery depends upon the inherent character of the act done—whether it naturally endangered the property of appellee, if carefully performed. If it did the appellant would be liable. The burden to show that it did is upon the appellee; whether he discharged it, was a question that should have been submitted to the jury. We cannot say, as a matter of law, that such was the nature of the act. It would depend upon a variety of circumstances. It is easy to conceive a case in which burning brush on a right of way would be obviously dangerous to adjoining proprietors; it is just as easy to conceive one in which there would be no danger, except from the careless and reckless manner of the burning. The employer's liability in each case must therefore depend upon its own facts.

The judgment will be reversed, and the cause remanded for a new trial.

KANSAS SUPREME COURT.

STATE OF KANSAS

BRADY, *Appt.*

(....Kan.....)

- *1. The following words: "Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary. The convict Harvey had been sent to Lansing from Salina."—published in a newspaper, if false, are, under the facts and circumstances surrounding this case, libelous.
2. To constitute criminal libel, it is not necessary that the alleged libelous article reflect upon the conduct of any particular person, but, if directed against a family, it is libelous.
3. In prosecutions for libel, it is not necessary to prove express malice, where the alleged libelous article is libelous *per se*.

(October 11, 1890.)

A PPEAL by defendant from a judgment of the District Court for Morris County, entered upon a verdict convicting him of criminal libel. *Affirmed.*

The facts are fully stated in the commissioner's opinion.

Messrs. Mohler & Milliken for appellant.

Messrs. L. B. Kellogg, Atty. Gen., J. K. Owens and R. A. Lovitt for appellee.

Green, C., delivered the following opinion:

This case comes here on appeal from the District Court of Morris County, where the defendant was prosecuted and convicted of criminal libel for publishing, in the Salina Daily Republican, of which he was the proprietor, at Salina, Kan., on the 12th day of November, 1889, the following statement: "Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary. The convict Harvey had been sent to Lansing from Salina." The information charged that the libel was published of and concerning James M. Harvey, John A. Harvey, George E. Harvey, Z. T. Harvey, J. E. Harvey and W. S. Harvey. The evidence showed that Dr. W. S. Harvey was a resident of Salina at the time of the publication, and a brother of Ex-Governor James M. Harvey. The publication was admitted. The claim is made by the defendant that the language published was not libelous *per se*; that the court below erred in not giving the following instruction to the jury: "The publication charged as libelous in this case is not libelous *per se*; and before the jury can find the defendant guilty in this case, express malice must be proven." This instruction was refused by the trial court, and the following given: "I instruct you, gentlemen of the jury, that to print and publish, concerning any person, that he has been a convict in the state penitentiary of the State of Kansas, is libelous *per se*, unless the same is true; and in this connection I further instruct you that

there is no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends."

1. The defendant insists that the above instruction given by the court was erroneous as applied to this case, and greatly prejudiced the substantial rights of the defendant. This is the decisive and controlling question in this case. Ordinarily, the instructions to the jury should be considered together, and a judgment will not be reversed because some one of them fails to state the law applicable to the facts with sufficient qualifications, provided the defects be cured in other instructions. *Rice v. Des Moines*, 40 Iowa, 638; *State v. Maloy*, 44 Iowa, 104.

In the eleventh instruction, which is complained of, the court said to the jury that to print and publish concerning any person that he had been a convict was libelous *per se*, unless the same was true. We see no error in this, taken in connection with the instructions as an entirety. "Libel" has been defined by *Judge Story* to be any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred or ridicule, or which accuses him of a crime punishable by law, or of any act odious and disgraceful in society. *Dexter v. Spear*, 4 Mason, 115; *Newell, Defamation*, 87.

In this case the alleged libel charged that Gov. Harvey had pardoned his own brother out of the penitentiary; that the convict Harvey had been sent to Lansing from Salina. This was certainly charging that one of the Harvey brothers had been convicted of a felony, and comes clearly within the definition of "libel," as defined by the Crimes Act: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." Par. 2444, Gen. Stat. 1889. To call a person a returned convict, or otherwise to falsely impute that he has been tried and convicted of a criminal offense, is actionable. *Newell, Defamation*, 109; *Fowler v. Dowdney*, 2 Moody & R. 119; *Bell v. Byrne*, 18 East, 554.

We think the trial court committed no error in giving the eleventh instruction.

2. The appellant again contends that the statement published referred to no particular one of the Harvey family as having been a prison convict. While this objection might be urged with some force in a civil suit for damages, we do not think it is good in a criminal prosecution for libel. The law is elementary that a libel need not be on a particular person, but may be upon a family, or a class of persons, if the tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace. *Rex v. Williams*, 5 Barn.

*Head notes by GREEN, C.

NOTE.—Libel. See *Muetze v. Tuteur*, ante, 58, 9 L. R. A.

See also 35 L. R. A. 611.

& Ald. 595; *Rea v. Osborn*, 2 Barnard. 166; *Anonymous*, Id. 188; 2 Bishop, Cr. L. 7th ed. § 984; 2 Starkie, Slander and Libel, 218; Russell, Crimes, 1st Am. ed. 805, 832.

A scandal published of three or four, or any one or two, persons, is punishable at the complaint of one or more or all of them. Holt, Libel, 247.

In *Palmer v. Concord*, 48 N. H. 211, the Supreme Court said: "As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libelous attack on a body of men, though no individuals be pointed out, may tend as much or more to create public disturbance as an attack on one individual; and a doubt has been suggested whether 'the fact of numbers does not add to the enormity of the act.'"

8. The defendant claims there was error in the court's refusing the fourth special instruction asked, that, before the jury could convict, express malice must be proven. We do not think this is the legal rule. In prosecutions

for libel, malice is inferred from the nature of the charge, and, when the publishing of words libelous *per se* is once proven, malice is inferred, as a person is presumed to have intended the consequences of his own acts. *Chief Justice Shaw* has clearly stated the rule: "It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of matters; but if in pursuing that design he willfully inflicts a wrong on others which is not warranted by law, such act is malicious." Newell, Defamation, 317; *Com. v. Snelling*, 15 Pick. 840; *Pledger v. State*, 77 Ga. 242.

The want of actual intent to vilify is no excuse for a libel; and if a man deems that to be right which the law pronounces wrong, the mistake does not free him from the guilt. *Curtis v. Mussey*, 6 Gray, 261; 1 Bishop, Cr. L. § 809; *Reynolds v. United States*, 98 U. S. 145 [25 L. ed. 244].

Upon a careful examination of the errors complained of, we are satisfied that the court below committed no error, and recommend an affirmance of the judgment.

Per Curiam:

It is so ordered; all the Justices concurring.

INDIANA SUPREME COURT.

John TARKINGTON *et al.*, *Appts.*,

v.

Sanford B. PURVIS.

(....Ind.....)

1. To prevent one from rescinding a contract of purchase, by which he has been defrauded, for the reason that he has acquiesced

therein, the alleged act of acquiescence must be unequivocal and must show an election to retain the property after discovering the deceit.

2. A sale, by a defrauded vendee, of some of the property received under the fraudulent contract, and a receipt of the money therefor, will not destroy a fully perfected right on his part to rescind the fraudulent contract, if he fully accounts for the proceeds to the fraudu-

NOTE.—*Rescission of contract; rights of party defrauded.*

The right to rescind a contract on account of subsequently discovered fraud is not lost because the contract has been partly executed and the parties cannot be fully restored to their former condition. *Boemer v. Conlon*, 45 N. J. Eq. 234.

Where a contract is for performance in separable parts, and the buyer accepts a separable proportion thereof, the right to recover therefor is not forfeited by a later default; but the buyer cannot be compelled to accept part performances in the inverse order of his contract; and where, at its initial point, the seller is in default, the buyer's right to rescind applies to the whole contract. *Pope v. Porter*, 8 Cent. Rep. 451, 102 N. Y. 364.

A party must affirm or avoid a contract as a whole; he cannot treat it as good in part and void in part. See note to *Katz v. Bedford* (Cal.) 1 L. R. A. 523.

Delivery by the seller's servants through mistake, in part performance of a contract, of wood inferior in quality to that stipulated for, gives the purchaser the right to rescind and to refuse to accept a subsequent offer of performance by the seller. *Walker v. Davis*, 65 N. H. —, 9 L. R. A.

Effect of rescission. See note to *McCreery v. Day* (N. Y.) 6 L. R. A. 508.

A party who has been defrauded in making a contract, on the discovery of the fraud has a right, within a reasonable time, to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud. *Gifford v. Carvill*, 29 Cal. 502, quoting the language of the court in *Herrin v. Libbey*, 35 Me 357. See also *Burton v. Stewart*, 8 Wend. 259, 20 Am. Dec. 692; and other cases cited in *Gifford v. Carvill*, 29 Cal. 502; *Wainwright v. Weake*, 82 Cal. 196.

Election to rescind must be exercised promptly.

An option to rescind a contract must be exercised promptly. *Dent v. Long* (Ala.) April 30, 1890; *Merrill v. Wilson*, 10 West. Rep. 165, 66 Mich. 253.

Parties who claim to be relieved from a purchase, on the ground of fraud, must act with the utmost diligence and promptitude in discovering the fraud, and in claiming to be relieved by reason of it; and whether they have so acted is a question of fact for the jury. *Upton v. Tribblecock*, 91 U. S. 45.

lent vendor, unless it appears that such sale was made in the regular course of business or under such circumstances as show an intent to affirm the fraudulent contract, since he has a right to make sales of the property for certain purposes, such as to preserve it from destruction, etc.

3. Merely signing and acknowledging a deed of assignment of the firm assets for benefit of creditors will not defeat the right of one, who has been defrauded in the purchase of an interest in a partnership concern, to rescind the fraudulent contract, if before delivery of the deed he withdraws his consent thereto.

4. No technical tender of property which a vendee was defrauded into buying need be made to the fraudulent vendor before the commencement of an equity suit to compel a rescission on the ground of fraud. It is sufficient if the vendee can show that he has preserved the property substantially in the condition in which he received it, without intentional or unnecessary change.

5. Taking a conveyance of land in consideration of an antecedent debt does not constitute a person who parts with nothing and who in no way changes his attitude an innocent purchaser as against one who has a clear and undoubted prior equitable right to the land.

6. A fraudulent vendor is not entitled on rescission of the sale to have the amount which the defrauded vendee has received from sales of the property paid over to him; all he can demand is to have the amount credited on the amount of purchase money which he is decreed to pay back to the vendee.

7. When facts found are not sustained by the evidence, the question is properly brought before the court for review by a motion

for new trial, and not by a motion to strike out portions of the finding.

(October 30, 1890.)

A PPEAL by defendants from a judgment of the Circuit Court for Howard County in favor of plaintiff in an action brought to rescind a contract for the purchase and sale of an interest in a certain hardware firm on the ground that it was a fraud on the vendee. *Affirmed.*

The facts are stated in the opinion.

Messrs. Elliott & Kirkpatrick and *Cooper & Harness* for appellants.

Messrs. E. K. Pollard, Bell & Furdum, J. C. Blackledge and W. E. Blackledge, for appellee:

The vendee in a fraudulent sale does not lose his right to a rescission of a contract by taking part of the property sold, or by taking the proceeds of the sales of such property, if upon learning of the fraud he offers to return such property and the proceeds of the sale of such property so taken out. A vendee perfects his right of action to rescind by offering to turn back the property received from the vendor although the vendee after that made offers to sell the property.

Pierce v. Wilson, 84 Ala. 596, 609.

If a vendee in a fraudulent sale makes a cash payment upon a stock of goods, afterward sells a portion of these goods receiving cash therefor, upon discovering the fraud, he may offer to rescind by tendering back the remaining goods to the fraudulent vendor, and the amount of money received on sales of goods

23 L. ed. 208; *Andrews v. Hensler*, 73 U. S. 6 Wall. 264, 18 L. ed. 737.

If a party intends to rescind a contract on the ground of its violation by the other party, he must do it promptly, on the first information of such breach. *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 423; *Dill v. Camp*, 22 Ala. 258; *McCulloch v. Scott*, 13 B. Mon. 173; *Lawrence v. Dale*, 8 Johns. Ch. 23, 1 N. Y. Ch. L. ed. 529, 17 Johns. 437.

He should take prompt action to repudiate it when the fraud is discovered, and notify the seller of his purpose to disavow and disown it. *Davis v. Read*, 37 Fed. Rep. 418.

The right to rescind a sale on the ground of fraud must be exercised within a reasonable time after the fraud is discovered, or the time when it should have been discovered. *Young v. Arntze*, 36 Ala. 116.

He must rescind as soon as possible after the discovery of the fraud. *Roemer v. Conlon*, 45 N. J. Eq. 234.

The defrauded party to a contract has but one election to rescind, which he must exercise with reasonable promptitude after the discovery of the fraud, and when he once elects he must abide by his decision. *Dennis v. Jones*, 44 N. J. Eq. 512.

Parties must be put back in statu quo.

Where a party desires to rescind a contract upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798.

A court of equity will not rescind unless the parties can be put back *in statu quo*, or the clearest and strongest equity imperatively demands it. *Ibid.*

Unless a party can be put *in statu quo*, which cannot be done when a portion of the property has

been disposed of, a court of equity is reluctant to rescind a contract, and will do so only when clear and strong equity compels it. *Dent v. Long* (Ala.) April 30, 1890.

Notice of rescission of a contract of sale is not void because given on Sunday, without a statutory provision to that effect. *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420.

Action or suit for rescission.

The general rule is that only the party injured by fraud can complain of it. *Waterbury v. Andrews*, 11 West. Rep. 202, 67 Mich. 281.

The misrepresentations of the seller of property, to authorize the rescinding of a contract of sale by a court of equity, must be of something material constituting an inducement or motive to purchase, by which the purchaser has been misled to his injury. It must be something in which the one party places a known trust and confidence in the other. *Smith v. Richards*, 38 U. S. 18 Pet. 20, 10 L. ed. 42.

An executed contract will not be rescinded on the ground of fraud unless the preponderance of evidence as to the fraud is so great as to satisfy the conscience of the chancellor. *Kern v. Middleton* (Pa.) Feb. 4, 1839.

Where a vendor of personal property in the hands of bailees, subject to charges for storage, agrees, as part of the consideration, to pay the charges and deliver the goods when requested by the purchaser, but, upon demand of the latter, refuses to perform such agreement, the purchaser may rescind and refuse to pay the contract price. *Malone v. Minnesota Stone Co.*, 38 Minn. 325.

In an action to rescind a sale of stock for false representation, delay in filing the bill, satisfactorily explained, will not defeat the right to relief. *Booth v. Smith*, 4 West. Rep. 231, 117 Ill. 370.

It is not necessary for a purchaser, on bringing a

less the amount paid by the vendee on the purchase.

Wharton, Cont. § 285; *Montgomery v. Pickering*, 116 Mass. 227.

The execution of a deed of assignment may be revoked before the assignee accepts the trust. A deed of assignment properly executed confers no right upon the assignee until recorded.

Ind. Rev. Stat. 1881, § 2663; *Forkner v. Shafer*, 56 Ind. 120.

A vendee may waive his right to a rescission of the fraudulent contract, but it is essential to such a waiver that the party should possess full knowledge of the fraud practiced upon him; that he should intend to confirm the contract and abandon all right to recover for the loss resulting from the fraud.

St. John v. Hendrickson, 81 Ind. 350; *Doherty v. Bell*, 55 Ind. 205; *McQueen v. State Bank*, 2 Ind. 418; Cooley, Torts, 505.

It is not necessary to produce money to make a valid tender.

Mathis v. Thomas, 101 Ind. 119, 122.

Fraud may be found from circumstances as well as from positive evidence.

Rhodes v. Green, 86 Ind. 7, 15.

The surrender of a pre-existing debt, not secured, is not a sufficient consideration to constitute a good-faith purchaser for value as against prior equities.

Busenbarks v. Ramey, 53 Ind. 499, 506; *Herritt v. Powers*, 84 Ind. 295, 297; *Louthain v. Miller*, 85 Ind. 161, 163; *Boling v. Howell*, 93 Ind. 329, 331.

A transfer of property by a fraudulent

vendee in consideration of a pre-existing debt confers no title as against the defrauded vendor.

Ratliffe v. Sangstoon, 18 Md. 383; *Frew v. Daenman*, 11 Ala. 860; *Ingram v. Morgan*, 4 Humph. 66; *Dickerson v. Tillinghast*, 4 Paige, 215, 8 N. Y. Ch. L. ed. 409; *Coddington v. Bay*, 20 Johns. 637; *Powell v. Jeffries*, 5 Ill. 387; Benjamin, Sales, § 649, and authorities cited.

Mitchell, J., delivered the opinion of the court:

The material facts in the present case as found by the court are, that in the month of August, 1887, Joseph S. Tarkington exchanged his interest in the firm of T. H. Ellis & Co., dealers in hardware, of which firm he was a member, for certain real estate and \$600 in cash, with Sanford B. Purvis, the latter assuming and agreeing to pay Tarkington's share of the indebtedness of the firm.

It is found that Tarkington, in order to induce Purvis to make the trade, made certain false representations concerning the value of the stock and assets of the firm and the amount of the partnership debts, to the effect that the assets of the firm were largely in excess of its liabilities. It appears from the finding that the firm was in fact in debt in an amount largely in excess of the value of the partnership assets, so that the interest of Tarkington at the time the exchange was made was of no value whatever. It is found that the exchange was made on the 15th day of August. On the 27th day of the same month Purvis discovered the fraud practiced upon him, and immediately

suit to recover back the purchase price for fraud, to receive and tender back a certificate of stock purchased, which had been left by the seller with his agents to be delivered to the purchaser. *Pence v. Langdon*, 99 U. S. 573, 25 L. ed. 420.

Rescission of contract by vendor for fraud of vendee. See *note* to *Fechheimer v. Baum* (Ga.) 2 L. R. A. 153.

Ratification or acquiescence defeats right to rescind.

It is the rule that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after discovery of the fraud and that when he once elects he must abide by his decision. *Bigelow*, Fr. 438.

Delay in rescission of the contract is evidence of a waiver of the fraud and an election to treat the contract as valid and still subsisting. *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311, 319; *Brown v. Mutual Ben. L. Ins. Co.* 82 N. J. Eq. 809; *Oakey v. Cook*, 41 N. J. Eq. 350; *Bigelow*, Fr. 438; 2 Pom. Eq. Jur. § 817; *Baird v. New York*, 96 N. Y. 567; *Farlow v. Ellis*, 15 Gray, 229; *Lawrence v. Dale*, 3 Johns. Ch. 23, 1 N. Y. Ch. L. ed. 529, 17 Johns. 437; *Morgan v. McKee*, 77 Pa. 231; *Pearson v. Chapin*, 44 Pa. 9; *Negley v. Lindsay*, 67 Pa. 217; *Leaming v. Wise*, 73 Pa. 173.

So payments of purchase money after knowledge of the fraud, are evidence to the same effect. *Knuckolls v. Lea*, 10 Humph. 577.

And so also is the continued dealing with the property purchased and in reference to the fraudulent transaction as if the contract were subsisting and binding. *Bassett v. Brown*, 105 Mass. 551; 1 Story, Eq. Jur. 13th ed. 227; 2 Kent, Com. 11th ed. 637; *Vigers v. Pike*, 8 Clark & F. 562; *Schiffer v. Dietz*, 88 N. Y. 300.

9 L. R. A.

Delay in the rescission of the contract, payments in pursuance of it and continued dealing with it, and with reference to the fraudulent transaction, after discovery of the fraud, may be shown as evidence of an election to treat a fraudulent contract as valid. Rule applied to sale of a skating rink. *Dennis v. Jones*, 44 N. J. Eq. 513.

Any act of ratification of a contract after knowledge of the facts authorizing a rescission amounts to an affirmation and terminates the right to rescind. *Bryan-Brown Shoe Co. v. Block*, 53 Ark. 458.

Acquiescence by lapse of time; estoppel.

When a party with full knowledge, or with sufficient notice or means of knowledge, of his rights, and of all the material facts, lies by for a considerable time, or abstains from impeaching the transaction, so that the other party is induced to suppose that it is recognized, it is acquiescence, and the transaction although originally impeachable becomes unimpeachable in equity. 2 Pom. Eq. Jur. 499, 500; *Cholmondeley v. Clinton*, 2 Meriv. 171, 361; *Honner v. Morton*, 3 Russ. 65; *Selsey v. Rhoades*, 1 Bligh, N. S. 1; *Vigers v. Pike*, 8 Clark & F. 562, 650; *Charter v. Trevelyan*, 11 Clark & F. 714; *Odlin v. Gove*, 41 N. H. 465; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426, 437; *Peabody v. Flint*, 6 Allen, 52; *Fuller v. Melrose*, 1 Allen, 166; *Tash v. Adams*, 10 Cush. 252; *Briggs v. Smith*, 5 R. I. 213; *Cobb v. Hatfield*, 46 N. Y. 533; *Lawrence v. Dale*, 3 Johns. Ch. 23, 1 N. Y. Ch. L. ed. 529, 17 Johns. 437.

Where a party enters into a contract on a speculation, and gives his promissory notes in consideration, he cannot turn round after failure of the speculation, and ask to have the contract rescinded, especially where he has acquiesced in it for a long time, and has paid one of said notes. *Lowber v. Selden*, 11 How. Pr. 523.

offered to rescind, by transferring back all that he had received from Tarkington, and demanding the reconveyance of the real estate which he and his wife had previously conveyed to the latter. He repeated the tender and demand on the 29th day of August, and again on the 1st day of September.

It is found that Purvis had received \$341 in cash out of the assets of the firm on the 80th day of August, 1887, and that he offered or tendered the money so received to Tarkington on the 1st day of September following. It is also found that on the same day on which the first demand was made for a rescission of the contract, Tarkington conveyed the real estate which he received in exchange for his interest in the stock of hardware to John Tarkington, his father, the consideration for the conveyance being an antecedent debt of \$4,000 alleged to be due from the son to his father. The latter is a party to this suit. At the time the elder Tarkington received the conveyance he knew that his son was insolvent, and that he made the conveyance to put it out of the power of Purvis to recover the property back.

Upon the facts found the court stated conclusions of law upon which a judgment for \$600 against Joseph S. Tarkington, and a decree ordering a rescission of the contract as prayed in the complaint, were entered. On the appellant's behalf it is insisted that the facts found show that the appellee, after discovering the fraud, converted part of the property to his own use, and otherwise dealt with it in such a manner as that his right to rescind was thereby destroyed. The facts specially found do not afford a basis for the assumption upon which this argument is predicated.

It appears from the facts found that the fraud was discovered on the 27th day of August, 1887, and that immediately upon discovering the deception practiced upon him the appellee took the proper steps to rescind the contract. Subsequently, on the 80th day of

August, after another unsuccessful attempt to rescind, he received from the firm assets \$341, and on the next day he again tendered the appellant all that he had received, including the sum above mentioned.

The doctrine is fully established that a contract induced by fraud is only voidable, and if one who has been defrauded after discovering the deceit acquiesces in the sale either by express words or by any unequivocal act, such as treating the property as his own, with an intent to condone the fraud, he will be deemed to have elected to affirm the contract, and he cannot afterwards rescind. One who, influenced by the fraud, deals with the property as his own, after having fully discovered that fraud has been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind. *St. John v. Hendrickson*, 81 Ind. 350; *Higham v. Harris*, 108 Ind. 248, 5 West. Rep. 643; *Worley v. Moore*, 97 Ind. 15; *Doherty v. Bell*, 55 Ind. 205; *Gatling v. Newell*, 9 Ind. 572; *Comporet v. Hedges*, 6 Blackf. 416; *Shafer v. Sleade*, 7 Blackf. 179; *Benjamin, Sales*, § 675.

Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal and must show an election to retain the property, after discovering the deceit, before the right to rescind is gone.

In the present case the right to claim a rescission had been fully perfected by the appellee, by tendering back everything that had been received, and by offering to place the fraudulent vendor *in statu quo*. That the plaintiff below afterwards received money arising from the sale of some of the assets of the firm in no way militates against his right to compel the rescission, since it does not appear that the property was sold in the course of the business of the firm, and the money received was fully

Party cannot rescind while retaining fruits.

Where one party has made part performance of a contract, the other cannot rescind and still retain the benefits which he has received. *Bowman v. Ayers* (Idaho) March 11, 1889.

A party who has had a partial benefit, under a contract, from the labors of other parties, is not entitled to rescind, and to restoration to him of what they have received under it, because of a subsequent breach on their part. His remedy is an action for damages. *Rogers v. Garland* (D. C.) 18 Wash. L. Rep. 331.

A party to a contract who has the benefit of the good will of the business of the other party, which cannot be restored, cannot rescind the contract; especially where he does not offer to restore property received under the contract. *Handforth v. Jackson*, 150 Mass. 149.

Must return or offer to return the property.

A purchaser, upon discovery of a fraud, may treat the contract as voidable, and may rescind by returning the property purchased. *State v. Fredericks* (N. J.) 1 Cent. Rep. 451; *Andrews v. Hensler*, 73 U. S. 6 Wall. 254, 18 L. ed. 737.

Where the purchaser of a farming implement is entitled to rescind the contract, and for that purpose

may return the article, he must return, or offer to return, within a reasonable time. *Cookingham v. Dusa*, 41 Kan. 229; *Davis v. Gosser*, 41 Kan. 414.

The purchaser of a farming implement, such as a header, cannot retain and use the machine, and at the same time say he repudiates and rescinds the contract of purchase. *Cookingham v. Dusa*, *supra*.

A purchaser's right to rescind a contract is not affected by his use of the property, after an offer to return it, by consent of the person whom he believes to have bought it from the other party. *Young v. Arntze*, 36 Ala. 116.

Where a party who has sold a piano is notified to remove it on the ground of fraud authorizing a rescission, and refuses to do so, a subsequent occasional use of it by the other party while it remains in his possession is not necessarily inconsistent with the rescission of the contract; the most that can be claimed by the seller is that it is a question for the jury. *Bell v. Anderson*, 74 Wis. 633.

A complaint in an action to rescind a contract of sale for fraud and to recover damages for such fraud, in which plaintiff offers to return the property, should not be dismissed because plaintiff is unable to return a part of the property which he has used up or disposed of, as he is entitled to dam-

accounted for without loss to the appellant. One who has perfected his right to rescind a fraudulent contract cannot lose it by merely taking care of the property received, or by preserving it in case it is of a perishable nature, unless what he does is done with the intent to confirm the contract. He is not bound to preserve perishable property, but if he acts in good faith in preventing reasonable apprehended loss or destruction and waste of the property, his perfected right of rescission will not be lost in a court of equity, if he fairly accounts for the property without loss to the vendor, and places him *in statu quo* as nearly as may be. *Pierce v. Wilson*, 34 Ala. 596; *Nebbett v. Macfarland*, 92 U. S. 101 [23 L. ed. 471]; *Wharton*, Cont. § 285.

Where subsequent acts are relied upon as a defense in a case where fraud is clearly established, it is said the act must stand upon the clearest evidence, and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind. If what is done is merely for the purpose of saving the plaintiff from further loss, without any purpose to give up whatever right he may have either at law or in equity to rescind, the right of rescission will not be affected. *Montgomery v. Pickering*, 116 Mass. 227; *Morse v. Royal*, 12 Ves. Jr. 355-873.

It also appears that after the offer to rescind the plaintiff below joined the other partners in a deed of voluntary assignment of the firm assets. Before the deed was delivered to the assignee or recorded, the plaintiff gave notice that he repudiated the assignment and that he would not consent to the delivery of the deed. Merely signing and acknowledging the deed, which was never delivered with the plaintiff's consent, did not defeat his right to rescind. So far as the assignment was perfected after the plaintiff below withdrew his consent it was the act of the other partners, and did not bind the plaintiff.

It is contended that the tender of the \$341

was not made in any manner recognized by the law. We do not inquire whether or not a good technical tender such as would be recognized in a court of law was made before the commencement of the suit. The suit being a proceeding in equity to compel a rescission on the ground of fraud, no such tender was necessary. In such a case it is sufficient for the plaintiff to show that he has preserved the property substantially in the condition in which he received it, without intentional or unnecessary change. *Shuee v. Shuee*, 100 Ind. 477; *Ligham v. Harris and Montgomery v. Pickering*, *supra*.

Complaint is made that the finding that John Tarkington took the conveyance from his son, Joseph S., with knowledge of the fraudulent purpose of the latter, is not supported by the evidence. We cannot say that the circumstances surrounding the transaction as it is disclosed in the evidence did not justify the finding. Besides, it is conceded that the consideration for the conveyance from Joseph S. Tarkington to his father was an antecedent debt due from the former to the latter. There was no change in the position of the parties; no right or security of value was surrendered up by the father as a consideration for the conveyance from his son. He was, therefore, not an innocent purchaser as against one holding a prior equity. While it is true that a precedent debt is a sufficient consideration to support a contract, it is also true that taking a conveyance in consideration of an antecedent debt does not constitute a person who parts with nothing, or in no way changes his attitude, an innocent purchaser, as against one who has a clear and undoubted prior equitable right to the land. *Petry v. Ambrosaker*, 100 Ind. 510, and authorities cited; *Boling v. Howell*, 98 Ind. 329.

As between creditors who have no prior equities, a precedent debt will support a conveyance, and, if made without fraud, render it unassailable; but the present is not such a case. The land in dispute, in equity and good conscience, belonged to the appellee, who had

agreed for the fraud, though he was not entitled to rescind. *Baker v. Zeigler*, 56 Hun. 405.

Rescission for breach of warranty.

Where there is a breach of warranty, the vendee may return the property and rescind the contract, within a reasonable time. *Johnson v. Whitman Agric. Co.* 2 West. Rep. 414, 20 Mo. App. 100. See note to *Baker v. Brem* (N. C.) 4 L. R. A. 370.

The question as to what is a reasonable time is generally a question of fact, but the court may declare it to be reasonable or unreasonable, as matter of law. *Johnson v. Whitman Agric. Co.* *supra*.

Where a harvester is sold with warranty, if it is not as warranted the purchaser may return it and rescind the contract of purchase; but if the purchaser retains the machine, he is bound, not only to account for its value for the purpose for which it was designed, constructed or sold, but for its value either to the purchaser or the seller for any purpose. *Aultman v. Mickey*, 41 Kan. 345.

The purchaser of a horse, who took it entirely on the strength of the seller's representations that it was sound, need only act, in order to rescind, within a reasonable time after he had personal knowledge or information that the horse was not sound. *Gridley v. Globe Tobacco Co.* 71 Mich. 522; *Whitworth v. Thomas*, 33 Ala. 303.

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A mutual fraud in a horse trade cannot be made a defense to an action by one of the parties for rescission, after discovery of a defect in the animal obtained by him. *Whitmore v. Thomas*, *supra*.

The purchase of a mirror by sample for a particular purpose known to the seller may be rescinded on the discovery of defects, although it has been accepted, when the defects were not apparent. *Hudson v. Roos*, 72 Mich. 363.

When it is once ascertained that goods purchased are not supposed to conform to samples, great promptness is required both in examining and in rescinding with as little delay as the usual methods of business will permit. *Farrington v. Smith*, 77 Mich. 550.

The sale of articles to be selected cannot be rescinded because, before sale, there may have been an honest expression of opinion that when the articles are selected they will be of a better quality than they proved to be. *Schramm v. Boston Sugar Ref. Co.* 5 New Eng. Rep. 721, 145 Mass. 211.

The fact that a purchaser of a stock of goods was induced to make the purchase by representations of the vendor that the stock was free of incumbrances, whereas it was mortgaged, will not entitle the vendee to rescind the contract where, as soon as he called the vendor's attention to it, the mortgage was discharged. *Johnson v. Seymour* (Mich.) Jan. 17, 1890.

given notice and taken all the steps necessary to perfect his right to rescind before the conveyance was made. His equity cannot be postponed in favor of one who in no manner changed his position.

Whatever error may have been committed by the court in overruling the appellant's motion to modify the judgment by requiring the plaintiff below to pay the appellant \$341 in money, was corrected by a remittitur of that amount by the appellee. The appellant, having received \$600 in cash in the trade that was rescinded by the decree of the court, was not entitled to have the \$341 which the appellee received out of the partnership assets paid back to him. All that he was entitled to was to have that amount deducted from the \$600 received by him. This was done in effect by the remittitur.

The motion to strike out parts of the special

finding of facts on the ground that the portions indicated were not supported by the evidence was properly overruled.

When facts found are not sustained by the evidence, the question is properly brought before the court for review by a motion for a new trial, and not by a motion to strike out such parts of the finding as are supposed to be unsupported by the evidence. Possibly, if a special finding was incumbered with facts outside of the issues, or mere statements of evidence or other extraneous matter, which could have no proper place in a finding of facts, a motion to strike out might be entertained with propriety. But even then the refusal of the court to strike out parts of the special finding would hardly be ground for reversal.

We find no error in the record.

Judgment affirmed, with costs.

NEW YORK COURT OF APPEALS.

Stevens VOISIN, *Appt.*,

2.
COMMERCIAL MUTUAL INSURANCE
CO., *Respnt.*,

(....N. Y.....)

An appeal may be taken to the General Term of the Supreme Court from a decision of the trial court denying a motion, made upon the judge's minutes, for new trial in an action which has been tried before a jury, notwithstanding judgment has been entered therein from which no appeal has been taken and as to which the time for appealing has expired.

(October 7, 1890.)

A PPEAL by plaintiff from an order of the General Term of the Supreme Court, First Department, denying a motion to dismiss an appeal from an order of the New York Circuit, which overruled a motion for a new trial of the action made upon the judge's minutes. *Affirmed.*

The case is fully stated in the opinion.

Messrs. Frederick R. Coudert and William Mitchell for appellant.

Mr. H. M. Hardin for respondent.

Ruger, Ch. J., delivered the opinion of the court:

It is quite necessary in the consideration of this appeal to bear in mind the precise question raised by the case presented. After a trial by jury and a verdict for the defendant the plaintiff moved for a new trial upon the judge's minutes, which motion was denied. The defendant thereupon entered judgment and gave notice of such entry to the plaintiff. No appeal from such judgment was taken, and the time for doing so expired before the appeal was taken from the order denying the motion for a new trial. After the denial of the motion a case was regularly made and served upon the defendant by the plaintiff, and an appeal from the order denying a new trial duly taken. The defendant, upon proof that judgment had been regularly entered and no appeal taken there-

from, moved at general term to dismiss the appeal, which motion was denied. The appeal to this court is from the decision of the general term refusing to dismiss the appeal to that court. The question presented is, whether an appeal lies to the general term from a decision of the trial court denying a motion for a new trial made upon the judge's minutes in an action tried by a jury, except in connection with, or previous to, an appeal from the judgment.

It is very probable, in the absence of express provisions of law allowing it, that such an appeal would not lie. A judgment is defined by the Code of Procedure, § 245, chap. 438, Laws 1849, to be "the final determination of the rights of the parties to the action," and this definition conforms, not only to the character of a judgment as described in the Code of Civil Procedure, but also to that ascribed to it by legal authorities generally. 1 Bouv. Inst. § 876; *Clason v. Shotwell*, 12 Johns. 31.

Previous to the Act of 1832, chap. 128, no motion for a new trial, founded upon error alleged in the proceedings on the trial, could be made after judgment had been entered in the action. *Jackson v. Chace*, 15 Johns. 354; *Rapelye v. Prince*, 4 Hill, 119; Sup. Ct. Rules, 1799; *Tracey v. Altmeyer*, 46 N. Y. 598.

It was considered that all such proceedings had merged in the judgment, which was the final determination of the issues, and could be reviewed only by an appeal from such judgment. The character which has thus been given to a judgment has been preserved from the earliest times to the present and whatever limitations have been imposed upon its effect as a final determination of the action are based upon special statutes prescribing the conditions upon which they were founded. It is undoubtedly competent for the Legislature to limit the effect of a judgment as respects the right and mode of granting relief to an aggrieved party from any of the proceedings in an action, and where it has indicated a clear intention to protect the right of review from the effect of such judgment, it is the duty of the court to give effect to the legislative intention.

There is hardly any question of practice since the adoption of the Code which has given rise to more conflicting and irreconcilable decisions and views among judges than that relating to appeals from orders granting or denying motions for new trials, whether founded upon a case, exceptions, judge's minutes or otherwise; and it would be a vain and unprofitable task to attempt to review and reconcile the numerous views expressed by the courts upon this subject. It is unquestionable that the rule governing such appeals now is contained in the provisions of the Code of Civil Procedure, and whatever may be the mode prescribed thereby, it must control the determination of this appeal.

A review of prior decisions might be useful for the purpose of interpretation, if the provisions of the Code of Civil Procedure were doubtful or ambiguous; but for any other purpose it would be unprofitable and misleading, and the present question must be determined by the existing statutes, which are, in many respects, materially different from the prior modes of practice. A general view of the condition of the practice previous to the adoption of the Code of Civil Procedure is all that is necessary for the purposes of this discussion. It is nowhere disputed but that prior to the Act of 1882 the only mode of reviewing the proceedings occurring on a trial, with a view of obtaining a retrial of the action, was by an appeal from the judgment, and a consideration of such questions as were presented by the judgment roll. By chapter 128 of the Act of 1882, and chapter 271 of the Laws of 1883, a great change was effected in the practice, and it was therein substantially provided that in actions tried before a jury whenever a case was made, a bill of exceptions taken, demurrer to evidence interposed, or a motion for a new trial upon newly discovered evidence made, and no stay of proceedings had been granted, the party in whose favor the verdict was rendered might perfect judgment and issue execution, but it was, nevertheless, lawful for the defeated party to obtain a rehearing before the supreme court, and, in case he succeeded, it might set aside the verdict and order restitution. Such applications were required to be heard, in the first instance, before the judge holding the circuit, and an appeal was authorized to be taken from his decision to the supreme court. Rules were adopted by the supreme court to carry out the provisions of the Statute (see 9 Wend. 246, and Supreme Court Rules of 1837), and the courts followed these rules until the Acts of 1882 and 1883 were supposed to be superseded by the enactment of the Codes of 1848 and 1849, and the Amendments of 1851 and 1852. No doubt can be suggested but that under this Statute the right to review in the supreme court the proceedings upon a trial at circuit by a motion for a new trial, founded upon the judge's minutes, a case or exceptions, was secured to the defeated party, notwithstanding the entry of judgment in the action. *Tracey v. Altmyer, supra.*

The Codes of 1848 and 1849 provided that where a verdict was rendered, the court should make an order of the judgment to be entered, or that the case should be reserved for argument or further consideration. In case no reservation was made the clerk was required to

enter judgment immediately, in conformity with the verdict, which became final in four days after entry. If an exception was taken, it might be reduced to writing at the time, or entered in the judge's minutes and afterwards settled as provided by the rules of court and then stated in writing in a case, or separately, with so much of the evidence as might be material to the questions to be raised. The judge who tried the case could, in his discretion, entertain a motion to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or excessive damages, if made at the same term or circuit at which the trial was had. If such motion was heard and decided and an appeal was taken from the decision, a case or exceptions was required to be settled in the usual form, upon which the argument on appeal was to be had. Secs. 264, 265, 268, Walt's Annotated Code, 1871.

It was also expressly provided that the only mode of reviewing judgments or orders in a civil action should be that prescribed by title II. of chap. 458 of the Laws of 1849, § 825. Under this Code a great diversity of view prevailed as to whether a review of the questions of fact arising on a trial by jury could be had on appeal to the supreme court, after judgment had been entered in the action. Some of the leading cases in the supreme court, holding the affirmative of this proposition, were: *Pumpelly v. Owens*, 22 How. Pr. 885; *Lane v. Bailey*, 30 How. Pr. 76; *Tucker v. White*, 37 How. Pr. 97. The most prominent cases on the other side are, probably, those of *Jackson v. Fassitt*, 21 How. Pr. 279; *Soverhill v. Post*, 23 How. Pr. 386; *Anderson v. Dickie*, 17 Abb. Pr. 83.

The case of *Tucker v. White* was decided in 1864. Judge Grover, writing the opinion, vigorously controverting the correctness of the view, concedes that the weight of authority was then in favor of the proposition that the entry of an absolute judgment was fatal to an appeal from an order in such cases. It is quite significant that among the numerous cases relating to this question in the supreme court, the Act of 1882 is seldom, if ever, cited or referred to, showing, we think, that it was quite generally understood at that time that the Act had been superseded by the Code.

The mode of reviewing both questions of law and of fact arising upon trials by a jury, as well as before the court alone, or before a referee, under the Code of Procedure, is quite learnedly discussed by Judge Hogeboom in *Morange v. Morris*, 30 How. Pr. 259, and his theory of the practice seems to accord with the provisions of the Code, not only as they existed then, but as affected by the adoption of the Code of Civil Procedure, except in respect to the time when motions for a new trial at special term should be made; and may be read with profit by those who are in doubt as to the correct practice in preparing appeals to be heard at the general term.

Upon a careful consideration of the authorities in this court, I am of the opinion that the weight of authority here has been in favor of the right of the supreme court to entertain an appeal from an order granting or denying a motion for a new trial, without regard to the question whether judgment has been entered or not.

In the case of *Pumpelly v. Owego*, 22 How. Pr. 895, decided in 1862, and which I infer was tried before a jury, the general term held that an appeal would lie to the general term from an order made at special term denying a motion for a new trial, when judgment had been entered before the appeal was taken but after the order appealed from was made. This decision was affirmed in this court in 1864 without an opinion. See 26 How. Pr. 602.

In *Folger v. Fitzhugh*, 41 N. Y. 228, the plaintiffs had a verdict and the defendants made a case containing exceptions. No motion was made at circuit for a new trial. The plaintiffs afterwards entered judgment and the defendants appealed therefrom to the general term, where a qualified affirmance was had, but with leave to the defendants to apply at special term for a new trial on a case. Such motion was made and a new trial granted and this order was affirmed at general term; upon appeal to this court the appeal was dismissed. It is somewhat difficult to determine the precise ground upon which this decision was based, as a majority of the court did not agree upon any of the propositions suggested by the several members of the court, and the case can hardly be considered authority upon any particular proposition; but it undoubtedly resulted in sustaining the right of the supreme court to entertain an appeal from the order after judgment.

In the case of *Tracey v. Altmyer*, *supra*, decided in 1871, the question, as stated by Judge Grover, was, "whether a motion can be made at special term for a new trial upon the ground that the verdict is against the weight of evidence, or surprise, or newly discovered evidence, or the misconduct of the jury, or other ground after the entry of judgment." Judge Grover further says: "There is obviously no distinction between this class of cases. If it can be so made in one, it can in all."

It was held that the Code expressly gave the right to a defeated party to move for a new trial at the circuit or special term upon the judge's minutes, or a case, and that the successful party could not defeat that right by entering a judgment on the verdict. Judge Grover thus saw the views expressed by him in 1864, in *Tucker v. White*, adopted by the Court of Appeals. This decision seems not to have been questioned subsequently, and it must be deemed to have expressed the views of this court upon the question decided as affected by the Code in force at that time. Under that Code it was held that the only mode of reviewing the facts in a case tried by a jury was upon a motion made before the judge trying the case, or at special term, for a new trial, and if such motion could not for any reason be made, the defeated party, manifestly, had no opportunity to review the trial upon the facts. *Wright v. Hunter*, 46 N. Y. 409.

The practice governing the review of trials of issues of fact before the court alone, or a referee, was, of course, different, being regulated by special provisions. *Ibid*.

The Code of Civil Procedure, subsequently adopted, contained many specific provisions relating to motions for new trials in cases tried 9 L. R. A.

before a jury; but they all tended to make more definite and certain the right of a defeated party to secure a review of a trial by jury upon the facts before the general term. It is thereby provided that "the judge presiding at a trial by jury may, in his discretion, entertain a motion made upon his minutes at the same term to set aside the verdict, or a direction dismissing the complaint, and grant a new trial upon exceptions, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence, or contrary to law. If an appeal is taken from the order made upon the motion, it must be heard upon a case prepared and settled in the usual manner." Section 999, as amended in 1889.

"The taking of an exception upon a trial by a jury, or the statement thereof in a case as prescribed by this article, does not prejudice a motion for a new trial on the ground that the verdict was contrary to evidence; but such a motion may be made before or after the hearing of the exception, or in the discretion of the court before which the exception is heard, at the time of the hearing." § 1006.

"The notes of the stenographer taken at the trial may, in the discretion of the judge, be taken as the minutes of the judge for the purposes of this article." § 1007.

"Where a party intends to appeal from a judgment rendered after the trial of an issue of fact, or to move for a new trial of such an issue, he must, except as otherwise prescribed by law, make a case, and procure the same to be settled and signed by the judge or the referee by or before whom the action was tried, as prescribed in the general rules of practice." § 997.

In a case tried before a jury an exception must be taken on the trial before the jury has rendered a verdict (§ 995), but when the trial is by the court alone or before a referee an exception to a ruling of law may be taken at any time within ten days after service of written notice of the entry of judgment. § 994.

The clerk is required to enter judgment in favor of the party who obtains the verdict if he requests it, unless a different direction is given by the court. § 1189.

Rule 32 of the supreme court provides that "where it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, it shall be made and a copy thereof served on the opposite party, if the trial were before a jury, within ten days after the trial, or within ten days after the notice of a decision of a motion for a new trial, if such motion be made and be not decided at the time of trial, or within ten days after notice of the entry of judgment under § 1185 of the Code."

An appeal to the general term from an order made by the trial judge or the special term, granting or refusing a new trial, is expressly authorized by § 1347.

Section 1006 provides that "the entry of final judgment and the subsequent proceedings to collect or otherwise enforce it, are not stayed by an exception, the preparation or settlement of a case, or a motion for a new trial, unless an order for such a stay is procured and served, and the entry, collection or other enforcement of a judgment does not prejudice the subsequent motion for a new trial. When a new trial is

granted, the court may direct and enforce restitution as when a judgment is reversed upon appeal."

A note to this section by the codifiers states that it had its origin in § 1 of the Laws of 1832, and it may properly be considered a re-enactment of that section.

It was held in *Chapin v. Thompson*, 80 N. Y. 275, that this section applied to a motion for a new trial of the action and did not affect the questions upon motions for a new trial of issues framed for a jury trial in actions triable by the court.

Under the provisions referred to it cannot, we think, be questioned but that a defeated party on a trial at a circuit before a jury has a right to move for a new trial before the judge trying the case, or at special term upon the judge's minutes of a case, and have a review in general term of a decision on such motion, whether judgment has been entered in the action or not. The right given to him by the statute to make a case and present it to the court for adjudication would otherwise be an idle ceremony and entirely ineffectual to accomplish any purpose. This is placed beyond controversy by the express provisions of § 1005, authorizing the prosecution of the proceedings to secure a new trial upon a case not only after judgment, but even after its collection. The language of this section is plain, and no reason seems to exist for denying to it the effect which its language imports. No doubt would probably have existed over this proposition had it not been for some misconception as to the position of this court as indicated by its decisions in the cases of *Derleth v. De Graaf*, 104 N. Y. 661, 6 Cent. Rep. 223, and *Ross v. Third Ave. R. Co.*, 109 N. Y. 645.

The *Derleth Case* was an appeal to this court from an order of the general term, affirming the judgment of the trial court and also an order denying a motion for a new trial on a case. In the *Ross Case* the appeal to this court was from an order of the general term, which affirmed an order denying a motion by defendant to set aside a verdict and for a new trial. These were both cases involving the right of appeal to this court from the general term, and cannot, with any just reason, be construed as involving the jurisdiction of the general term to hear and determine appeals from orders on a case. They were intended to express the views of this court as to the finality of the jurisdiction of the supreme court over questions of fact arising upon trial before a jury. The Code expressly gives such jurisdiction to that court, and expressly denies it to this. Code, §§ 1337, 1347. The decisions then made were founded upon the want of power in this court to review the determination of the general term in actions tried by a jury, where the decisions of that court were, or might have been, based upon a review of the facts. These decisions were in accordance with the principle laid down in numerous cases in this court, and no doubt ought any longer to exist as to the correct practice.

We held in the case of *Harris v. Burdett*, 78 N. Y. 186, that "an appeal from an order

of general term, granting a new trial in a jury cause, will not be entertained if any material and controverted question of fact was involved on which the general term might have granted the new trial. Its appealability does not depend upon whether it was or was not granted on questions of fact, nor can it be made to appear that it was not granted upon a question of fact, for the opinion cannot be referred to, and the ground of reversal cannot be inserted in the order." It was not, by this decision intended to hold, where the general term has certified in its order that it has examined the facts and has determined that no reason appears therein for granting a new trial, but that this court has power to review its determination of the questions of law in the case. In *Snebley v. Conner*, 78 N. Y. 218, there was an appeal by the defendant to the general term from a judgment for the plaintiff upon a verdict, and also from an order denying a motion for a new trial upon the minutes. The general term reversed both the judgment and the order denying the motion. Upon appeal to this court it was held that the record presented no question for review here. Judge Earl, writing the opinion, says: "The facts were before the general term and it had the power to grant a new trial upon the facts, and it may have done so; we cannot say that it did not. We cannot look at the opinion given at general term for the reasons or grounds of the decision there pronounced. If the new trial was granted upon the facts the decision is not reviewable here, and the appellant, in such a case, fails to show that the general term committed an error of law." See also *Wright v. Hunter*, 46 N. Y. 409; *Whitson v. David*, 81 N. Y. 645.

In *Kennicutt v. Parmalee*, 109 N. Y. 650, 12 Cent. Rep. 303, the appeal was from an order of the trial judge, setting aside a verdict and granting a new trial, affirmed by the general term. Judge Earl, writing the opinion in this court, says: "The motion for a new trial does not appear to have been based solely upon exceptions or questions of law, and hence the motion may have been granted by the trial judge in the exercise of his discretion upon the facts. That such an appeal does not bring anything for review to this court has been settled by numerous decisions."

No such question is involved in this appeal. The question here is whether the general term had the power to entertain an appeal from the order of the trial judge, denying a motion for a new trial upon the minutes, when a case had been properly made and served after judgment had been entered. This court has never decided that such an order was not appealable to the general term. When such appeal is heard at general term the question may arise whether an appeal will, upon any ground, lie to this court from the order of that court; but it is quite certain that we have no right to hold that the appeal cannot be heard by that court.

The order of the General Term should be affirmed, with costs.

All concur.

Fred H. SMITH, *Appt.*,

v.

NATIONAL BENEFIT SOCIETY of the
City of New York, *Respt.*

(....N.Y....)

1. A clause in the charter of a benefit insurance society, which attaches the beneficial interest in the insurance to membership in the society, and permits the member to change the beneficiary or payee of the insurance at any time without the latter's consent, does not prevent the making of a contract between the parties by which a vested interest will pass to the designated payee, which will compel the society to recognize him as the one entitled to the proceeds of the insurance certificate.
2. Evidence of applications by a person since deceased to many different insurance companies, by which he secured a large amount of insurance upon his life, and his letters to relatives and friends indicating a deliberate intent on his part to defraud the companies by killing himself, is admissible in an action brought by one of his creditors upon a policy received from the decedent as security for the debt in support of the defense that the policy was void because obtained with an intent to commit fraud.
3. Where the defense to an action upon a life insurance policy is placed upon the ground that the policy is void because obtained by the insured in pursuance of a deliberate scheme to heavily insure his life and then commit suicide, and thus defraud the insurance companies, testimony is admissible to show that shortly before deceased began to insure his life witness at his request attempted to raise money for him, and upon informing deceased of his inability to do so, deceased replied that he must have money and would commit suicide if he could not raise it; evidence is also admissible to show that deceased made inquiries as to the easiest mode of producing death.
4. One who has taken a policy of life insurance from his debtor as collateral security for his debt cannot, although the absolute owner of the policy, object to the introduction by the company in an action upon the policy of evidence as to acts and declarations of the insured before the transfer of the policy, which tend to show a deliberate purpose on the part of the insured to heavily insure his life and then commit suicide with the intent of defrauding the companies, it being part of the *res gestae*.
5. Proof of death by suicide, although under the terms of an insurance policy it is no defense to an action thereon, is yet admissible in such action where the defense is fraud, and the suicide is alleged to be the ultimate agency by which the fraud was accomplished.

(October 7, 1900.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of defendant in an action brought to recover the amount alleged to be due on a certificate of membership in a mutual benefit society, and also affirming an order denying a motion for a new trial made on the judge's minutes. *Affirmed.*

The facts sufficiently appear in the opinion.
9 L. R. A.

Mr. Joseph A. Shoudy for appellant.
Mr. A. J. Perry for respondent.

Finch, J., delivered the opinion of the court:

The facts of this case are unusual and extraordinary. In answer to the plaintiff's demand for the sum payable by the defendant's policy of life insurance the Company took upon itself the difficult burden of proving that the assured perpetrated a deliberate fraud, planned upon a broad scale, and accomplished by taking his own life; that, his efforts to achieve success failing, and a future of poverty and debt seeming to await him, he determined to secure a large insurance upon his life, appropriate it to the payment of his creditors and the comfort and support of his relatives, and reach the result by suicide. The difficult burden was successfully borne, as the verdict of the jury has determined, and the sole inquiry now is whether the scope and range of the evidence admitted, showing the acts and declarations of the assured, transcended the lawful limit or violated the rules of evidence.

The plaintiff was a creditor of the assured and stands in the case as the assignee of the policy from the date of its transfer to him. He describes as a witness the manner of its acquisition. Tyler owed him about \$10,000, and upon demand of payment proposed to secure the debt by an insurance upon his life. The plaintiff assented. The conversation was in December, 1885, and in pursuance of the agreement made, the policy now sued was executed in June of the next year. By its terms the defendant constituted Tyler a "benefit member" of the "Society," and agreed "to pay to Fred. H. Smith, creditor, if living, if not to the heirs-at-law of said member," the sum insured. The plaintiff, having thus become the owner of the policy, objected on the trial to proof of the acts and declarations of Tyler as incompetent to affect or destroy the policy transferred.

The general term questioned his right, considered as an assignment carrying a vested interest, and rely upon § 18 of the Laws of 1883, under which the defendant company was organized. That section attaches the beneficial interest to the membership, and permits the member to change the payee or beneficiary of the insurance without the latter's consent. Where the right of the payee has no other foundation than the bare intent of the member, revocable at any moment, there can be no vested interest in the named beneficiary any more than in the legatee of a will before it takes effect. But the Statute does not prevent a contract between the parties by force of which a vested interest does pass, in which respect the present case differs from *Hellenberg v. District No. 1 of I. O. of B. B.*, 94 N. Y. 580. There the designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and remaining wholly within his control. Here the transfer was as collateral security for an existing debt, and the fact brought to the knowledge of the defendant Company which explicitly promised to pay the plaintiff in his character as creditor.

Granting, however, that such was the relation of the parties, we are still of opinion that no material error is shown by the record, since all

the evidence to which objection was made came fairly within the *res gesta* and the rule permitting proof of the actual transaction involved in the issue. The limitations upon that rule are easily stated, but often difficult in their application. Those limitations were well described in *Tilson v. Terwilliger*, 56 N. Y. 277. The declarations must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain; and they must so harmonize with those facts as to form one transaction. That transaction, the thing done, the fact put in issue, was the fraud, which evidently was not a simple but a compound and continuous fact, proceeding to its result by consecutive steps, and separate acts, having necessarily an origin, a progress and an ultimate result, involving not only the intent of the assured but also his sanity, without which the responsible intent could not exist. This fraud, therefore, could be studied and proved all along the line, and in all its stages from origin to culmination formed part of the issue to be investigated. If in such a case declarations are excluded which are merely narrative of a past transaction, the residue so far as pertinent to the issue will generally and with few exceptions be admissible in evidence.

It is thus not difficult to decide that the proof of applications by Tyler to thirty-six different insurance companies, by which he secured \$282,000 of insurance upon his life, and his letters and telegrams to relations and friends written and sent as steps or agencies in the consummation of his purpose, and indicating a sane and deliberate intent to consummate the fraud, which for more than a year had been in preparation, by a final act of suicide, were all admissible. But some of the evidence was more remote and approached so near to the outside boundaries of the *res gesta* as to require a specific and particular examination.

The defendant was allowed to prove by Henry A. Bowen that in the summer of 1885 he went at the request of Tyler to the latter's friends to raise money for him; that he failed to accomplish the purpose; that on his return he had a conversation with Tyler in which he informed him of that failure; in reply to which Tyler said he was a man who must have money, and if he couldn't raise it he would commit suicide. This was a few months before the process of insuring began, and tended to show two things, both of which were pertinent to the issue. It indicated an existing motive for the fraud in the want of money and the failure to obtain it, and the origin and occasion of the alleged suicidal intent. The declaration accompanied and characterized an act which was itself admissible in evidence, for that act indicated the then desperate character of Tyler's financial situation, and the declaration explained the operation and effect of the fact upon his mind, its force and strength as a motive to the fraud, and the presence of a thought or contemplation of suicide in a contingency which did in fact occur. The evidence serves to indicate the origin and motive of the alleged suicidal intent which grew to be the effective agency of the fraud.

In the same connection the witness was permitted to detail inquiries with Tyler made of Sutkin as to the easiest mode of producing death. These inquiries were rather acts than declarations, and show the assured in the process of acquiring information to effect easily and swiftly the destruction of his own life.

Similar testimony of an intent to commit suicide rather than endure poverty or hard labor was given by the witness Trested, but in connection with inquiries about insurance, and with an endeavor to get into a benefit society connected with the hat trade. The witness added Tyler's declaration that he intended to put a large insurance upon his life and make the boys happy.

These acts and declarations all occurred before the plaintiff took his policy as collateral, and when they affected no one but Tyler himself. They tended to show the origin and progress of the fraudulent intent, the manner of its growth and the motive from which it sprang. They indicate a sane and deliberate purpose moving steadily to its result, and constitute a part of the history of the fraud. They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance upon his life, which he knew he could not continuously maintain. They show the motive of the fraud, and mark its progress, and harmonize so completely with all which afterward occurred as to constitute with that element of the single transaction, the fraudulent conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gesta*, and did not transcend its limits.

Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true; but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud.

We think no error was committed in the admission of the evidence upon which the jury acted, and that after due consideration of the exceptions taken to the charge, the case was fairly submitted for determination upon its facts.

The judgment should be affirmed, with costs.

All concur, except **Andrews, J.**, not voting.

Frank W. STEDMAN, Substituted for Samuel N. Bacon, *Resp't.*,

v.

UNITED STATES MUTUAL ACCIDENT ASSOCIATION of the City of New York, *Appt.*

(...N. Y....)

Death resulting from malignant pustule caused by contact with putrid animal matter

NOTE.—See notes to Sheanon v. Pacific Mut. L. Ins. Co. (Wis.) post, 685; Paul v. Travelers Ins. Co. (N. Y.) 8 L. R. A. 443.

containing bacteria of the kind known as "bacilli anthrax," is death from disease, and not from accidental means, within the meaning of a policy insuring against death from external, violent and accidental means, and which is not to cover death caused by disease.

(Ruger, Ch. J., and O'Brien, J., dissent.)

(October 14, 1890.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Albany Circuit in favor of plaintiff in an action brought to recover the amount alleged to be due upon an accident insurance policy insuring the life of Frederick J. Oakes, deceased, and also affirming an order denying defendant's motion for a new trial. *Reversed.*

The facts sufficiently appear in the opinion. **Mr. Winsor B. French**, with **Mr. William Bro. Smith**, for appellant:

Deaths happening directly or indirectly in consequence of disease, or caused wholly or in part by bodily infirmities or disease, are excluded from the policy in this case.

Paul v. Travelers Ins. Co. 3 L. R. A. 448, 112 N. Y. 478; *Bacon v. United States Mut. Acc. Asso.* 44 Hun, 599; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574; *McCarthy v. Travelers Ins. Co.* 8 Biss. 362; *Whitehouse v. Travelers Ins. Co.* 7 Ins. L. J. 23; *Barry v. United States Mut. Acc. Asso.* 23 Fed. Rep. 712; *Pollock v. United States Mut. Acc. Asso.* 102 Pa. 230.

When the damages claimed in the action were occasioned by one of two causes, for one of which defendant is responsible and the other of which it is not, the plaintiff must fail if his evidence does not show that his damage was produced by the former cause.

Seerles v. Manhattan R. Co. 2 Cent. Rep. 442, 101 N. Y. 661.

The contract excludes all manner and form of poisoning. The anthrax bacilli, whether taken internally or externally, is a poison. It is seriously injurious to health, and fatal to life.

Pollock v. United States Mut. Acc. Asso. supra; *Hill v. Hartford Acc. Ins. Co.* 22 Hun, 187; *Bayless v. Travelers Ins. Co.* 14 Blatchf. 143.

Mr. Richard L. Hand also for appellant. **Mr. G. L. Stedman** for respondent.

Peckham, J., delivered the opinion of the court:

I think the deceased died from disease, within the meaning of the language used in the policy sued upon in this action. The case of *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, 3 L. R. A. 448, has been cited by counsel for the respondent as decisive of this case. Upon the question decided the case is conclusive, and we have no disposition to alter our views as expressed therein. But upon the question of whether the deceased in this case died from disease, the case of *Paul* is without the slightest analogy. In that case the deceased came to his death by accidentally inhaling illuminating gas. This gas is a manufactured article, gathered into large reservoirs, and thence distributed through pipes into almost every house in a city or village. The deceased accidentally,

while asleep, inhaled this gas, and was suffocated. This would seem to be a plain case of death from accident, as it was found that the gas was not purposely inhaled. The death being the result of accident, it was then held that such death was caused by external and violent means, within the meaning of the policy. This also seems plain enough. The gas was external, and it was not inhaled voluntarily,—i. e., intentionally and for the purpose of being killed thereby. It might naturally be said, as in effect it was, that death, as the result of accident, imports an external and violent agency as the cause. There was no question in the *Paul Case* that the deceased came to his death through disease. No pretense could properly be made as to death from disease in such a case. If the deceased had been asleep in a room into which a large quantity of water was poured through the accidental breaking of a water-main, and in consequence thereof he had been drowned, no one would deny that the death was caused by accident, and was not the result of disease, as that word is generally used among men. There is no difference in the case in principle, if the death, instead of being caused by water, which was visible, was caused by gas, which is invisible. In neither case would the idea even suggest itself that death was caused by disease. But in the case before us the facts are entirely different. The deceased died, as is said, and as will be here conceded, from malignant pustule. It is caused, as the plaintiff's witness testified, by the infliction upon the body of a certain kind of animal substance,—contact with diseased or putrid animal matter. This acts by producing at the point of contact with this matter a papula something like a fleabite, which rapidly becomes a vesicle, a blister-like affair, and then a pustule. This is accompanied by a great deal of swelling in the parts immediately around it, and a great deal of pain in the individual. The glands in the vicinity become infiltrated with blood and pus, and become dark red, or even black, in color. The neighboring glands become involved. Then comes, almost immediately after or together with these signs, a great prostration, and the patient dies in a short time—five to eight days generally,—the extreme limits being from twenty-four hours to sixteen days. He dies of exhaustion. As to the cause of the pustule, the witness stated that the virus comes from the hide or hair or wool of animals suffering from this disease, from their flesh sometimes, or it may come from the feathers of birds that have been feeding upon this peculiar kind of carrion. It may be communicated directly—that is, by the immediate contact of the individual with it—by his touching it or handling it, and then bringing the matter in contact with the skin, or thin mucous membrane; or it may be transported, as there are many cases known, by insects, flies, mosquitoes that have been feeding upon this, carrying it away, and depositing it upon individuals. It is commonly known as "malignant pustule," or "charbon," or "anthrax." They are all synonymous terms. It has been called "wool-sorter's disease," because it happens among people that handle wools and hides, such as tanners, butchers and herdsmen, and those people that are engaged in busi-

ness where they are brought in contact with that sort of thing. In answer to the question, "How rare is malignant pustule?" this same witness for the plaintiff answered: "In the eastern part of this country, it is pretty rare. There have been some epidemics reported in America. In the eastern part of Massachusetts, I think about twenty years ago, there were quite a number of cases among the hair workers, people that take the hair that comes from abroad and make mattresses of it." The witness thus designates the difficulty as an "epidemic," which word is so frequently used in connection with "disease" as almost to be synonymous therewith. It was undoubtedly so used in this instance by the witness, who thus describes malignant pustule as a "disease" when referring to its frequency in Massachusetts some years ago. The word "epidemic" would scarcely be used to express a frequent occurrence of accidents. The witness also said that he has seen it termed in one standard authority as an "acute infectious disease." He said that the special poison of the disease has been found to be a particular kind of bacteria,—"bacillus anthrax." The following question was put to the witness. "Is it not so that anthrax is an acute, infectious malady, which breaks out commonly in an epizootic or enzootic manner, and is not infrequently sporadic in herbivorous animals and swine, and is transmissible to a great number of other animals as well as to mankind." The answer of the witness, after some fencing, was: "Yes; I think that is correct." Malignant pustule differs, according to this same witness, from diphtheria, small-pox or scarlet fever, in the single fact that this is a particularly poisonous animal matter, and it has one particular germ from which it originates, as small-pox has another and hydrophobia another, and the cause of the difficulty in each case is some form of bacteria transmissible to mankind. It can be contracted through eating the flesh of animals subject to the disease. The bacillus is very small, so small that it may enter in the pores of the skin, and an abrasion of the skin is not necessary, but might quicken the result. The forming of the pustule upon the skin is the product of the poison. Another witness for the plaintiff, who was a physician, said that he understood malignant pustule to be a development of the particular bacilli in the system radiating from the point of contact. He added that the contagion might be internal as well as external, taken through the mouth, or through the nose, and it is generally considered an acute, infectious disease. Both these learned gentlemen, however, refused, themselves, to designate malignant pustule as a disease. Dr. Harris defined it as "a pathological condition and succumbing of the body to the infliction of this particular poison." Dr. Bailey says he considers it as a "pathological condition following this particular inroad of this particular kind of bacilli." We all know that "pathology," as used generally, means that part of medicine which explains the nature of diseases, their causes and symptoms. A "pathological condition" means neither more nor less than a diseased condition of the body. The insurance in this case was against bodily injuries, effected through external, violent and accidental means. It was not

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to extend "to any death or disability which may have been caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date" of the policy, "nor to any case except where the injury is the proximate or sole cause of the disability or death." There cannot be the slightest doubt that malignant pustule is regarded generally, by those who have but the usual acquaintance with such matters, as a disease. Every particle of testimony given by the doctors called by the plaintiff shows clearly to my mind that it is so regarded generally in the medical world, and that it is only when these doctors are asked to define the case in a manner to suit their refined notions of scientific and artistic accuracy that they define the trouble as a "pathological condition of the body" in the one case, "succumbing to infliction of this particular poison," and in the other, "following this particular inroad of this particular kind of bacilli." The difference between the cause of this condition and the causes of typhoid fever, tuberculosis, small-pox, scarlet fever and such like diseases, is that this particular condition is caused by different bacilli from the others, and they come in contact with the skin, or enter into its pores, while in the other cases they are generally breathed in. But no abrasion of the skin is needed to produce the contact of the bacilli, and what follows from such contact seems to be as plainly a disease as in the case of small-pox or typhoid fever.

The question, then, is, even assuming that some particular physicians refuse to call this a disease, and describe it as a "pathological condition," whether it is not a disease within the meaning of that term as used in this policy. Taking all the facts testified to by these physicians of the plaintiff, including their own special description of this condition of the body, and it seems to me there can be no intelligent, rational doubt that the insured died from a disease, attacking him subsequent to the issuing of the policy. The definition given by the physicians for the plaintiff as to the difficulty being a pathological condition of the body, and not a disease, is, upon these facts entirely too fragile to base a recovery upon; and the distinction between a disease and a pathological condition of the body is, with reference to this case, much too refined for common acceptance. It seems to me clear that the meaning of the words used in the policy covers just such a case, and that the parties never intended that a cause of death, which to all outward appearances, and to the world in general, was a disease, should be converted into a "pathological condition" of the body, caused by an accident.

The judgment should be reversed, and a new trial ordered, costs to abide event.

Andrews, Earl, Finch and Gray, JJ., concur.

O'Brien, J., dissenting:

The defendant is a corporation incorporated and existing under the laws of this State for the purpose of carrying on the business of accidental or casualty insurance on the co-operative or assessment plan. On the 28th of September, 1883, Frederick J. Oakes, then a resident

of the State of Massachusetts, made application for membership in the Association, which was accepted on that day, the applicant at the same time paying the necessary fee. From an inspection of the application as it appears in the record, it is evident that it was a printed blank, prepared by the Association, and furnished to the applicant. It contemplates and provides for the issuing, by the Association, and delivery to Mary J. Oakes, the mother of the applicant, of a certificate of membership in due form, expressing the contract between the parties. The mother was designated as the beneficiary, to whom the sum stipulated was to be paid in case the applicant died by accident, within the terms of the application and certificate. The Association issued and delivered the certificate to the mother, whereby it agreed, in consideration of the warranties and agreements made in the application for membership, to accept the applicant as a member of the Association, subject to all the requirements, and entitled to all the benefits, thereof. This paper contains the substance of an ordinary contract of insurance upon the life of a person, and stipulates that a sum, not to exceed \$5,000, to be raised by assessment upon the members, as provided for in the by-laws of the Association, should be paid to the mother of the said Oakes, "within sixty days after sufficient proof that said member, at any time within the continuance of membership, shall have sustained bodily injuries, effected through external, violent and accidental means, within the intent and meaning of the by-laws of the Association, and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or, if said member shall sustain bodily injuries by means, as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership, then, upon satisfactory proof of such injuries, he shall be indemnified against loss of time thereby in a sum not to exceed \$25 per week, for such period of continuous, total disability," etc. It was also stipulated that "benefits under this certificate shall not extend . . . to any bodily injury of which there shall be no external and visible sign; nor to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate; or by poison, in any manner or form; . . . nor to any case except where the injury is the proximate or sole cause of the disability or death." In the application which forms part of the contract, and is to be read with the certificate, the applicant states that he was aware that the benefits secured by the certificate "will not extend . . . to death or disability caused wholly or in part . . . by taking poison in any form or manner." The insured died at Council Bluffs, in the State of Iowa, on the 21st day of March, 1884. His mother, the beneficiary named in the certificate, survived him, and assigned the certificate and cause of action to the plaintiff, who recovered upon a trial of the issues before a jury,

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and this judgment has been affirmed at general term.

The principal, if not the only, question in the case, is whether the death of the insured was the result of accident, within the meaning of the words used in the contract, or of disease, or other cause not covered by the stipulations of the parties. There is no dispute as to the fact that death resulted from the effects of a malignant sore upon the lip of the insured, which soon after its appearance involved the neighboring parts, producing septicemia and other exhaustion. There were two theories as to what this local sore was. On the part of the plaintiff it was claimed that it was what is known as "malignant pustule," while the defendant sought to establish the proposition that it was a "facial carbuncle," and therefore a disease, or the result of disease, within the terms or meaning of the contract. The court instructed the jury that if the sore was in fact a carbuncle the plaintiff could not recover, but that if it was a malignant pustule, produced upon the person of the deceased in the manner claimed by the plaintiff, then the plaintiff was entitled to a verdict. The testimony of the medical experts produced by the plaintiff was to the effect that this pustule is not a disease, in the strict sense of that term, but a pathological condition of the system, caused by the accidental infliction of diseased or putrid animal matter, infested with bacteria, or bacilli anthrax, upon the thin skin of the lip, whence the bacilli multiply, and are diffused through the system. The animal virus that produces the sore comes from hides, hair, wool or flesh of animals suffering from the disease known as "anthrax," and may be transmitted to human beings directly by the immediate contact of the individual with it, by his touching or handling it, and then bringing the matter in contact with the skin, or thin mucous membrane; or it may be caused by carrion birds, or by insects, and in various other ways communicated to man, and inflicted or implanted upon some exposed portion of the body. People whose business requires them to handle hides, hair or wool, and who live in cattle-grazing regions or localities, such as the southern or western portion of the United States, are, according to the proofs in this case, more exposed to malignant pustule than persons in other vocations, or who live in localities where cattle do not abound. The insured went to Council Bluffs on the 1st of February, 1884, and, as has been stated, died there in less than two months after. He was first employed as a book-keeper in a meat-market, and later as a check clerk in the transfer department of the Union Pacific Railroad. It was shown that carloads of hides frequently pass that station, and that a large number of cattle are brought there, and slaughtered in the vicinity; but there was no direct or positive proof that the deceased ever came in immediate contact with the hides, or even the flesh, of these animals. We must accept the verdict of the jury that the deceased died from the effects of malignant pustule. Whatever an appellate court may think of the weight and force of the evidence submitted at the trial, it cannot, when there is some evidence, ignore or disregard the deliberate judgment of the body which, under our system of

administering justice, is empowered and required to determine disputed questions of fact. There was evidence to warrant the finding, and in such a case, after review by the general term, this court must deal with the case upon the principle that death was caused as claimed by the plaintiff. Whether the malignant pustule of which the insured died was the result of the animal virus coming in contact with the lip, or whether the sore was produced in some other way, was, perhaps, a more difficult question; but in view of the testimony of the plaintiff tending to show that the infliction of this virus upon the person is the only cause of pustule, and that the insured was in some degree exposed to it, and that death generally follows contact with it in a few days, we think it cannot be said that this finding is based wholly on speculation and conjecture. It was the province of the jury to draw all proper inferences from the testimony, and while there was no direct or positive proof as to when or how the animal virus came in contact with the person of the deceased, yet the jury was warranted in finding from the other testimony in the case that in some way the bacilli anthrax were implanted upon the lip, where the sore appeared, at some time within ninety days prior to the death of the insured. Assuming that death was the result of malignant pustule, caused in the manner claimed by the medical experts who testified in behalf of the plaintiff, the question remains whether this was "external, violent and accidental means," within the intent and meaning of the contract. This court has held that where death resulted from breathing an atmosphere impregnated with illuminating gas, which in some way escaped from pipes while the insured was asleep, the beneficiary was entitled to recover under a policy containing those words. *Paul v. Travelers Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443.

Death by drowning is included in such a contract. *Trew v. Railway Pass. Assur. Co.* 3 Hurlst. & N. 839; *Mallory v. Travelers Ins. Co.* 47 N. Y. 58.

So is death which may have been produced by fright. *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 New Eng. Rep. 450.

Without attempting to collect all the cases on this point, it is sufficient to observe that the courts, both in this country and in England, have given to these words a broad and liberal interpretation in favor of the insured, or the beneficiary designated in the policy. *United States Mut. Acc. Asso. v. Barry*, 131 U. S. 100, 121 [33 L. ed. 60, 66]; *North American L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. 43; *Accident Ins. Co. v. Crandal*, 120 U. S. 527 [30 L. ed. 740]; *Winspear v. Accident Ins. Co.* 6 Q. B. Div. 42; *Paul v. Travelers Ins. Co.* *supra*.

Guided by the principles laid down in these and other cases, and by what seems to me to have been the intention of the parties, I am of the opinion that we should hold in this case that the infliction of animal virus, by some exterior force or power, upon the person of the deceased, as found by the jury, was a bodily injury, "effected through external, violent and accidental means," producing death, within the intent and meaning of the policy, and that the defendant is liable. When death results from the accidental infliction of the animal

virus upon the person, whether by handling the same, or deposited upon his person by insects, or otherwise, as shown by the witnesses for the plaintiff, it cannot, I think, be said that the jury was bound to find that the malignant pustule was a disease, within the conditions of the policy exempting the defendant from liability. The jury could have found, in view of the evidence, that the deceased lived in a locality, and was engaged in employments, in which he was exposed to contact with this peculiar form of poison, and it seems to me that a malignant pustule, produced by the deposit upon the lip of the deceased of a particle of this animal virus, resulting in death, is as much an accident as in the case of death from breathing illuminating gas while asleep. There was evidence upon which the jury could have found that the deceased contracted the pustule in this way. For these reasons, I am constrained to dissent from the prevailing opinion in this case, and am in favor of affirming the judgment.

Ruger, Ch. J., concurs.

John E. MOREY, Jr., *Respt.*,

MORNING JOURNAL ASSOCIATION,
Appt.

(....N. Y....)

1. A newspaper publication charging that a breach of promise suit is threatened to be brought against a married man is

NOTE.—*Libel and slander; libel defined.*

A libel is a malicious publication expressed either in printing or writing or by signs and pictures tending either to blacken the memory of the dead or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. *Nelson v. Musgrave*, 10 Mo. 648; *Price v. Whitely*, 50 Mo. 439; *Legg v. Dunleavy*, 80 Mo. 553; *Herman v. Bradstreet Co.* 1 West. Rep. 459, 19 Mo. App. 227; 4 Bl. Com. 150; *White v. Nicholls*, 44 U. S. 8 How. 285, 11 L. ed. 600.

It is a publication without justification or lawful excuse, calculated to injure the reputation of another by exposing him to hatred or contempt. *Whitney v. Janesville Gazette*, 5 Ills. 331. See notes to *Runge v. Franklin* (Tex.) 5 L. R. A. 417; *Park v. Detroit Free Press Co.* (Mich.) 1 L. R. A. 690; *Byam v. Collins* (N. Y.) 2 L. R. A. 129; *Bradstreet Co. v. Gill* (Tex.) 2 L. R. A. 405; also see *Smith v. Smith*, 3 L. R. A. 52, 73 Mich. 445; *Allen v. Pioneer Press Co.* 3 L. R. A. 532, 40 Minn. 117; note to *Arnott v. Standard Asso.* (Conn.) 3 L. R. A. 69; *Seeler v. Montgomery*, 3 L. R. A. 553, 73 Cal. 458; note to *Missouri P. R. Co. v. Richmond* (Tex.) 4 L. R. A. 280; *People v. Stephens*, 4 L. R. A. 845, 79 Cal. 423; note to *Elmer v. Fessenden* (Mass.) 5 L. R. A. 724; *Broughton v. McGrew*, 5 L. R. A. 406, 39 Fed. Rep. 672; note to *Hayes v. Press Co.* (Pa.) 5 L. R. A. 643; *John W. Lovell Co. v. Houghton* (N. Y.) 6 L. R. A. 363; *Sillars v. Collier* (Mass.) 6 L. R. A. 690; *Nissen v. Cramer*, 6 L. R. A. 730, 104 N. C. 574.

License of the press, restriction.

A reporter of a newspaper has no right to collect stories on the street, or to gather information from policemen or magistrates out of court, to the detriment of a citizen, and to publish them as facts. *McAllister v. Detroit Free Press Co.* 76 Mich. 333.

There is no distinction, unless by provision of

libelous *per se*, its tendency being to disgrace him and to bring him into ridicule and contempt.

2. **Proof that a man against whom a newspaper article charges that a breach of promise suit is about to be brought is married,** and of the nature of his business, is competent to show the hurtful tendency of the libel and his damages.
3. **Evidence that a newspaper correspondent had heard the substance of a publication which is libelous *per se*, before sending the item to his paper, is inadmissible, in an action against the publisher, to rebut malice or to mitigate damages, where the libelous article was published without any inquiry or knowledge by defendant on the subject.**
4. **That an action for breach of promise of marriage was begun against a person, not the plaintiff, but of nearly the same name, and that defendant's correspondent had heard of the suit before sending the article for publication, is inadmissible,—at least where the defendant had no knowledge of such action before making the publication.**

(October 7, 1890.)

APPPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Monroe Circuit, entered upon a verdict in favor

of plaintiff for \$1,000 in an action brought to recover damages for the publication of an alleged libel. *Affirmed.*

The other facts are stated in the opinion.

Mr. Cassius C. Davy, for appellant:

Saying that the plaintiff was a stockholder in the Union & Advertiser did not refer to him in his occupation, profession or trade.

Moak's Underhill, Torts, 121; Townshend, Slander and Libel, § 190; *Van Tassel v. Capron*, 1 Denio, 250; *Oakley v. Farrington*, 1 Johns. Cas. 129; *Kinney v. Nash*, 3 N. Y. 177; *Doyley v. Roberts*, 3 Bing. N. C. 835; *Ayre v. Craven*, 2 Ad. & El. 2; *Jeffries v. Paghem*, 3 Cro. Car. 510; *Ireland v. McGarrah*, 1 Sandf. 155; *Anonymous*, 1 Ohio, 235; *Foster v. Small*, 3 Whart. 188; *Edsall v. Russell*, 4 M. & G. 1090.

It was error to allow the plaintiff to prove the nature of his business and that he was a married man.

Woodruff v. Bradstreet Co. 85 Hun, 16; *Caldwell v. Raymond*, 2 Abb. Pr. 197; *Smith v. Ashley*, 11 Met. 367; *Hoey v. Rubber Typencil Co.* 57 N. Y. 119; *Gumb v. Twenty-Third St. R. Co.* 114 N. Y. 411.

Where the article is not libelous *per se*, and no special damages are alleged in the complaint, no damages can be proved or considered on the trial.

statute, as to liability, between the publication by a proprietor of a newspaper and a publication by any other person. *Ibid.*

Where an honest man has been arrested and put in prison for an offense of which he is innocent, a false publication of the circumstances of such arrest and imprisonment, looking toward his guilt, is actionable. *Ibid.*

A publication in a newspaper as follows: "Whereas R. did make representations to me that it would be impossible for my sister B. to secure the position of teacher" of a certain school, when at the very time he made the assertion a contract had been made in which she was engaged to teach such school; "and whereas the disappointment occasioned by this misrepresentation caused my sister's mind to be sorely troubled during her late illness, . . . and assisting the ravages of disease to undermine her constitution; and further considering the fact that his sister applied for the same school, I regard this conduct in him as uncalled for, ungentlemanly and detestable, as his statement was fallacious,"—signed T., is libelous *per se* in charging the utterance of a falsehood; and the owners of the newspaper are liable therefor. *Riley v. Lee* (Ky.) May 25, 1889.

An article in a newspaper, purporting to be a voluntary interview with a reporter of a newspaper, representing plaintiff as having stated to the reporter that her mother, having been bitten by a cat, was afflicted with a disease akin to hydrophobia; that she dreaded the approach of water, suffered extreme pain and was much swollen; that she acted like a cat, purring and mewling and crawling about like a cat, and trying to catch rats, and did other similar acts; and that she was almost miraculously cured of this disease by taking a certain medicine sold by defendants, who procured the publication of the article,—is libelous, and the plaintiff may maintain an action thereon. *Stewart v. Swift Specific Co.* 76 Ga. 280.

A showing that alleged defamatory matter was true in fact and published for justifiable ends would, under the Constitution and statutes of Kansas, be a complete defense; and in such a case the

supposed libelous matter would not be libelous. *State v. Watt* (Kan.) July 3, 1890.

False and malicious publication.

It is a false and malicious publication concerning the person, which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him. *Donahue v. Gaffey*, 54 Conn. 288.

A newspaper publication that a person is illegitimate is actionable *per se*. *Shelby v. Sun Print. & Pub. Asso.* 11 Cent. Rep. 869, 109 N. Y. 611.

The word "malicious," in defining the intent with which a slander is spoken, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives other than the interest of the public. *Blumhardt v. Rohr*, 70 Md. 323.

A censorious or ridiculous writing, picture or sign, made with a mischievous and malicious intent toward government magistrate or individual, is an actionable libel. *People v. Crowell*, 3 Johns. Cas. 354; *Steele v. Southwick*, 9 Johns. 215; 2 Kent Com. 13; *Starkie, Slander and Libel* 4; *Townshend, Slander and Libel*, 75; *Anderson, Dict.* 617.

Libel, malice as an element. See notes to *John W. Lovell Co. v. Houghton* (N. Y.) 6 L. R. A. 363; *Byam v. Collins* (N. Y.) 2 L. R. A. 129.

Reputation of tradesmen and business men.

Words written or spoken against the reputation of business men or tradesmen are actionable. *Harman v. Delany*, 2 Strange, 693.

Words spoken of a butcher, charging him with slaughtering diseased cattle for sale for human food, are actionable *per se*. *Blumhardt v. Rohr*, 70 Md. 323; *Young v. Kuhn*, 71 Tex. 645.

A publication which charges upon or imputes to a merchant or business man insolvency or bankruptcy or conduct which would prejudice him in his business or trade, or be injurious to his standing and credit, is a libel. *Erber v. Dun*, 13 Fed. Rep. 581.

A publication stating that the teller of a bank had become mentally deranged from overwork,

Stone v. Cooper, 2 Denio, 299, 300; *Purdy v. Rochester Print. Co.* 96 N. Y. 372; *Kennedy v. Press Pub. Co.* 41 Hun, 422; *Bennett v. Williamson*, 4 Sandf. 65; *Solms v. Lias*, 16 Abb. Pr. 811; *Terrilliger v. Wands*, 17 N. Y. 57; *Sedgw. Dam.* 674, 676; *Bell v. Sun Print. & Pub. Asso.* 3 Abb. N. C. 157; *Dickson v. Philips*, 19 Jones & S. 162.

The court erred in rejecting defendant's offer to show by the witness who sent the dispatch to the Journal that it was an item of news, and the manner in which, and where, it was obtained.

Code Civ. Proc. § 535; *Klinck v. Colby*, 46 N. Y. 428; *Spooner v. Keeler*, 51 N. Y. 527; *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 N. Y. 67; *Wachter v. Quenzer*, 29 N. Y. 547.

All matters which tend to disprove malice may be pleaded in mitigation of damages, although they may tend to prove the truth of the words complained of.

Dolein v. Wilder, 34 How. Pr. 488; *Stanley v. Webb*, 21 Barb. 148; *Gilman v. Lowell*, 8 Wend. 573.

Messrs. Raines Bros., for respondent:

The complaint states a cause of action.

Cropp v. Tilney, 3 Salk. 226; *Villers v. Monale*, 2 Wils. 403; *Shelby v. Sun Print. & Pub. Asso.* 38 Hun, 476, affirmed, 11 Cent. Rep. 869,

109 N. Y. 611; *Byrnes v. Mathews*, 12 N. Y. S. R. 75; *Solpenson v. Peterson*, 32 Alb. L. J. 423; *Gubble v. Pioneer Press Co.* 33 Alb. L. J. 154; *King v. Root*, 4 Wend. 135; *Cramer v. Riggs*, 17 Wend. 209; *Thorley v. Lord Kerry*, 4 Taunt. 355.

The publication was libelous *per se*; both malice and damage were conclusively presumed.

Bergmann v. Jones, 94 N. Y. 61-63.

The falsity of the libel is sufficient proof of malice to uphold exemplary damages.

Samuels v. Evening Mail Asso. 75 N. Y. 604; *Lewis v. Chapman*, 16 N. Y. 372; *Hardwood v. Keech*, 4 Hun, 389.

No information obtained by the defendant from others as to the truth of the charge, unless accompanied by proof that such information is true, can be received for the purpose of rebutting the presumption of malice.

Root v. King, 7 Cow. 613, 629; *Matson v. Buck*, 5 Cow. 499; *Mapes v. Weeks*, 4 Wend. 659; *Inman v. Foster*, 8 Wend. 602; *Bush v. Prosser*, 11 N. Y. 347, 361; *Willover v. Hill*, 72 N. Y. 36; *Alderman v. French*, 1 Pick. 1, 11 Am. Dec. 114, 129, note; *Pease v. Shippen*, 80 Pa. 613, 21 Am. Rep. 116; *Scott v. Sampson*, 8 Q. B. Div. 491, 36 Moak, Eng. Rep. 345; *Mullett v. Hulton*, 4 Esp. 248; *Hunt v. Algar*, 6 Car.

and while in this condition had made injurious statements in respect to the bank's affairs, which occasioned it trouble, is defamatory in a legal sense, constituting a libel *per se*, because it subjects him to injury in his business character and employment. *Moore v. Francis*, 8 L. R. A. 214, and note, 121 N. Y. 199.

Any written words which have a tendency to injure a person in his or her office, profession, calling or trade are libelous. *Price v. Conway*, 8 L. R. A. 193, 134 Pa. 340.

A publication in regard to a charge by an undertaker for services rendered, that no consultation was had with the family of deceased to determine as to the justice of the demand, although such consultation could easily have been had and the injustice of the claim have been made manifest,—is libelous *per se*. *Holmes v. Jones*, 121 N. Y. 461.

A publication charging that a teacher of a certain system of shorthand is incompetent to teach that system, and is using, without authority, the name of the author of the system, is libelous. *Price v. Conway*, *supra*.

Words tending to bring one into disgrace, ridicule or contempt.

A printed publication that tends to bring a man into disrepute, ridicule or contempt is a libel in a legal sense. *Keemle v. Sass*, 12 Mo. 499; *Stewart v. Swift Specific Co.* 76 Ga. 230; 2 Colby, Cr. L. 57; *Starke, Slander and Libel*, 2d Eng. ed. 164, 168; *Moak's Underhill, Torts*, 199; *Townsend, Slander and Libel*, § 21; *Cropp v. Tilney*, 3 Salk. 226; *Villers v. Monale*, 3 Wils. 403; *Shelby v. Sun Print. & Pub. Asso.* 38 Hun, 474, affirmed in 11 Cent. Rep. 869, 109 N. Y. 611; *Moore v. Francis*, 8 L. R. A. 214, 121 N. Y. 199.

Printed and published words which clearly imply that a person is a hypocrite, and under the cloak of hypocrisy oppresses widows and orphans, are libelous and actionable *per se*. *Jones v. Greeley*, 25 Fla. 629.

The picture of a jackass in a newspaper article, headed by a person's name, with a description of him in the article as an "egotistical, overestimated, self-conceited jackass,"—is libelous *per se*. *Moley v. Barager (Wis.)* May 20, 1890.

9 L. R. A.

To call the mayor of a village a bigot, and to say that his conduct as mayor is influenced by his bigotry, is actionable *per se*, without proof of actual damage. *Wickham v. Hunt*, Montreal L. Rep. 6 Super. Ct. 23.

Words imputing a criminal act.

Words which accuse a person of a crime punishable by law, or of an act odious and disgraceful in society, are actionable. *Dexter v. Spear*, 4 Mason, 116.

Words charging a person with being an incendiary and a murderer are actionable. *Noeninger v. Vogt*, 5 West. Rep. 290, 38 Mo. 589.

The words, "She is a thief," are equivalent to a charge of larceny, and actionable *per se*. *Stumer v. Pitchman*, 13 West. Rep. 530, 124 Ill. 260.

To charge one with taking a false oath before a justice of the peace in a pending suit is actionable. *Rue v. Mitchell*, 2 U. S. 2 Dall. 53, 1 L. ed. 238.

Words imputing a possible crime—as incest—are actionable *per se*, although not believed by the hearer, and although the charge could not be true. *Rea v. Harrington*, 1 New Eng. Rep. 624, 58 Vt. 181.

Publication that a person has committed adultery, and that from the current report it seems to be a case of rape, is libelous. *Lowe v. Herald Co. (Utah)* June 3, 1889.

Words spoken of another, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else. He is to blame for it,"—do not import a killing in a criminal sense, and are not actionable *per se*. *Thomas v. Blasdale*, 147 Mass. 438.

Words spoken of a person, "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there,"—may fairly be considered to impute a crime, and are actionable *per se*. *Ibid*.

To falsely charge one with the purchase of liquors from one who commits a crime by selling them is not actionable *per se*, as the words do not charge the commission of a crime,—the purchaser not being *particeps criminis* with the seller in such a case. *Sterling v. Jugsheimer*, 69 Iowa, 210.

It is slanderous *per se* to impute to a person the

& P. 245; *Bennett v. Bennett*, 6 Car. & P. 588; *Hatfield v. Lasher*, 81 N. Y. 248; *Lothrop v. Adams*, 183 Mass. 471, 476.

Earl, J., delivered the opinion of the court:

On the 20th day of October, 1884, the defendant was a corporation, and published in the City of New York a newspaper called "The Morning Journal," and the plaintiff was a resident of Rochester. On that day, the following article appeared in that paper: "Refuses to be Reconciled. A Rochester Society Pella Who Insists Upon Being Married. (Special to the Morning Journal.) Rochester, N. Y., Oct. 19. Upper-tendom is highly excited over a threatened breach of promise suit against John E. Morey, Jr., a stockholder in the Union Advertiser, and prominent in society circles. A prominent society belle will be plaintiff in the action. Morey and his friends are moving to effect a reconciliation, but the young lady insists on his marrying her." The plaintiff, claiming that the publication was libelous, brought this action to recover damages on account thereof, and recover a judgment, which has been affirmed at the general term. The defendant claims that the article is not libelous *per se*, and, as no special damages were alleged or proved, contends that the plaintiff should have been nonsuited. There can be no doubt that the publication is libelous *per se*. Its tendency was to disgrace the plaintiff, and to bring him into ridicule and contempt. 2 Colby, Cr. L. 57; *Starkie, Slander and Libel*, 2d Eng. ed.

166, 169; *Moak's Underhill, Torts*, 199; *Townsend, Slander and Libel*, § 21; *Cropp v. Tiney*, 3 Salk. 228; *Villers v. Monale*, 3 Wils. 403; *Shelby v. Sun Print. & Pub. Assn.* 38 Hun, 474, affirmed in 109 N. Y. 611, 11 Cent. Rep. 869; *Moore v. Francis*, 121 N. Y. 199, 8 L. R. A. 214.

At the trial, the defendant objected to proof of the nature of the plaintiff's business, and that he was a married man. This proof was competent, not to show special damage, as none was alleged, but to show the circumstances surrounding the plaintiff, and as bearing upon the hurtful tendency of the libel, and the general damage to which he was exposed.

The article was sent by telegraph to the Morning Journal by its Rochester correspondent, and on the trial the defendant offered to show by him, substantially, that he had heard that the breach of promise suit had been commenced against the plaintiff, and how and where he obtained the information. This evidence was excluded by the trial judge, because the defendant did not have any information on the subject at the time of the publication. It published the libelous article without any inquiry, and without any knowledge on the subject, and hence it was not entitled to the evidence for any purpose. The evidence had no bearing upon its good faith, and could not be used to rebut malice, or to mitigate the damages. It received the libelous article from its correspondent, who was not its agent in the sense that his act was its act, and his informa-

commission of the crime of fornication. Page v. Merwin, 3 New Eng. Rep. 533, 54 Conn. 423.

It is slander to falsely charge a woman with fornication or adultery. It is sufficient if the words impute this to her, and were so understood by those who heard them. Buscher v. Scully, 4 West. Rep. 725, 107 Ind. 248; *Stoke v. Miller* (Pa.) 4 Cent. Rep. 54; *Binford v. Young*, 13 West. Rep. 513, 115 Ind. 174.

Words imputing corruption and dishonor.

An article published in a newspaper concerning an attorney-at-law, which would tend to injure his character and reputation as an honest and honorable attorney-at-law and citizen, would, like any similarly injurious article published against any other person, be *prima facie* libelous. *State v. Wait* (Kan.) July 3, 1890.

A publication speaking of a man's "clutch on his friends, which caused them to trust him and get left," and which states in substance that he had left the city under a cloud, had collected a bill due to his employers, which he secreted until another attempted to collect it, that he borrowed what money he could from his friends, and left with an unpaid board bill,—is libelous *per se*, because it not only imputes fraud and dishonesty in other respects, but plainly imports embezzlement in the collection of the bill. *Iron Age Pub. Co. v. Crudup*, 85 Ala. 519.

Where the publication charged that plaintiff had corruptly failed to make a proper exhibit of fruit sent to him, but had appropriated it to himself and entered it in his own name; that the exhibit had not been conducted in an honorable manner, and that he had failed to make any report because, if given, it would disclose his dishonorable acts,—it was held that the article, if false, was libelous. *Bettner v. Holt*, 70 Cal. 270.

A publication charging persons with confederating to mismanage the affairs of a company, so as to

destroy the value of its stock and injure the other shareholders, is actionable *per se*. *Walls v. Walker*, 73 Tex. 8.

Published words charging a wife with deserting her husband in his sickness are libelous *per se*. *Smith v. Smith*, 3 L. R. A. 52, 73 Mich. 445.

Words imputing want of chastity.

Language imputing a want of chastity to a female is actionable *per se*. *Hitchcock v. Caruthers*, 82 Cal. 523; *Williams v. McManus*, 38 La. Ann. 161.

To falsely speak of a married woman as the paramour of a man not her husband imparts to her a want of chastity, and is slanderous *per se*. *McKinney v. Roberts*, 68 Cal. 192.

Calling a married woman a prostitute, or charging her with having committed prostitution, are words imputing unchastity. *Rhoads v. Anderson* (Pa.) 12 Cent. Rep. 727.

The words "You are a bitch and a whore. You visit Halfway House and got your dress there,"—spoken of an unmarried woman,—are actionable *per se*. *Kelly v. Flaherty*, 6 New Eng. Rep. 600, 18 R. I. —.

The words, "I know all about the case; while she was out there claiming to be the wife of F she was here claiming to be my wife,"—do not impute a want of chastity, and are not actionable *per se*. *Funk v. Beverly*, 11 West. Rep. 227, 113 Ind. 190.

Words impliedly charging a single woman with degradation of character, and justifying a jury in finding that the intent was to impute to her an act of fornication, are clearly actionable. *Stoke v. Miller* (Pa.) 4 Cent. Rep. 84.

An allegation that the plaintiff has been damaged and injured in her name and fame is not sufficient as an allegation of special damage, where the words charged to have been spoken are not actionable *per se*. *Pollard v. Lyon*, 91 U. S. 226, 33 L. ed. 308.

tion its information; and it could receive no advantage from the fact that he was imposed on, or innocently mistaken. The defendant also offered to prove that an action for breach of promise of marriage was actually commenced against one John E. Morey, not the plaintiff, and that the Rochester correspondent had heard of the suit before sending the article to it for publication, and this evidence was ex-

cluded upon the same ground; and for the same reasons we think there was no error in the exclusion. The defendant cannot have the benefit of such a fact in mitigation of damages of which it had no knowledge.

For these reasons, and others more fully stated in the able opinion in the court below, *the judgment should be affirmed, with costs.*
All concur.

NEW YORK COURT OF APPEALS (2d Div.).

Linaes LE BARRON, *Appt.*,
v.
Samuel BABCOCK *et al.*, *Respts.*
(.....N. Y.)

Crops grown upon land while it is in the peaceable possession of one of several tenants in common become his individual property when they are, in the due course of husbandry, peaceably and in good faith severed

by him from the common estate; and if his co-tenants afterwards enter and take away such crops they will be liable in trover for the value thereof.

(October 7, 1890.)

A PPEAL by plaintiff from an order of the General Term of the Supreme Court, Fifth Department, reversing a judgment of the Cattaraugus Circuit in favor of plaintiff in an action brought to recover the value of certain crops alleged to be the property of plaintiff and

NOTE.—Emblements, right to.

The growth of the earth produced annually, not spontaneously, but by labor and industry, called *fructus industrialis*, are emblements of the land. Reiff v. Reiff, 64 Pa. 137; 1 Wms. Exrs. 670, 672; Taylor, Land. and T. § 548; Anderson, Law Dict. 399.

The doctrine of emblements is founded on the uncertainty of the termination of the tenant's estate; for where that is certain there exists no title to emblements. Whitmarsh v. Cutting, 10 Johns. 361; 2 Bl. Com. 123, 145; Woodfall, Land. and T. 587.

Those only are entitled to emblements who have an uncertain estate or interest in the land, which is determined either by the act of the law or of God between the period of sowing the crop and of its severance. Shepherd, Touch. 244 n; Co. Litt. 55 b; Oland's Case, 5 Coke, 116; Johns v. Whittey, 8 Wils. 127; Bulwer v. Bulwer, 2 Barn. & Ad. 470; Davis v. Eytan, 7 Bing. 154; Nicholas v. Simonds, 2 Rolle, 468; Wood, Land. and T. 972.

Rights of tenant in common to crops.

The decision of the lower court in the main case was as follows:

A tenant in common of a farm lawfully in possession, who sows and cuts oats thereon, is entitled to them as against his co-tenants not in possession, but not to hay cured from grass growing thereon mowed by him. Le Barron v. Babcock, 46 Hun. 598.

In the absence of evidence of an ouster of his co-tenants by a tenant in common and that he assumes to occupy the premises in exclusion of them, it will be assumed that the co-tenants are free and at liberty to go upon and occupy the premises jointly with him, and that he is not liable to them for the use and occupation had by him of the farm. *Ibid.*

A tenant in common who, although permitted, is not disposed, to occupy or cultivate the lands, cannot take or appropriate any share in the productions of his co-tenant, or charge the latter for their use. *Ibid.*

Acts of a tenant in common of a crop stored in a building, in substituting another lock and appropriating the entire property to himself, were held sufficient to constitute a demand and refusal which rendered him liable for conversion. Burns v. Winchell, 44 Hun. 261.

One tenant in common, merely because of being such, has no property in the crops which a co-tenant

may raise and gather upon land held in common. Creed v. People, 81 Ill. 565.

Crops grown upon the common estate by one tenant in common vest in and become the property of the producer exclusively. Bird v. Bird, 15 Fla. 424.

Liability to account for use and occupation, rents and profits.

Under the Ohio Revised Statutes the voluntary and profitable use, occupation and enjoyment of a tenant in common of the common estate creates a liability against him to account to the other tenant for his share of the rents and profits. West v. Weyer, 48 Ohio St. 66.

Under the West Virginia Code, where one tenant in common uses and occupies less than his just share of the common property, he is not accountable to his co-tenants for the profits of that portion of the property owned by him. Dodson v. Hays, 29 W. Va. 577.

Under the Illinois Statute the one of several tenants in common of land who has had the use and benefit must account to the others. Woolley v. Schrader, 8 West. Rep. 492, 116 Ill. 29.

He is liable to account for the rents and profits of so much of the common property as he has occupied and used in excess of his share. Pearson v. Carlton, 18 S. C. 47; Almy v. Daniels, 4 New Eng. Rep. 915, 15 R. I. 318.

The joint proprietor of a plantation, who cultivates half of it for his own account without preventing his co-proprietor from occupying and cultivating the other half, is not liable to the latter for rent of the common property. Balfour v. Balfour, 33 La. Ann. 297; Kean v. Connelly, 25 Minn. 222.

In such case he is liable only for what he receives over and above his just proportion. Roseboom v. Roseboom, 15 Hun. 300; Buckelew v. Snedeker, 27 N. J. Eq. 82.

He is not liable to his co-tenants for the use and occupancy of the common property in the absence of agreement, and demand to surrender possession, unless he has received rent for the property from a third person. Reynolds v. Wilmeth, 45 Iowa, 698; Carver v. Fennimaker, 116 Ind. 238; Belknap v. Belknap, 77 Iowa, 71.

The Statute of Limitations will begin to run only from demand and refusal to account. Jolly v. Bryan, 96 N. C. 457.

to have been taken from his possession by defendants. *Reversed.*

The facts are fully stated in the opinion.

Mr. W. S. Thrasher, for appellant:

The plaintiff was in by virtue of his own right as a tenant in common. He had taken possession of a certain piece of meadow land, and had actually severed the growing grass as his portion, and was in the lawful, rightful possession of it, when the defendants forcibly took it from him. Being rightfully in possession, he could not, against his will, be rightfully ousted by a co-tenant.

King v. Phillips, 1 Lans. 421; *Wood v. Phillips*, 48 N. Y. 152.

Being rightfully there, and having severed the grass and raised the oats, he was the owner of the same as against the whole world. If liable for anything, it would be for an accounting only. Having gathered the crop, he owned it.

Stockwell v. Phelps, 34 N. Y. 866; *Tripp v. Biley*, 15 Barb. 338; *Fobes v. Shattuck*, 22 Barb. 568.

If the parties were tenants in common before severance, the severance terminated the tenancy, and the plaintiff was the lawful possessor of the crop thereafter, and could maintain trover against any party removing it.

Newcomb v. Ramer, 2 Johns. 421 *note*.

Mr. Lorenzo Morris for respondents.

Follett, Ch. J., delivered the opinion of the court:

March 19, 1882, Linaes Le Barron, the elder, died intestate, seised of a farm of 233 acres, and leaving eleven children, his only heirs, one of whom is the plaintiff, and another is the wife of Alphonso House, one of the defendants. The plaintiff was the administrator of his father's estate; and, being in possession of the farm in the year 1885, he plowed two and one half acres of land, and sowed it to oats. Upon the farm there was about forty acres of meadow land. In August of that year he cut these oats, and also the grass on about fifteen acres of the meadow. He left the oats in the swath to dry, and the hay, which had been partly dried, he had raked into windrows. No one but the plaintiff had bestowed any labor on the grain or hay, or on the farm whereon they grew. These products being in this situation, the defendants entered in the night-time, and drew away the oats, and entered in the day-time, and drew away the hay, claiming to do so in the right of Mrs. House, and by her direction. The plaintiff forbade the removal of the property, but openly admitted the right of any one of his co-tenants to cut and take his or her share of the standing grass from the meadow. None of the tenants had ever been excluded from the farm; nor had the right to possess or enjoy it ever been denied to them, or to any one of them. This action was brought to recover the value of the hay and oats, upon the theory that the defendants were liable in trover; and at circuit it was held that they were so liable, and the plaintiff had a verdict for the value of both, but their values were not separately assessed. The judgment entered upon the verdict was reversed at general term, where it was held that the plaintiff was the sole owner of the oats, and could recover their value, but that he was

a mere tenant in common of the hay, and could not recover its value of his co-tenant, who had carried it away. The oats and hay were personal chattels, the former being such before, as well as after, they were cut, and the latter became such when severed from the meadow. 2 Steph. Com. 8th ed. 212. If they were owned in common by the plaintiff and Mrs. House, it was not a conversion in law for the defendants, acting by her (a co-tenant's) authority to merely draw them away (*Carr v. Dodge*, 40 N. H. 404; *Ballou v. Hale*, 47 N. H. 847; *Russell v. Allen*, 18 N. Y. 173; *Lobbell v. Stowell*, 51 N. Y. 70; *Freeman, Co-tenancy*, § 806); but if the plaintiff owned the products in his own right, then the defendants' act in carrying them away was a conversion in law, and they are liable for the damages.

When one of several tenants in common of a farm, all being of full age, occupies it, and has taken, in the usual course of husbandry, the annual products thereof, without having entered into any contract in respect to its use, and without having ousted or denied the rights of any of his co-tenants, he is not liable to account to them, or to any one of them, for its use or for the products so taken. *Woolver v. Knapp*, 18 Barb. 265; *Wilcox v. Wilcox*, 48 Barb. 827; *Dresser v. Dresser*, 40 Barb. 300; *Roseboom v. Roseboom*, 15 Hun. 809, affirmed, 81 N. Y. 356; *Zapp v. Miller*, 109 N. Y. 51, 57, 11 Cent. Rep. 494; *Henderson v. Eason*, 17 Q. B. 701; 4 Kent, Com. 369; *Freeman, Co-tenancy*, § 286.

The judgments which hold that a tenant in common of farming land, who, while in peaceable possession, takes and uses the products which have grown while so in possession, is not liable to account for their value to his co-tenant, rest necessarily on the assumption that he becomes the sole owner of such products; for if a tenant in common of a chattel uses it up, or sells it for his own exclusive benefit, without the express or implied assent of his co-tenants, he is liable to them for its conversion. *Wilson v. Reed*, 3 Johns. 175; *Nowlen v. Colt*, 6 Hill, 461; *Dyckman v. Valiente*, 43 N. Y. 560; *Freeman, Co-tenancy*, §§ 307, 308.

When a co-tenant of such land peaceably takes the products grown during his possession, there comes a time when he is vested with the sole title, which cannot be later than when, in the due course of husbandry, they are peaceably and in good faith severed by him from the common estate on which they were grown. If they do not then become the individual property of the co-tenant who grew and severed them, it is difficult to see what subsequent act he could perform which would vest him with the title. Storing the hay and grain in a barn would not strengthen his title; and, unless it becomes perfect when the products are severed, a co-tenant out of possession can lie by and permit the one in possession to rear and prepare crops for market, and then peaceably take them whenever and wherever he can, or, under certain circumstances, of the purchasers, so long as the property can be traced. This would not be a convenient nor an equitable rule, and we find no authority which justifies the court in declaring it to be the legal one. The plaintiff, having in the due course of husbandry grown and severed the grass and oats while

being, with the acquiescence of his co-tenants, legally and peaceably in possession of the land whereon they grew, became the sole owner of them, and the defendants, by taking them away, became liable for their value. *Calhoun v. Curtis*, 4 Met. 418; *Brown v. Wellington*, 106 Mass. 818; *Bird v. Bird*, 15 Fla. 424; *Henderson v.*

Eason, 17 Q. B. 701; 1 Dom. Civil Law, Cush. ed. p. 952.

The order should be reversed, and the judgment entered on the verdict affirmed, with costs.

All concur, except Bradley and Haight, JJ., not sitting.

KENTUCKY COURT OF APPEALS.

Albert G. COTTINGHAM, *Appt.*,
v.

FIREMAN'S FUND INSURANCE CO.

(....Ky.....)

A transfer of the equitable title to property will avoid a policy of insurance thereon which provides that it shall become void if any change takes place in the title or possession of the property, in a State where the beneficial interest passes with the equitable title.

(September 30, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Henderson County in favor of defendant in an action brought to recover the amount alleged to be due under a policy of life insurance. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. J. L. Dorsey, for appellant:

The written instrument did not so change the title of appellant as to avoid the policy.

Masters v. Madison County Mut. Ins. Co. 11 Barb. 624; *Trumbull v. Portage County Mut. Ins. Co.* 12 Ohio, 806; *Washington F. Ins. Co. v. Kelley*, 32 Md. 421, 8 Am. Rep. 149; *Loy v. Home Ins. Co.* 24 Minn. 815, 81 Am. Rep. 846;

Hammell v. Queens Ins. Co. 54 Wis. 72, 41 Am. Rep. 1.

The mere making of a conveyance does not avoid the policy. The conveyance must be perfected by delivery, and the mere fact that it was recorded does necessarily establish a legal conveyance.

1 Wood, Fire Ins. 2d ed. § 849.

An agreement to sell does not divest insured of his interest.

1 Wood, Fire Ins. § 881, *note*.

Transfer or change of title does not take place until deed is delivered.

May, Ins. § 264; Browning v. Home Ins. Co. 71 N. Y. 508; *Hill v. Cumberland Valley Mut. Prot. Co.* 59 Pa. 474; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 15; *Aetna Ins. Co. v. Jackson*, 16 B. Mon. 242; *Manhattan Ins. Co. v. Stein*, 5 Bush, 656.

Masters, Yeaman & Lockett, for appellee:

By the sale to the Kings, appellant parted with the equitable title, the beneficial interest with the right to the use and occupation, and remained the custodian of the bare legal title, and that he held in trust for the Kings. This was certainly a "change in the title."

May, Ins. §§ 269, 273.

NOTE.—*Fire policy, title or interest of insured.*

A mere qualified or equitable interest in property is insurable. *North Alabama Home Protection v. Caldwell*, 35 Ala. 607.

An equitable ownership will support a recital of ownership. *Guest v. New Hampshire F. Ins. Co.* 9 West. Rep. 590, 66 Mich. 98; *Farmers Mut. F. Ins. Co. v. Fogelman*, 36 Mich. 431.

One getting insurance is not required to show the exact content of his title until he is requested to do so. *Guest v. New Hampshire F. Ins. Co.* 9 West. Rep. 590, 66 Mich. 98; *Castner v. Farmers Mut. F. Ins. Co.* 46 Mich. 15; *O'Brien v. Ohio Ins. Co.* 52 Mich. 131; *Tiefenthal v. Citizens Mut. F. Ins. Co.* 53 Mich. 305.

A policy requiring that the interest in property, if other than a fee simple absolute, must be stated, is not invalidated where the assured failed to state that his title was an equitable one subject to the payment of the purchase money on articles of agreement. Such title, as respects the contract of insurance, is equivalent to a fee. *Elliot v. Ashland Mut. F. Ins. Co.* 10 Cent. Rep. 561, 117 Pa. 543.

The requirement that the interest of the insured should be truly stated does not call for a distinction between the legal and the equitable title, but simply a statement of the nature of the insurable interest. *Hough v. City Ins. Co.* 29 Conn. 10; *Williams v. Roger Williams Ins. Co.* 107 Mass. 377; *Gaylord v. Lamar F. Ins. Co.* 40 Mo. 12; *Swift v. Vermont Mut. Ins. Co.* 18 Vt. 305.

A mortgagor against whom has been rendered a decree of strict foreclosure has, before the expiration of the period of redemption, an insurable interest in the land, so that a policy issued to him will not be avoided by his mere omission to make known the decree, where there is no fraud; but the insurable interest ends at the expiration of the period of redemption; and his interest in the premises is not kept alive by a verbal promise, without consideration, made after the expiration of such period, by the mortgagee, to sell the land to the mortgagor. *Essex Sav. Bank v. Meriden F. Ins. Co.* 4 L. R. A. 759, 57 Conn. 335.

Clause of forfeiture for sale of insured property.

A failure to mention incumbrances, if not inquired about, and if the application was oral and no deceit was practiced, is immaterial. *Tiefenthal v. Citizens Mut. F. Ins. Co.* 53 Mich. 305.

It cannot be said that a mortgage lessens the insurable interest unless there is a stipulation to the contrary, or some very peculiar state of things. *Carpenter v. Continental Ins. Co.* 61 Mich. 635. See *note* to *Nussbaum v. Northern Ins. Co.* (Ga.) 1 L. R. A. 704; *Reoh v. Home Ins. Co.* 78 Iowa, 384.

A deed to a creditor to secure a debt, with reservation of balance, and the right to redeem the pledge by payment, is not such alienation as will avoid the policy. *Nussbaum v. Northern Ins. Co.* *supra*.

Where the assured gave a deed duly recorded, receiving a bond for reconveyance upon indemnity against liability as a surety, the bond not being recorded, but the grantee, with knowledge of the as-

The loss of the house, either insured or not, was the loss of the Kings, and not of the appellant.

Vance v. Foster, 9 Bush, 891; *Smith v. Canaler*, 88 Ky. 368.

Bennett, J., delivered the opinion of the court:

The appellee's defense to the appellant's action against it to recover the value of the house insured by the appellee, and which was destroyed by fire, was that the appellant, before the house was destroyed by fire, had sold the same, and transferred the possession. The jury having found for the appellee, the appellant has appealed to this court. The contract of sale relied on by the appellee is as follows:

This contract witnesseth that we, C. L. and H. A. King, have this day swapped or exchanged property with Albert Cottingham as follows: We, C. L. and H. A. King, give Cottingham the G. H. Cottingham house and lot for the Albert Cottingham house and lot, formerly owned by James A. Watson, and the lot west of the house. . . . Deeds to be made soon. Feby. 24th, 1887.

C. L. & H. A. King.
A. G. Cottingham.

The policy provides that "if the property be sold or transferred, or any change take place in the title or possession, without written permission in this policy," it shall be void, etc. The ground upon which a sale of the property insured vacates the insurance is due to the operation of the sale divesting the owner of the title to the property insured. The rule seems to be general that, if the insured in making the transfer of title retains an interest in the thing insured, the policy is not vacated by the sale. Pursuant to this rule it has been held in a number of cases, and by elementary writ-

ers, that the sale, in order to vacate the policy, must be of the legal title; that the sale of a mere equity, the vendor holding the legal title, will not suffice to vacate the insurance. It is believed that the *rationale* of this rule is that the vendor in such case, as the owner of the legal title, he having parted with the equity, retains the risk of the property, that is, the risk of the property remains with the legal title, and the loss or destruction of the property falls upon the owner of the legal title; and in that view it is believed that, if the owner has sold the equitable, but not the legal, title, he has not parted with his insurable interest in the property. But in this State the purchaser of real estate by title bond takes the risk of the property. He is the beneficial owner of it, and its loss or destruction falls upon him, and not the vendor. See *Marks v. Tichenor*, 85 Ky. 586; *Calhoon v. Belden*, 8 Bush, 674.

It is the vendor's parting with the beneficial interest in the property that vacates his contract of insurance, and, where a sale of the legal title is to deprive the owner of such interest, a sale of the equitable title only will not be sufficient for that purpose. But where, as in this State, the beneficial interest is passed to the vendee of the equitable title, the contract of insurance is vacated by such sale. The vendee in such case assumes all risk of loss or destruction of the property. Such risk is no longer with the vendor. Hence, the insurer's contract of indemnity against the destruction or damage of the insured property is at an end. According to these views, the first instruction given for the appellant was more favorable to him than he was entitled to. But, apart from all this, it is evident that the jury found that the appellant had surrendered the possession of the property in violation of his agreement. The second instruction on that subject

insured, giving a mortgage, which was recorded, but without seal and nothing paid upon it; and after destruction of the property, the mortgage was discharged and the property reconveyed,—the assured may recover on the policy. *Bryan v. Traders F. Ins. Co.* 5 New Eng. Rep. 457, 145 Mass. 399.

Under a provision against a sale of the property without insurer's consent the making of a contract for sale of the property without consent, providing for payment by installments, conveyance to be made upon full payment, and all payments made to be forfeited upon failure to make any payment as therein agreed, and possession being given immediately upon making the contract, avoids the policy; and the policy is not restored upon abandonment of the contract. *Davidson v. Hawkeye Ins. Co.* 71 Iowa, 532.

An equitable lien of the vendor upon the property will not avail to keep it alive. *California State Bank v. Hamburg-Bremen Ins. Co.* 71 Cal. 11.

But is not avoided by a deed made by the assured to another for the mere purpose of negotiating a loan or as collateral security for a debt, and which is not intended by either party to convey title. *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144.

Under such a clause of forfeiture for sale of interest in the property the policy is not forfeited by an incorrect description in the deed to the insured, which is subsequently corrected by a quitclaim deed from the grantor. *Diehlman v. Dwelling-House Ins. Co.* 78 Mich. 141.

The condition is waived by knowledge of the
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agent of such transfer, and his making an indorsement on the policy referring to the purchase and the interest which each party is entitled to in case of loss. *Bonenfant v. American F. Ins. Co.* 75 Mich. 653.

Where the agent authorized to renew policies had subsequently approved an assignment of the policy to the purchaser, the company is bound by his acts. *Imperial F. Ins. Co. v. Dunham*, 10 Cent. Rep. 575, 117 Pa. 460.

What not a transfer of the property.

A condition in an insurance policy, requiring notice to the company of any contract to sell the property, applies only to contracts of sale between the assured and third persons, and not to contracts between the assured themselves for the sale or transfer of their respective interests as partners or joint owners. *Allemania F. Ins. Co. v. Peck*, 133 Ill. 230.

Where upon dissolution of a copartnership the interest of one of the firm in the property was transferred to the other partner, who executed a mortgage thereon in favor of his partner, to secure the purchase price, this did not work such a transfer of interest as to avoid the policy. *Dresser v. United Firemen's Ins. Co.* 45 Hun, 238.

It is not a breach of the condition of the policy against change in the title of the possession of the property by sale. *New Orleans Ins. Assn. v. Holberg*, 64 Miss. 61.

required the jury to believe that the appellant had, before the fire, surrendered the possession of the property to the Kings. Of this instruction, limiting the surrender to the Kings, the appellant has no right to complain. The third instruction tells what acts would amount to a surrender of the possession of the property to the Kings, to wit, that of abandoning the possession of the insured house, and taking possession of the house exchanged by the Kings, with their knowledge and consent. This instruction still confines the surrender of the possession to the Kings; whereas, a surrender to anyone else would have been sufficient. In this respect the second and third instructions are more favorable to the appellant than he was entitled to. The proof is clear that the appellant took possession of this house under the authority of the contract with the Kings, and took said possession with the purpose of making it his permanent home. The jury had the right to infer all the rest.

The judgment is affirmed.

CITY OF LOUISVILLE, *Appt.*,
v.
LOUISVILLE BOARD OF TRADE.

(....Ky.....)

1. An exemption from taxation of the real estate of a corporation so long as it is occupied by the corporation for the purposes contemplated in its organization will not prevent taxation of such portions of the property as have been rented out to tenants, although the rents are applied to uses contemplated in the organization of the corporation.
2. When one seeking to enjoin the taxation of certain property upon the ground that it is exempt shows by his petition that at least a portion of the property is taxable, the burden is upon him to definitely point out the extent to which he is entitled to the relief for which he asks.

(September 25, 1890.)

APPEAL by defendant from a judgment of the Louisville Chancery Court in favor of plaintiff in an action brought to enjoin the collection of certain taxes upon the ground

that the property upon which they were levied was exempt from taxation. *Reversed.*

The facts are fully stated in the opinion.

Mr. L. M. Dembits for appellant.

Messrs. Brown, Humphrey & Davis for appellee.

Holt, Ch. J., delivered the opinion of the court:

The appellant, the City of Louisville, having, by its proper officer, levied upon some furniture in use in the board of trade rooms of the appellee, the Louisville Board of Trade, for municipal taxes for the year 1886, upon its building in the City of Louisville, it enjoined their collection upon the ground mainly that the property was exempt from taxation. This claim is based upon a Legislative Act of 1873, which provides: "Any real estate held by the Louisville Board of Trade in the City of Louisville, by purchase in fee simple, not exceeding one hundred by two hundred feet in area, and any improvements thereon, shall be and are hereby exempted from all state taxes so long as such property shall be occupied by said Board of Trade for the purposes contemplated in its organization; and the general council of the City of Louisville is authorized to exempt such property, so held and occupied, from all taxes authorized to be levied by said general council of said City of Louisville."

The property was purchased by the appellee several years after the passage of this Statute. The council of the City adopted a resolution which contains no reference to the limitation in the Legislative Act relative to the occupation of the property by the appellee for the purposes of its organization, and which by its terms purports to exempt the property from all city tax. Unquestionably, however, the council could grant an exemption only to the extent that the Legislature could constitutionally authorize and had in fact authorized. Conceding that an institution may render such a local governmental service to a city as will authorize its exemption from city tax by the Legislature, or by the municipal government acting under legislative authority, and that the appellee does so, yet the first question presented is whether, upon the facts shown, and under a fair construction of the Statute, the property of the appellee is exempt. The building is five stories

NOTE.—Exemption; restricted to use of property.

The exemption of a corporation from taxation includes all that is obviously appropriate and convenient to carry into effect the franchise granted, and to its object and its use; and property beyond this is not within the exemption. *State v. Georgia R. & Bkg. Co.* 54 Ga. 423; *Hardy v. Waltham*, 7 Pick. 108; *Worcester v. Western R. Corp.* 4 Met. 564; *State v. Mansfield*, 23 N. J. L. 510; *State v. Flavell*, 24 N. J. L. 370; *State v. Newark*, 26 N. J. L. 519; *State v. Haight*, 31 N. J. L. 400; *Cook v. State*, 33 N. J. L. 474; *State v. Hancock*, 35 N. J. L. 537; *State v. Woodruff*, 38 N. J. L. 94; *State v. Love*, 37 N. J. L. 60; *Railroad v. Berks County*, 6 Pa. 70; *Vermont Cent. R. Co. v. Burlington*, 23 Vt. 193; *Wright v. Southwestern R. Co.* 64 Ga. 783.

The exemption of lands from taxation necessarily embraces also an exemption of the permanent improvements thereon used for the purposes contemplated in the charter of the corporation. 9 L. R. A.

Appeal Tax Court v. Baltimore Cemetery Co. 50 Md. 436; *Osborne v. Humphrey*, 7 Conn. 336; *Landon v. Litchfield*, 11 Conn. 251; *Hardy v. Waltham*, 7 Pick. 108; *Matheny v. Golden*, 5 Ohio St. 361; *Kumler v. Traber*, Id. 442.

If the interest in the buildings is created entirely distinct from the interest in the lands, the buildings may be taxed, although the land is exempt. *Hart v. Cornwall*, 14 Conn. 223.

Where property which would otherwise be exempt is used to derive an income or profit, the whole property becomes taxable, but due apportionment of values may be made so as to confine the exemption to so much of the value as the privileged part of the premises represents. *State v. Board of Assessors*, 34 La. Ann. 574; *Masseyburg v. Grand Lodge*, 81 Ga. 212; *Appeal Tax Court v. Grand Lodge*, 50 Md. 421; *Frederick County v. Sisters of Charity*, 48 Md. 34; *St. Joseph's Church v. Assessors*, 12 R. I. 19; *County Comrs. v. Colorado Seminary*, 12 Colo. 497.

high; and when the taxes for 1886 were assessed but two small rooms, constituting a part of the rear of one floor, and which are not over one-twentieth part of the building probably, if that, were in actual use by the appellee for the purposes of its organization. All of the balance of the large and valuable property, save two or three rooms temporarily vacant, were rented out by the appellee for various purposes, such as banking, insurance and office use generally. The lower court enjoined perpetually the collection of any city taxes for 1886 upon the building. What is the meaning of the condition, "so long as such property shall be held and occupied by the Board of Trade for the purposes contemplated in its organization?" Is the renting of it to strangers an "occupation" of it by the Board, within the meaning of the Exempting Statute? And, next, if it be, is it an occupation by it "for the purposes contemplated in its organization?" The taxation of all property is the just and equitable rule. An exemption from it is a special privilege; one in conflict with the universal obligation of all property holders to aid in the support of the government, and the exception will not be presumed. A surrender upon the part of the State of the right to tax must be shown by express and unequivocal language, or necessary inference. The exemption, however meritorious, is of grace, and statutes imposing restrictions upon the taxing power of the State, save so far as they may tend to secure equality of assessment, are to be strictly construed. These are familiar principles, well settled, not only by the decisions of this court, but of the Supreme Court of the United States. It readily strikes the mind as unjust to all other property holders, and as not only likely, but certain, to lead to infinite mischief to permit a corporation to escape the common burden, and secure immunity from taxation, by investing its means in property not in use for the purposes of its creation. Before a court will help it to do so by injunction, a clear case must be presented. It is claimed for the appellee that the occupation by a tenant is an occupation by it within the meaning of the Statute, and that, as the rents are applied to its uses, this is an occupation "for the purposes contemplated in its organization." In support of this view, we are referred to the construction which has been given by this court to the word "occupation," as used in our Homestead Law; but it, unlike the Statute under consideration, should be liberally construed. Moreover, if a widow were, by a temporary absence, to lose her homestead right, it would be gone forever; while the appellee, provided it renders such governmental service as to constitutionally entitle it to exemption, may, at any time, regain the right by such a use of the property as its organization contemplated. If it is entitled to the exemption of a building worth \$100,000, upon the ground that, within the fair meaning of the Statute, an occupation by a tenant is its occupation, and that an application of the rents to its uses is an occupation for the purposes of its organization, then equally is it entitled to the exemption from the common burden of a building worth millions of dollars. This would serve to render its stock very valuable, perhaps, and place upon its neighbor the burden which

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it could well afford to bear. No presumption in its favor should be indulged that will lead to such a result, and defeat that reasonable equality necessary to valid taxation; and in our opinion a fair and reasonable construction does not admit of it. This view is sustained by both reason and authority.

No case can perhaps be found where the language of the Statute in question is precisely like this one, but precedent is not lacking where it is the same in substance.

In the case of *Appeal Tax Court v. Grand Lodge*, 50 Md. 421, where the Statute exempted the property belonging to benevolent and charitable institutions so far as the same was used for the purposes of the organizations, it was held that, where such an institution rented out a portion of its building, such portion was not exempt from taxation, although the rent was applied in aid of the charitable purposes of the organization. The same construction had been previously adopted by the court in *Frederick County v. Sisters of Charity*, 48 Md. 34, where it was contended, as it is here, that the application of the rents to the benevolent objects of the institution entitled it to the exemption of the portion of its property occupied by its tenants. The claim was denied.

In the case of *Chapel of Good Shepherd v. Boston*, 120 Mass. 212, the Statute exempted from taxation the property of charitable and religious institutions, occupied by them for the purposes of their organization; and the right to an exemption of property which was rented out, and the rents applied to the purposes of the institution, was denied. Said *Chief Justice* Gray, in delivering the opinion: "In order to exempt real estate belonging to a charitable institution from taxation, it is not enough that the income derived therefrom should (as all the income of the corporation, from whatever source derived, must) be applied to the purposes for which it was incorporated, but the real estate itself must be occupied by the corporation, or its officers, for those purposes."

In *Pierce v. Cambridge*, 2 Cush. 611, where the Statute exempted the property of literary and charitable institutions, if actually occupied by them for the purposes of their organization, it was decided that property leased out was not to be considered as in the occupancy of Harvard College, so as to exempt it from taxation.

In the recent case of *Morris v. Lone Star Chapter No. 6 of Masons*, where the Constitution of the State of Texas authorized its Legislature to exempt from taxation the buildings of institutions of public charity, it was held that such buildings only were intended as were used exclusively and actually by such institutions, and that, if certain portions of a building belonging to such an institution were rented out, it was to that extent taxable, although the rents were used in furtherance of the charity. 5 S. W. Rep. 519.

In the case of *Bank of Commerce v. Tennessee*, 104 U. S. 493 [26 L. ed. 810], where a bank was required, by its charter, to pay a certain tax upon its capital stock in lieu of all other taxes, and was authorized to hold property for its use as a place of business, it was held that its immunity from taxation extended to only

so much of the building as was necessary to the carrying on of its business.

Many other cases might be cited to the same effect. They establish the rule that an exemption from taxation in favor of an institution while it occupies its building for the purposes of its organization does not exempt it when rented out, or such portions of it as may be leased, although the rents may be applied to such purposes.

Deasy, on Taxation (vol. 1, p. 120), says: "If the buildings, or any portion thereof, belonging to a benevolent and charitable institution, are used for other purposes for a profit, the building, to the extent thus used, is liable to taxation, although the proceeds from such extraneous use are devoted to charitable purposes."

The petition in this case shows that some portions of the appellee's building are rented out, but it does not point out what portions. It discloses the fact that at least a portion of it is liable to taxation, but it does not disclose what portion. The answer avers that the assessor, in assessing the tax in question, deducted a proportionable part of the building for the

two rooms actually in use by the appellee. This is denied by the reply, and not proven; and it is therefore urged that the judgment below must be sustained, upon the ground that the tax-bill is erroneous. The judgment, however, is that no taxes can be assessed or collected, as to the entire building, for the year 1886, and it must therefore, of course, be reversed. But a party seeking relief by injunction must make out a clear case for equitable interposition. The burden is upon him. Here the petition shows that at least a portion of the property was liable for taxes. It shows that something is due. This being so, it was the duty of the party asking relief to definitely point out the extent to which he was entitled to be relieved. If he seeks equity, he must do equity. He must show his willingness to pay what he in fact owes, or at least, in a case like this, he must show to the court how much he in fact does not owe. He must, inasmuch as injunction is peculiarly an equitable remedy, separate the just from the unjust portion of the claim, and ask relief only as to the latter. This the appellee has failed to do, and *the judgment is reversed, with directions to dismiss the petition.*

PENNSYLVANIA SUPREME COURT.

Leandro DE LA CUESTA, *Appt.*,

v.

President, etc., of the INSURANCE COMPANY OF NORTH AMERICA.

(...Pa....)

1. A protest made by a stockholder of a corporation at the time of payment by him of a bonus required for the privilege

of subscribing to new stock issued by it for the purpose of increasing its capital will entitle him to no advantage from a decree in a suit to which he was not a party, brought by other stockholders to restrain the increase of the capital or to compel the issuance of stock to them upon payment of its par value only, although such decree requires the stock to be issued to complainants at par and provides for a refunding of whatever bonus payments may have been made by them under protest.

NOTE.—Corporation, increase of capital stock.

Corporations have no power to increase or diminish their stock unless expressly authorized to do so. *Winters v. Armstrong*, 87 Fed. Rep. 508.

Where the charter provided that the capital stock might be increased at the pleasure of the company, it was a privilege not included in the powers and duties of the directors of the corporation, and could not be exercised by the directors alone as ordinary business transactions of the company, unless expressly authorized thereto, but must be authorized by the shareholders at a corporate meeting. *Crandall v. Lincoln*, 52 Conn. 73; *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 233, 31 L. ed. 902; *Chicago v. Joney*, 60 Ill. 383; *Eldman v. Bowman*, 58 Ill. 444; *Percy v. Millaudon*, 3 La. 568; *Finley S. & L. Co. v. Kurts*, 34 Mich. 89; *Re Wheeler*, 2 Abb. Pr. N. S. 361; *People v. Parker V. C. Co.* 10 How. Pr. 543; *People v. Twaddell*, 18 Hun. 427; *State v. Merchant*, 37 Ohio St. 251; See *Cook, Stock and Stockholders*, § 285.

Directors of a corporation cannot increase its capital stock beyond the limit fixed by its charter. *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 233, 31 L. ed. 902.

An amendment of the charter, which allows the directors to authorize an increase, is not such a fundamental change in the Constitution of the corporation as will operate to release non-consenting shareholders from their obligations. *Payson v. Withers*, 5 Biss. 209; *Payson v. Stoeve*, 3 Dill. 423.

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When the power to increase the capital stock is vested in the directors, they are the judges whether the business actually requires it; and so long as they act in good faith in exercising their power their determination is conclusive. *Sutherland v. Olcott*, 95 N. Y. 98.

Where the acts of the directors were not fraudulent nor in derogation of the rights of the corporation or its creditors, the shareholders by subsequent action at a corporate meeting, may ratify and validate even the irregular acts of the directors. *Waldo v. Portland*, 33 Conn. 363.

Where the shareholders acquiesce in the change, they will be as fully bound as though the increase had been expressly authorized by them, and their assent may be as conclusively shown by their conduct and acquiescence as by their formal vote. *Payson v. Stoeve*, 3 Dill. 423; *Mahoney Min. Co. v. Anglo-California Bank*, 104 U. S. 192, 26 L. ed. 707, 5 Sawy. 255; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 98 U. S. 640, 24 L. ed. 648; *Bank of Pennsylvania v. Reed*, 1 Watts & S. 101; *Chicago Bldg. Society v. Crowell*, 65 Ill. 453; *Darst v. Gale*, 33 Ill. 136; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Perry v. Simpson Waterproof Mfg. Co.* 37 Conn. 520; *Chicago & N. W. R. Co. v. James*, 24 Wis. 388; *Walworth County Bank v. Farmers L. & T. Co.* 16 Wis. 629; *Phillips v. Campbell*, 43 N. Y. 271.

An increase in the capital stock, made with the consent of all the stockholders, is binding upon them, although some of the statutory formalities were omitted. *Pool v. West Point B. & C. Assn.* 30 Fed. Rep. 512.

2. An assurance to one who is about to make a written protest before the payment of money which is demanded of him, that, if he will not write the protest, he shall receive under his verbal one any benefit which anyone shall receive under a written one in any suit, will have no more effect than to place him in the same position he would have occupied had he completed his written protest.
3. Paying money under protest will not entitle a stockholder of a corporation, who is required to make the payment as a bonus for the privilege of subscribing to new stock to be issued by the corporation for the purpose of increasing its capital, to recover back the amount paid, although it is subsequently judicially determined that the bonus was wrongfully exacted and that he was entitled to new stock upon payment of merely its par value.
4. The only effect of a protest to the payment of money in a case in which it may be legitimately applied is to show that the payment was not voluntarily made, and that the party protesting intends to claim it back.
5. If a demand made upon a person for the payment of money is illegal, and he can save himself and his property in no other way, he may pay under protest and recover back the payment; but if other means are open to him by a day in court or otherwise, he must resort to such means.
6. A declared intention not to recognize a right is not duress within the rule that a person acting under duress of person or property, who under protest makes a payment of money unlawfully demanded from him, can recover the same back again.

(*Sterrett and Clark, JJ., dissent.*)

(October 6, 1890.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for

Philadelphia County in favor of defendants in an action brought to recover back money alleged to have been wrongfully demanded by defendants from plaintiff, and to have been paid by him under protest. *Affirmed.*

Plaintiff was a stockholder in the corporation of which defendants were president and directors. The corporation passed a resolution that "the capital stock of this Company be increased \$1,000,000 by the issue of one hundred thousand shares at par to the stockholders, in proportion of one share for each two shares held by them on the day they shall respectively subscribe for the same, they subscribing an agreement to pay \$10 per share for the stock and also \$10 per share for the privilege of subscribing, the proceeds of which privilege shall be added to the surplus fund of the Company."

The exaction of the bonus was earnestly opposed by plaintiff and certain other of the stockholders of the Company. On January 28, 1881, plaintiff went to subscribe for the stock to which he was entitled as a stockholder, but his subscription was refused unless he would pay the bonus, which he finally did under protest, as fully appears in the opinion.

In consequence of what then took place plaintiff refrained from becoming a party to a bill which was filed by one Cunningham and certain other protesting stockholders, which prayed, among other things, that the Company should be restrained from demanding the \$10 per share bonus. The plaintiffs were successful in that suit, and plaintiff then brought the present action to recover the amount which he had paid as bonus under protest.

The facts further appear in the opinion.

Messrs. J. Warren Coulston and Crawford & Dallas, for appellant:

The only statutory authority for the increase

Whether the corporate stock has been properly increased is a question the State only can raise. *Pullman v. Upton*, 96 U. S. 823, 24 L. ed. 518.

Under a constitution which prohibits and declares void a fictitious increase in the capital stock of a corporation, where the original capital had been invested in property which had more than doubled in value, without showing how it was invested, in what it now consists, and what makes up the increase in value, the company has no right to increase its capital stock. *Fitzpatrick v. Dispatch Pub. Co.* 88 Ala. 604.

Issue of new stock.

The acceptance of new stock, and a payment of 60 per cent of its par value as payment therefor, makes the other 40 per cent assets of the corporation in case of its insolvency. *McAvity v. Lincoln Pulp & P. Co.* 82 Me. 504.

An original stockholder who signs without qualification a subscription for new stock to increase the original stock is not entitled to cancellation of his subscription and return of the amount paid in, on the ground that all the new shares were not subscribed for. In the absence of any stipulation or limitation to the contrary, his subscription is not contingent or dependent upon the taking of all the shares, but is absolute and binds him accordingly. *Avegne v. Citizens Bank*, 40 La. Ann. 799.

Where a corporation issued new shares after the claim of a creditor arose, the latter, not having dealt with the company on the faith of any capital represented by such shares, cannot insist on contribution, by the holders, of a greater amount of capital than the corporation itself could claim from § 1, R. A.

them as part of its assets. *Deadwood First Nat. Bank v. Gustin-Minerva Consol. Min. Co.* 6 L. R. A. 676, 42 Minn. 327.

Those who never took new stock, on the increase of the capital of a corporation, cannot be made individually liable under R. I. Rev. Stat., chap. 128, § 1, for failure to have the required certificate recorded. *Sayles v. Brown*, 40 Fed. Rep. 8.

In order to subject any of the stockholders to a liability, under R. I. Rev. Stat., chap. 128, § 1, for failure to file a certificate for an increase of the capital stock, such increase must be made by a valid corporate act. *Ibid.*

Where shares issued for an increase of capital stock were soon afterwards recalled and canceled, a prior creditor of the corporation cannot hold the stockholders liable for such stock. *Colt v. North Carolina Gold Amalgamating Co.* 119 U. S. 843, 30 L. ed. 420.

Payment, when involuntary; protest.

A payment made under compulsion, coercion or duress is an involuntary or compulsory payment. The coercion or duress which will render a payment involuntary must consist of some actual or threatened exercise of power possessed or believed to be possessed by the person exacting the payment. *Brumagin v. Tillinghast*, 18 Cal. 272; *Radich v. Hutchins*, 95 U. S. 210, 24 L. ed. 409. See *Anderson*, Dict. 760.

Service or filing a written protest cannot make a payment involuntary. *Wabunsee County v. Walker*, 8 Kan. 488; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 544, 25 L. ed. 196.

Contracts entered into under duress may be an-

of the defendant's capital stock is that which was conferred upon its stockholders by the 27th section of the Act of May 1, 1876 (Pub. Laws, p. 60), which provided that such increase "shall be allotted *pro rata* to the stockholders of said Company according to their interest;" and by its terms, they were entitled "to the stock clear of bonus."

Cunningham's App. 108 Pa. 557.

The payment of the bonus by the plaintiff was of such nature, and was made in such manner and under such circumstances, as to entitle him to a return thereof.

Mots v. Mitchell, 91 Pa. 117; *Parker v. Great Western R. Co.* 7 Man. & G. 253, 292; *Great Western R. Co. v. Sutton*, L. R. 4 App. Cas. 249; *Wakefield v. Newbon*, 6 Q. B. 276; *Ashmole v. Wainwright*, 2 Q. B. 887; *Hospital v. Philadelphia County*, 24 Pa. 229; *Cobb v. Charter*, 82 Conn. 865; *Baker v. Cincinnati*, 11 Ohio St. 594; *Lehigh Coal & Nav. Co. v. Brown*, 100 Pa. 388; *White v. Heylman*, 84 Pa. 142; *Harmony v. Bingham*, 1 Duer, 229; *Elliott v. Swartwout*, 85 U. S. 10 Pet. 188, 9 L. ed. 374; *Laurence v. City*, 14 W. N. C. 421; *American S. S. Co. v. Young*, 89 Pa. 187; *Hospital v. Philadelphia County*, 24 Pa. 229; *McBriccart v. Pittsburgh*, 88 Pa. 133.

In no case has the right been denied to reclaim a payment made upon a demand enforced by the exercise of unlawful, even if not compulsive, power, when such payment had been accompanied by a protest, which was accepted as effectual.

See 2 Herman, Estoppel, p. 863, § 783; *Cairncross v. Lorimer*, 8 Macq. H. L. Cas. 829.

In such case the payee is precluded from disputing the payor's right to recover under the doctrine of equitable estoppel, which is a favored one in the jurisprudence of this State.

Ackla v. Ackla, 6 Pa. 228, 233; *Mercer Min. & Mfg. Co. v. McKee*, 77 Pa. 170; *Bidwell v. Pittsburgh*, 85 Pa. 418; *Montgomery v. Heilman*, 96 Pa. 44; *Re Opening of Spring Street*, 8 Cent. Rep. 114, 112 Pa. 253.

nullified. See note to *Adams v. Irving Nat. Bank* (N. Y.) 6 L. R. A. 491.

Duress, what constitutes.

Duress is an actual or threatened violence of a man's person, contrary to law, to compel him to enter into or discharge a contract. *King v. Williams*, 65 Iowa, 187.

Threatened illegal imprisonment inducing a party to enter into a contract or do acts to his disadvantage, which he would not otherwise have done, constitutes duress. *Landa v. Obert*, 78 Tex. 33.

To put a party under duress so as to avoid a note made by him, there must be either an unlawful imprisonment or an abuse of a lawful process or detention. *Heape v. Dunham*, 95 Ill. 533.

It is those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, that can be avoided for duress. *Sanford v. Sornborger* (Neb.) April 4, 1889.

For a master to induce his servant to believe that in case of his failure to comply with the foreman's demands he will be prosecuted and imprisoned, arousing the fears of the servant to such an extent that he surrenders property to avoid such prosecution, constitutes duress, and the transaction will be set aside. *Landa v. Obert*, *supra*.

A mere threat to sue the defendant and to arrest
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Messrs. John G. Johnson and R. C. McMurtrie, for appellates:

The plaintiff's proper remedy in the present case was twofold. One would have enabled him to become the owner of the shares he was entitled to and have compelled the Company to pay him the amount he has been compelled to pay beyond the par. The other would have enabled him to obtain the difference in the amount demanded and the amount he was bound to pay. The first would have been done by buying in the market after a refusal by the Company to deliver on payment of the par. The second would have been done by tendering the par and suing for the refusal to deliver the shares. These remedies were exclusive.

Fry, Spec. Perf. 11; *Nutbrown v. Thornton*, 10 Ves. Jr. 161; *Ang. & A. Priv. Corp.* § 381, citing *Rex v. Bank of England*, Doug. 524; *Danforth v. Schoharie & D. Turnp. Road*, 12 Johns. 227; *Helm v. Swiggett*, 12 Ind. 194; *Re Shipley v. Mechanics Bank*, 10 Johns. 484; *Gray v. Portland Bank*, 3 Mass. 864; *Sargent v. Franklin Ins. Co.* 8 Pick. 90.

The law excludes the exceptional remedy attempted to be employed in this case by paying under protest and suing to recover back.

Lindon v. Hooper, Cowp. 414; *Gulliver v. Cosins*, 1 C. B. 799; *Moses v. McFarlan*, 2 Burr. 1009.

A refusal to recognize a right such as the plaintiff had here is not duress in the meaning of the law.

Silliman v. United States, 101 U. S. 465, 25 L. ed. 987.

The essential facts to this remedy are an exaction of money not due, by compulsion, actual, present and potential, by force of process available for instant seizure of person or property.

Harvey v. Girard Nat. Bank, 11 Cent. Rep. 675, 119 Pa. 212; *Shaw v. Allegheny*, 6 Cent. Rep. 167, 115 Pa. 46; *Harrison v. Waln*, 9 Serg. & R. 319; *Union Ins. Co. v. Allegheny*, 101 Pa. 250; *Peebles v. Pittsburgh*, Id. 304;

him in such suit, or by virtue of an execution which could be issued upon a judgment obtained therein, would not be such duress as would avoid a promise induced by such threat. *Dunham v. Griswold*, 1 Cent. Rep. 307, 100 N. Y. 226; *Shepherd v. Watrous*, 3 Calnes. 166 b; *Knapp v. Hyde*, 60 Barb. 80; *Farmer v. Walter*, 2 Edw. Ch. 601, 6 N. Y. Ch. L. ed. 519. See note to *Shattuck v. Watson* (Ark.) 7 L. R. A. 551.

A contract made under duress cannot be enforced, but if bad only for that cause, it is voidable; and if ratified after the duress has ceased, it becomes valid and enforceable. *Ferrari v. Health Board*, 24 Fla. 390.

What is not duress.

It is not duress such as will avoid a settlement that a threat to sue and arrest in the suit was made. *Dunham v. Griswold*, 1 Cent. Rep. 307, 100 N. Y. 224.

It is not created by mere threats unless they are such as to put the party in fear of bodily injury or unlawful imprisonment. *Adams v. Stringer*, 78 Ind. 175.

Where the only coercion influencing the person's mind is the fear of the consequences of his own criminal act it is not duress in any sense. *Felton v. Gregory*, 130 Mass. 178.

The mere fact of executing a deed with great reluctance and after repeated urgings does not constitute duress. *Hamilton v. Smith*, 57 Iowa, 14.

Zents v. Shaner (Pa.) Oct. 18, 1886; *Lehman v. Shackelford*, 60 Ala. 487; *Harmon v. Harmon*, 61 Me. 237; *Swanston v. Hams*, 68 Ill. 165; *Eaton v. Chicago*, 40 Ill. 514; *Baltimore v. Lefferman*, 4 Gill, 425; *Awalt v. Eutaw Bldg. Assn.* 84 Md. 435; *Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. 298; *Shane v. St. Paul*, 26 Minn. 543; *Detroit v. Martin*, 84 Mich. 170; *Sheldon v. South School Dist.* 24 Conn. 88; *Lamborn v. Dickinson County*, 97 U. S. 186, 188, 24 L. ed. 929, 930; *Lackey v. Mercer County*, 9 Pa. 819.

It is impossible to predicate duress of such property as the plaintiff had.

Davis v. Bank of England, 2 Bing. 398.

Protest is of no force and serves no purpose but to make it apparent that the payment is not voluntary.

Marriot v. Hampton, 2 Smith, Lead. Cas. 7th Am. ed. 400.

That a contract executed six months before could constitute duress is simply absurd.

Wilson v. Ray, 10 Ad. & El. 82; *Patterson v. Boehm*, 4 Pa. 507; *Atkinson v. Denby*, 6 Hurlst. & N. 778.

Paxson, Ch. J., delivered the opinion of the court:

I do not understand that there is any dispute as to what took place at the office of the defendant Company on January 28, 1881, when the plaintiff called there to pay the subscription to the new stock. The following account of what then occurred is taken from the plaintiff's offer of proof:

"That Mr. De la Cuesta, Jan. 28, 1881, went with Mr. Keefe to the clerk's office in the office of the Company, and the clerk refused to take Mr. De la Cuesta's subscription without the bonus, when he took the pen and commenced to write. 'This is paid under protest,' and had formed part of the word 'This,' and then Mr. Platt, the president of the Company, standing beside them, said to Mr. De la Cuesta, 'Don't write that protest, your verbal one is just as good, and you shall have whatever advantage any party or parties shall receive under a written protest,' and that he, Mr. Platt, would, as president of the Company, for the Company, guarantee that Mr. De la Cuesta should receive under his verbal protest any benefit anyone should receive under a written protest by any suit; and in consequence of that, Mr. De la Cuesta did not complete his written protest, or have his name added to Cunningham's bill, but waited the termination of those proceedings and then demanded the return of his bonus."

The effect of these facts, thus stated by the plaintiff himself, is to place him in the precise position he would have accepted had no conversation occurred between Mr. Platt and himself, and he had gone on and completed his written protest. The defendant Company does not deny the facts as stated by plaintiff, nor seek to avoid the legal effect thereof. There was nothing in the transaction but a waiver of protest; that is to say, the protest was to be as effectual as if it had been written out in the most formal manner. It prescribes no evidence of a contract between the plaintiff and the corporation, that

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as a consideration for the plaintiff not putting his protest in writing, he should be entitled to recover, if anyone, in any suit, past, present or to come, should be capable of recovering. On the contrary, he was to have the advantage only of what any other person should receive in any suit by virtue of a written protest. There was no consideration for anything else. The Company did not receive the bonus because of the waiver. The plaintiff went to the office for the purpose of paying the money, and would have paid it under a written protest had not Mr. Platt, as an act of courtesy, merely, accepted the verbal waiver.

In this connection I am unable to see what *Cunningham's App.*, 108 Pa. 546, has to do with this case. There was no question of the effect of a protest in that case; it was not alleged that the decree was obtained on any such ground. The bill was filed to restrain the scheme properly by the Company, or to limit the new stock to \$10 per share, its par value; to compel the Company to issue the stock to complainants upon the payment of \$10 per share, and to restrain it from selling the allotments to which the plaintiffs were entitled. This left the Company an option. They could advance or recede. As they had gone on to a large extent, upon terms offered and accepted by nearly all the stockholders, this bill did not interfere with the scheme further than was necessary to sustain the right of the particular claimants therein to have their shares of the new stock issued to them at par, if the Company concluded to issue the shares. The present plaintiff gives the Company no option, but in seeking the same advantage as though he had put the Company to an election, that is to say, by protesting under the contract, or against being required to contract, he can obtain the right under the contract, without being bound to comply with its terms.

Undue importance has been attached to the following language in the decree in *Cunningham's App.*: "And if they or any of them have under protest paid such bonus or charges for the said stock shares, that the same be refunded to them with interest." This must be understood to apply only to the litigants in that case. This court did not intend to decide the rights of parties not before it, who were not, and could not have been, heard. It has never, since its foundation, attempted to exercise such an arbitrary power. Moreover there was neither protest nor payment in that case; there was nothing, therefore, to which the language referred to could apply, and the expression was doubtless used inadvertently. The decree is broader than the case.

The only important question presented by this record is the legal effect of payment under protest. The plaintiff was entitled, under *Cunningham's App.*, *supra*, to subscribe for the new stock at par. The Company required him to agree to pay an additional sum at a future time for the privilege of subscribing. This bonus, as it was called, was to be added to the surplus fund. This, however, is not material. He signed the

contract to pay the additional sum under protest, and paid under protest. This suit was brought to recover back the money thus demanded. This is the whole case.

It will be observed there was nothing to interfere with the plaintiff's right to stock which he already held. It was a contract for the delivery, not of his proportion of the new stock, but of the certificates or evidence of his ownership of such stock. The stock was already his and no action of the Company could deprive him of it. He could have tendered the par of the stock and demanded a certificate. If the Company had refused to issue it, he could have brought suit and recovered its market value. If he wanted the shares he could have bought them in the market, and recovered from the Company what he paid in excess of par. One share of the stock of a business or trading corporation is the precise equivalent of every other share. Hence it is that equity does not concern itself about particular shares and a bill will not lie to compel specific performance for the sale of specific shares. *Foll's App.* 91 Pa. 484.

There is no principle of law better settled than that money voluntarily paid with a knowledge of the facts cannot be recovered back. It is unnecessary, in referring to a settled rule of law, always to state the reasons of the rule, in a judicial opinion. It is sufficient to say here that I know of no legal principle which is sustained by better reasons of public policy. If, in every instance in which a man is in doubt as to which is the safe course to pursue, he can pay under protest and then sue to recover it back, it is difficult to see where litigation is to end. The law therefore wisely holds that a voluntary payment cannot be recovered back. In the recent case of *Harvey v. Girard Nat. Bank*, 119 Pa. 212, 11 Cent. Rep. 675, the law is thus stated: "A voluntary payment of money under a claim of right cannot in general be recovered back. There must be compulsion, actual, present and potential, in inducing the payment, by force of process available for instant seizure of person or property, when the party so paying must give notice of the illegality of the demand, and of his involuntary payment. The element of coercion being essential, a mere protest or notice will not change the character of the payment, or confer of itself a right of recovery,"—citing *Feebles v. Pittsburgh*, 101 Pa. 804.

In *Harvey v. Girard Nat. Bank* there was a loss of credit, a very serious matter to a business man, by permitting a draft to go to protest. The party paid to protect his commercial honor, but we said it was not duress.

In *Neely's App.*, 124 Pa. 406, there was an attempt to set aside an ante-nuptial contract on the ground of duress. After the marriage day had been fixed, the guests invited and the caterer engaged, the husband produced an ante-nuptial contract which he requested his intended wife to sign. She protested by her tears. His reply was, "No contract, no wedding." We held there was no duress. Many other cases of a like nature could be

cited were it necessary. Those above mentioned are referred to as showing that mere embarrassment, or loss of credit, as in the *Bank Case*, or mortification, as in the *Neely Case*, do not amount to the kind of duress which the law recognizes as justifying a payment under protest. And just here it is proper to remark that the only effect of a protest in a case in which it may be legitimately applied, is to show that the payment was not voluntarily made, and that the party protesting intends to claim it back.

The law in regard to voluntary payments was well and concisely stated by Chief Justice Lewis in *Hospital v. Philadelphia County*, 24 Pa. 229: "A voluntary payment of money under a claim of right cannot, in general, be recovered back; but it has been held that when a party is compelled by duress of his person or goods to pay money for which he is not liable, it is not voluntary but compulsory; and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. *Aslley v. Reynolds*, 2 Str. 918; *Preston v. Boston*, 12 Pick. 14. But the threat of a distress for rent is not such duress, because the party may replevy the goods distrained, and try the question of liability at law. *Knibbs v. Hall*, 1 Esp. 84. The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable. *Brown v. McKinnally*, 1 Esp. 279. But the warrant to a collector, under a statute, for the collection of taxes, is in the nature of an execution running against the person and property of the party, upon which he has no day in court, no opportunity to place and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily, and maintain an action to recover it back,"—citing *Amesbury W. & C. Mfg. Co. v. Amesbury*, 17 Mass. 461; *Preston v. Boston*, 12 Pick. 14.

We have here succinctly stated the principle upon which the doctrine rests in its application to a warrant for the collection of taxes. If the demand is illegal, and the party can save himself and his property in no other way, he may pay under protest and recover it back. But if other means are open to him by which he may prevent the sale of his property; if a day in court is accorded to him,—he must resort to such means. Thus, the seizure of a man's goods under a landlord's warrant for rent that is not due, or for more than is due, would seem to be duress as much as the seizure of property for taxes; yet if the unlawful demand for rent be paid under protest, it cannot be recovered back, for the reason above stated, that the tenants can replevy the goods, and try the issue of no rent in arrear before a jury.

In *Taylor v. Board of Health*, 81 Pa. 73, it was held that a payment of taxes, imposed by an Act of Assembly which was afterwards held to be unconstitutional, was not com-

pulsory because made under a threat, express or implied, that the legal remedies to collect it would be resorted to.

In *McCrickart v. Pittsburgh*, 83 Pa. 133, it was ruled that where a party would recover back taxes he is under no legal obligation to pay, he must protest, or give notice of his intention to reclaim them.

Note v. Mitchell, 91 Pa. 114, much relied upon by the plaintiff, was the case of an unrecorded deed for certain real estate which the party, having obtained the possession of, used for extorting money from the owner of the premises. The destruction of the deed in such a case might be the loss of title, and a suit brought to recover it might not avail, as it would not necessarily prevent its destruction. This case came fairly within the doctrine of *White v. Heylman*, 84 Pa. 142, where a promissory note was given by a principal to his fraudulent agent to recover certain rights to which he was entitled, and out of which he had been defrauded by the agent, and it was held that in a suit by the equitable transferee of the note, the equities between the original parties could have been inquired into.

Union Ins. Co. v. Allegheny, 101 Pa. 250, was the case of the payment of executions issued to sell lands for taxes, when the lien of the taxes had previously been discharged by a sheriff's sale. Held, that the payment was voluntary. Two reasons were given. One was that the execution could not take from the company the possession of the land; and the other was, that there might have been an application to a court of equity before the sale. It was said by Mr. Justice Mercer: "No immediate and urgent necessity existed for the payment of the taxes to protect the property of the plaintiffs. Its goods were not about to be seized."

In *Pebbles v. Pittsburgh* there was a street assessment against plaintiff's real estate, under an Act of Assembly which this court subsequently held to be unconstitutional. The plaintiff paid his assessment under protest after notice that a *scire facias* would be issued to collect it. Held, (a) that his payments having been voluntary, could not be recovered back, and (b) that his notice and protest at the time of his payments gave him no higher right.

In *Shaw v. Allegheny*, 115 Pa. 48, 6 Cent. Rep. 167, it was held that a taxpayer who has invoked the aid of a court of equity in vain to restrain the collection of a tax by a sheriff's sale of the real estate taxed, the lien of which has been devested by a prior sheriff's sale, does not become a volunteer in the payment of said tax. It was said by Mr. Justice Sterrett, delivering the opinion of the court: "Plaintiff's property having been levied on and advertised by the sheriff, he appealed to the equity side of the court for relief, but it was denied, and he was thus compelled either to submit to a sale of his property, by which his title thereto might be imperiled, or pay the taxes and costs. On the eve of the sale he chose the latter alternative, and paid the city's unjust demand under protest. In a legal sense was this a voluntary payment? We think not."

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In *Union Ins. Co. v. Allegheny*, 101 Pa. 250, it is said of the insurance company, which was similarly circumstanced, except that it did not apply to the court for redress, that by application to the equitable powers of the court or by bill in equity, execution might have been stayed and the claim removed from the record. That is just what plaintiff in this case endeavored to do, but without success; and therein is the distinction between that case and this. Relief in the form suggested in that case was asked, but it was refused, as we think, erroneously, and plaintiff was compelled to choose one of the two alternatives above mentioned. If there is anything against which equity should relieve, it is an act of injustice and oppression, such as the city was proceeding to commit by exposing plaintiff's property to sale on liens which had been previously devested by sheriff's sale."

It would exceed the reasonable limits of a judicial opinion, and serve no useful purpose, were I to attempt to review the vast mass of authorities cited upon either side. Nor is it necessary to go outside of our own State for authority. We have abundant cases of our own which rule the question.

Applying the law as we find it to the facts of this case, we are of opinion there was no duress. It is a duress either of person or goods that constituted the coercion. It is not pretended there was a duress of person; nor was there anything to show duress of goods. There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress. It is true, the denial of the right placed the plaintiff in a "dilemma," to use the expression of *Judge Hare in Dawson's Case*. But if we adopt the principle that whenever a man is placed in a position in which the law is doubtful, and he is compelled to choose between two paths, in other words to decide between conflicting views of the law, he is to be considered as under duress, we shall certainly multiply litigation, even if no other end is accomplished.

It is fair to test this question by supposing the Company to have done what it is alleged they threatened to do. Suppose the plaintiff had tendered the Company the par of the new shares to which he claims he was entitled; that the Company had declined to accept it and had sold the right to subscribe for a corresponding number of shares. How would this have affected the rights of the plaintiff? The Company could no more have sold his stock than they could have sold his house. If he had a right to certain shares by paying \$10 each therefore, that right could not have been devested by a sale of them by the Company, nor by any other action on its part. His rights as a stockholder were fixed by the law; a certificate would have added nothing to them; it would have been evidence, nothing more, that he owned stock, but that already appeared upon the books of the Company. The duress, if any, was not of a thing, of goods or chattels, but of an incorporeal right. Had the stock been sold he would have had no contest with the purchaser as he would have necessarily had if a corpo-

real thing, or the title to a corporeal thing, had been sold accompanied by a delivery of possession. He had to do only with the Company, and after tender of the par could have brought his suit and recovered, as before stated, the market value of the stock, and if he wanted shares, with the money thus recovered, could have bought a corresponding amount of other shares.

It was urged, however, that this case is upon all fours with *Mots v. Mitchell*, *supra*, where there was duress of an unrecorded deed, while in the case in hand there was duress of stock. This argument involves the assumption that a certificate had been issued for the new shares, which certificate the Company unlawfully withheld from the plaintiff. In point of fact the plaintiff never had a certificate for the new shares, for none had been issued. The plaintiff had a right to demand a certificate for them upon payment of the par, and to sue them for a refusal, as before stated. That there could not be duress of this right is too plain for argument. There was not duress of person or goods; there was simply the denial of a right; a refusal to issue shares of stock to which the plaintiff was entitled, and for which refusal he had a full, complete and convenient remedy at law. We may concede that the action of the Company placed him in a "dilemma;" he had to choose between two roads, neither of which he may have

regarded as safe. In other words, he was uncertain as to his legal rights under the scheme proposed by the Company. The "dilemma" was the uncertainty of the law. There was no other pressure or duress that caused the payments. However great the uncertainty of the law may be in particular cases it has never been supposed to amount to duress of either person or goods. It was nothing more than is experienced by every lawyer in the course of his practice. He is often called upon to advise where the law is uncertain, and in all such cases the client must take the risk.

We attach little importance to the suggestion that the Company was acting in a fiduciary capacity. This was a matter really between the stockholders, and they were evidently dealing at arm's length. The corporate organization was the means by which their scheme was carried through.

Fortunately the plaintiff suffers no injury by the affirmance of this judgment. He receives his proportion of the new shares at the same price at which they were issued to the other stockholders. It is true he does not get shares at \$10 for which others paid twenty, but his equity in this respect is not strong.

We find no error in this record.

Judgment affirmed.

Sterrett and Clark, JJ., dissent.

NEBRASKA SUPREME COURT.

Carlos C. BURR *et al.*, *Plffs. in Err.*,

Milton F. LAMASTER.

(....Neb.....)

*1. Where a person purchases a vacant lot, which supports the half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a previous party-wall agreement entered into by his grantor, obliged to pay a part of the costs of the wall in order to use it, such agreement and wall constitute an incumbrance.

*3. A covenant against incumbrances covers incumbrances unknown to the purchaser, as well as those known.

(November 5, 1890.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover for an alleged breach of a covenant of warranty contained in a certain deed of real estate. *Reversed.*

*Head notes by NORVAL, J.

NOTE.—Party-wall.

See *Heartt v. Kruger* (N.Y.) 9 L. R. A. 13; *notes to Fowler v. Saks* (D. C.) 7 L. R. A. 649; *Matthews v. Dixey* (Mass.) 5 L. R. A. 102; *Everett v. Edwards* (Mass.) 5 L. R. A. 110; *Graves v. Smith* (Ala.) 5 L. R. A. 236; *Nalle v. Paggi* (Tex.) 1 L. R. A. 83. 9 L. R. A.

The facts are fully stated in the opinion. *Messrs. Pound & Burr*, for plaintiffs in error:

The party-wall agreement and wall constituted an incumbrance.

Chapman v. Kimball, 7 Neb. 399; *Post v. Campau*, 49 Mich. 90; *Frits v. Pusey*, 31 Minn. 368; *Prescott v. Trueman*, 4 Mass. 630; *Mitchell v. Warner*, 5 Conn. 527; *Carter v. Denman*, 23 N. J. L. 273; *Bronson v. Coffin*, 108 Mass. 175; *Cary v. Daniels*, 8 Met. 482; *Huyck v. Andrews*, 8 L. R. A. 789, 118 N. Y. 85.

The party-wall is an easement on lots 7 and 8. *Roche v. Ullman*, 104 Ill. 11; *Sharp v. Cheatham*, 5 West. Rep. 873, 88 Mo. 498; *Richardson v. Tobey*, 121 Mass. 457; *Dowling v. Hennings*, 20 Md. 179; *Eno v. Del Vecchio*, 4 Duer. 53; *Bloch v. Iaham*, 28 Ind. 87; *Ingals v. Palmondon*, 75 Ill. 123; *Platt v. Eggleston*, 20 Ohio St. 414; *Keteltas v. Pensfold*, 4 E. D. Smith, 134; *Savage v. Mason*, 8 Cush. 500; *Andrae v. Hazeltine*, 58 Wis. 395; *Hazlett v. Sinclair*, 76 Ind. 488; *Maine v. Cumston*, 98 Mass. 317; *Brown v. McKee*, 57 N. Y. 684.

Easements on land constitute a breach of the covenant against incumbrances.

Spurr v. Andrew, 6 Allen, 420; *Lamb v. Danforth*, 59 Me. 322; *Russ v. Steele*, 40 Vt. 310; *Wilson v. Cochran*, 46 Pa. 233; *Mitchell v. Warner*, 5 Conn. 497; *Burk v. Hill*, 43 Ind. 52; *Beach v. Miller*, 51 Ill. 206; *Kellogg v. Malin*, 50 Mo. 496; *Bronson v. Coffin*, *supra*.

The following easements have been held to be incumbrances: a railroad right of way, a

private right of way, a right to cut timber, a right to dam up water, a right to cut, drain or to lay pipes or use stairway.

Clark v. Conroe's Estate, 88 Vt. 469; *Beach v. Miller, supra*; *Gerald v. Elley*, 45 Iowa, 322; *Butt v. Riffe*, 78 Ky. 352; *Russ v. Steele*, 40 Vt. 810; *McGowen v. Myers*, 60 Iowa, 256; *Blake v. Everett*, 1 Allen, 248; *Spurr v. Andrew*, 6 Allen, 420; *Cathcart v. Bowman*, 5 Pa. 319; *Morgan v. Smith*, 11 Ill. 199; *Ginn v. Hancock*, 81 Me. 42; *Rosenberger v. Keller*, 33 Gratt. 489; *Huyck v. Andrews*, 3 L. R. A. 789, 118 N. Y. 81.

So, too, the right to use party-wall is a breach of covenant against incumbrances.

Mackey v. Harmon, 84 Minn. 168; *Giles v. Dugro*, 1 Duer, 831; *Mohr v. Parmelee*, 11 Jones & S. 320; *Rawle, Cov.* §§ 79, 191; *Fritz v. Pusey, supra*; 2 Washb. Real Prop. 4th ed. 800, 368; 3 Washb. Real Prop. 4th ed. 468, 470, 474; *Mitchell v. Stanley*, 44 Conn. 312; *Kellogg v. Malin*, 50 Mo. 496; *Bronson v. Coffin, supra*; *McGowen v. Myers*, 60 Iowa, 256; *Burk v. Hill, supra*; *Roberts v. Levy*, 3 Abb. Pr. N. S. 811.

Mr. O. P. Mason for defendant in error.

Norval J., delivered the opinion of the court:

On the 8th day of May, 1886, the defendant, Milton F. Lamaster, was the owner of lots 7 and 8, in block 40, in the City of Lincoln, and E. W. Baldwin and G. S. Baldwin were the owners of lot 9 in said block. On the said day the said Lamaster and the said Baldwins entered into the following contract for a party-wall between said lots 8 and 9: "Articles of agreement made and concluded this eighth day of May, 1886, by and between E. W. Baldwin and G. S. Baldwin, party of the first part, and Milton F. Lamaster, party of the second part, witnesseth: That whereas, said parties of the first part are the owners of lot 9, block 40, in the City of Lincoln, in the County of Lancaster, and State of Nebraska; and whereas, said party of the second part, the owner of lot 8, block 40, in the said City of Lincoln, which lot joins said lot 9 belonging to said first parties on the west side; and, whereas, said first parties contemplate building upon their said lot nine a three-story brick store building, and one wall of which would lie along the west of said lot adjacent to said lot eight belonging to the party of the second part: Now, therefore, it is hereby mutually covenanted and agreed by and between the parties hereunto that said first parties shall build said wall so that the center of the same shall be upon the dividing line between said lots eight and nine, in said block forty, in the City of Lincoln, Lancaster County, Nebraska, and that the same shall be and remain a party-wall for the common use of the parties hereinunto. And it is further agreed that said parties shall construct said wall in a good, durable and sufficient manner, the wall of basement being one foot, ten inches, in thickness, with a footing of concrete one foot thick by three feet wide, and a footing of large stone upon this; that the wall of the first story shall be four bricks or sixteen inches in thickness, and that the remainder of wall shall be three bricks or thirteen inches in thickness; that said wall shall contain flues properly built and ar-

ranged for the accommodation and use of the party of the second part; that there shall be, at the height of each story proper, joist holes left in said wall and in the west side thereof, for the accommodation of the party of the second part; and that said holes shall be filled with bricks set on end so they can be taken out when required; and that said holes shall be made directly opposite to the ends of the joists of said building to be erected by the parties of the first part. It is also further agreed that in case said first parties do not build on the whole of said lot 9, and that their wall does not extend to the full depth of lot 9, and if, at any time, either of the parties hereinunto desires to extend said party-wall, they shall be at liberty to do the same subject to all the terms and conditions of this contract as to thickness and character of wall, and as to the rights and privileges of both parties hereinunto. It is also mutually agreed that, when the party of the second part shall join to, or make use of, said party-wall, he shall pay to said first parties for the same a sum not exceeding the first cost thereof, or the portion thereof so used, to be determined at that time by two disinterested persons or arbitrators, one to be chosen by the party of the first part, and one by the party of the second part, and in case of disagreement these two arbitrators shall choose a third person as referee, and the decision of these three persons, as to the value of said wall, shall be final. And in case of the extension of said party-wall by either of the parties hereinunto, then the other party shall, upon his joining to or using said wall, pay to the party building the same one half the value thereof, the same to be determined as hereinbefore provided. It is further agreed by and between the parties hereinunto that the several covenants and agreements herein contained shall extend to and be binding upon their several heirs, executors, administrators and assigns. In witness whereof we have set our hands this seventh day of May, 1886, in presence of, party of the first part, G. S. Baldwin; E. W. Baldwin. Party of the second part, M. F. Lamaster."

The above contract was duly acknowledged, and on the 19th day of May, 1886, was recorded in the county clerk's office of Lancaster County. During the year 1886 the Baldwins erected a brick building on lot 9, and, in pursuance of the above agreement, constructed a party-wall on the line between lots 8 and 9, one half of the wall resting on each of said lots. On February 19, 1887, Lamaster sold and conveyed to Carlos C. Burr and Lionel C. Burr said lots 7 and 8. The deed contains the following covenants: "The said Milton F. Lamaster does hereby covenant with said Carlos C. Burr and Lionel C. Burr, and their heirs and assigns, that he is lawfully seised of said premises; that they are free from incumbrance; that he has good right and lawful authority to sell the same. And said M. F. Lamaster does hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." Afterwards, the Burrs erected a six-story stone building on the lots purchased by them, but did not use said party-wall. The plaintiffs brought this suit for damages, claiming that the party-wall agreement, and the party-wall constructed by the Baldwins, constituted a breach of the covenants in the deed

The judgment of the district court was for the defendant.

The main question presented by the record is whether the party-wall agreement, and the party-wall erected in pursuance thereof, constituted a breach of the covenants of the deed against incumbrances. An incumbrance is defined to be any right to or interest in land which may subsist in third persons to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by the deed of conveyance. 1 Bouvier, Law Dict. 785; 2 Greenl. Ev. § 242; *Frita v. Pusey*, 81 Minn. 368; *Prescott v. Trueman*, 4 Mass. 627.

By the contract entered into between Lamaster and the Baldwins, the latter were authorized to construct one half of the party-wall on the vacant lot owned by Lamaster, and he covenanted for himself, his heirs and assigns to pay the Baldwins the one half of the cost of the wall whenever he should make use of the same. This agreement gave the Baldwins an interest in the nature of an easement in the Lamaster lot, and constituted an incumbrance. The obligation to pay a portion of the cost of the wall was not merely a personal covenant binding upon Lamaster, but was a burden which ran with the land and bound his grantees to pay for one half of the wall if they used the same. It was a charge upon the lot conveyed to the Burrs, and, until it was used by them, the Baldwins had a right of property in the wall.

In *Savage v. Mason*, 3 Cush. 500, the action was brought for a breach of covenants against incumbrances. In an agreement of partition of real estate between the owners it was stipulated that the center of the party-walls of each brick or stone building might be placed upon the lines dividing the lots from a contiguous lot, and that the owner of such contiguous lot should pay for one half of the wall so used by him whenever he should make use of the same. A lot set off to Benjamin Joy, one of the parties to the agreement, was conveyed by his heirs to John P. Loring and Henry Andrews, and subsequently it was by them conveyed to Ezekiel W. Pike, who erected his brick dwelling-house on the lot, placing the center of one of the walls upon the line dividing his lot from the contiguous lot. Subsequently, Pike conveyed his lot to Luther S. Cushing and wife, who in turn conveyed to the plaintiffs. The contiguous lot owned by Jonathan Mason was upon his death set off to the defendant, who erected thereon a brick dwelling, in which the party-wall was used. The plaintiff sued upon the covenant for one half of the value of the party-wall. The court in the opinion says: "A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. The liability to perform and the right to take advantage of this covenant both pass to the heir or assignee of the land, to which the covenant is attached. This covenant can by no means be considered as merely personal or collateral and detached from the land. There was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns. It has direct and immediate ref-

erence to the land. It relates to the mode of occupying and enjoying the land. It is beneficial to the owner as owner, and to no other person. It is, in truth, inherent and attached to the land, and necessarily goes with the land into the hands of the heir or assignee." Among the many decisions sustaining the same proposition we cite *Roche v. Ullman*, 104 Ill. 11; *Sharp v. Cheatham*, 88 Mo. 498, 5 West. Rep. 373; *Richardson v. Tobey*, 121 Mass. 457; *Bronson v. Coffin*, 108 Mass. 175; *Platt v. Eggleston*, 20 Ohio St. 414.

In the case of *Sharp v. Cheatham*, *supra*, Roach & Stitt and Austin Elliott, being the owners respectively of adjoining lots in the Town of Warrensburg, Mo., on July 7, 1868, entered into a written agreement, by which Roach & Stitt agreed to erect a party-wall on the line between the two lots, and Elliott agreed that, when he should use said wall, he would pay to the other parties one half of so much of the wall as he should join to. Subsequently Roach & Stitt erected a wall along the line between the lots, and six inches on Elliott's lot, for ninety feet in length. Afterwards Elliott erected a building on his lot, using the party-wall. Subsequently Roach & Stitt conveyed their lot to one Sharp, and shortly thereafter Elliott conveyed his lot to Cheatham, who erected thereon a brick extension of the building previously erected by Elliott, and joined the same with the party-wall, using thirty feet in length and sixteen feet in height. Suit was brought to recover from Cheatham the cost of one half of the wall used by him. It was held that the effect of such an agreement was to create cross-easements as to each owner, and that the one who purchased the lot with notice would be bound by his grantor's agreement to pay one half the cost of the party-wall upon using it.

The question was again before the same court in March, 1886, in the case of *Keating v. Korfhage*, reported in 88 Mo. 524. It was a suit to enforce the provisions of a party-wall agreement similar to the one in the case at bar. We quote from the syllabus of that case: "An agreement made between adjoining owners in relation to a party-wall erected on the division lines of their lots is binding on the parties, and creates an equitable charge, easement and servitude upon the lots built upon." There are cases holding that a party-wall agreement like the one before us is merely personal, binding alone upon the parties to it, and does not attach to the land; but the weight of the decisions in this country is to the effect that it attaches to and is a charge upon the land.

A case similar in its facts to the one at bar is *Mackey v. Harmon*, 34 Minn. 168. One Hurlburt and the defendant Harmon, owning adjoining lots in Minneapolis, entered into a written agreement that Hurlburt might erect a party-wall on the dividing line between the lots, so that one half of the wall should stand on each lot, and that Harmon should have the right to join to and use the wall, by paying one half of the value of so much thereof as he should use. The agreement was acknowledged and recorded. Hurlburt erected the party-wall according to the agreement, and afterwards Harmon conveyed his lot to the plaintiff Mackey, by a deed containing covenants against incumbrances.

and Mackey conveyed one half of the lot to his co-plaintiff Legg, which deed contained like covenants. The plaintiffs, in order to use the wall, paid to Hurlburt \$850, being one half of the value of the wall used by them. Suit was brought against Harmon on his covenants against incumbrances. The trial court held that the party-wall agreement did not constitute a legal incumbrance. The case was reversed by the supreme court. Berry, J., in delivering the opinion of the court, says: "The easement in the plaintiff's land, in favor of and appurtenant to Hurlburt's, is a right or interest in a third person in the former to the diminution of its value, and therefore an incumbrance within the authoritative definition before given. The existence of the incumbrance does not depend upon the extent or amount of the diminution in value. If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered. It follows that, in the case at bar, the existence of the right in plaintiffs' land conferred upon, and as appurtenant to, Hurlburt's land, was an incumbrance, and that therefore the covenant against incumbrances in Harmon's deed to plaintiff Mackey is broken."

The Supreme Court of Iowa, in *Bertram v. Curtis*, 81 Iowa, 46, held that where the owner of a vacant lot on which rests one half of a neighbor's wall conveys the same with a covenant of warranty against incumbrances, the existence of such wall is not a breach of the covenant. This case is not an authority in point. An examination of the reported case shows that it is based upon a statute of that State, which confers the right to one who is about to erect a building contiguous to the lot of another to construct one half of the wall on his neighbor's lot, and gives the latter the right to make use of the wall, as a party-wall, by paying one half of the expense of constructing the same. Under such a statute, the existence of a party-wall would not be an incumbrance. The covenant is presumed to have been made with reference to the provisions of the Statute. As we have no law in this State regulating party-walls, it is obvious that the decision in *Bertram v. Curtis* is not applicable.

In *Mohr v. Parmelee*, 11 Jones & S. 320, it was held that a party-wall resting upon the land of adjoining owners is not an incumbrance. In that case it appears that the party-wall was constructed wholly on one of the two adjoining lots, with the right granted to the owner of the

other contiguous lot to use the same as a party-wall. It was held, both in the opinion and syllabus, that such right constituted an incumbrance upon the lot on which the wall stood. It is obvious that what is said by the court about party-wall constructed upon the lots of adjacent owners not being an incumbrance is mere *obiter dicta*, and was not pertinent to any question necessary to be decided in the proper determination of the case.

In *Hendricks v. Stark*, 87 N. Y. 106, it was held that "party-wall creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal incumbrance." That was an action to enforce the specific performance of a contract for the sale of real estate. Stark refused to complete his purchase on the ground that two of the walls of the building on the premises were party-walls, which supported the buildings on adjoining lots. These walls stood part on the premises purchased and part on the adjoining lots. It is doubtless true that a party-wall, between two buildings, owned by different persons, would not constitute a breach of a covenant against incumbrances, for the owners have a community of interest in the wall, each having the right to support his building by that part of the wall owned by the other. It is difficult to see how a purchaser of one of the buildings and the lot on which it stands could be damaged by the existence of the party-wall, as the easement of support is mutual and reciprocal. But where one purchases a vacant lot which supports the half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a previous party-wall agreement, obliged to pay part of the costs of the wall in order to use it, such agreement and wall is an incumbrance. The plaintiffs offered to prove at the trial that they did not know that the wall rested upon any part of lot 8. This testimony was excluded, and we think properly so. Whether or not the plaintiffs had such knowledge is immaterial to their right of action. A covenant against incumbrances covers those unknown as well as those known at the time of the purchase. *Barlow v. McKinley*, 24 Iowa, 69; *McGowan v. Myers*, 60 Iowa, 256; *Burk v. Hill*, 48 Ind. 52; *Huyck v. Andrews*, 113 N. Y. 81, 3 L. R. A. 789; *Herrick v. Moore*, 19 Me. 313; *Prichard v. Atkinson*, 3 N.H. 335; *Clark v. Conroe's Estate*, 38 Vt. 469; *Kellogg v. Malin*, 50 Mo. 496; *Hubbard v. Norton*, 10 Conn. 422; *Parish v. Whitney*, 3 Gray, 516; *Long v. Moler*, 5 Ohio St. 271.

The judgment of the District Court is reversed, and the cause remanded for further proceedings. The other Judges concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Adrian F. GORDON

v.

Mary B. CUMMINGS *et al.*

(.....Mass.....)

1. To entitle one to recover damages

NOTE.—Negligence, basis of liability.
The basis of liability in negligence cases is the violation of some legal duty to exercise care. *Cusick v. Adams*, 115 N. Y. 53.
9 L. R. A.

for injuries received in falling into an elevator well on another's premises, in an action in which he relies solely on the common-law counts, he must offer evidence which will justify the jury in finding that he entered such premises by some invitation or authority from the latter, that he was injured in so doing by some want of

Where there is an opening in the sidewalk of a public street, in front of the premises of a person who uses it for his private convenience, he must exercise reasonable care and diligence, not only in

due care for which the latter is responsible in the construction or management of the portion of the premises which he was authorized to use, and that he himself was in the exercise of due care.

2. If the evidence offered by plaintiff in an action to recover damages for personal injuries is sufficient, if believed, to authorize the jury to find in his favor, the case should be submitted to them.
3. The maintenance, by tenants of the upper stories of a building, of boxes for the reception of their mail in a lower hallway thereof, which is entirely under the control of the owners of the building, will authorize the jury to find that a letter carrier who enters the hallway for the purpose of placing mail in the boxes does so by the implied invitation of such owners; and it is immaterial that the building is used for workshops and that there are no offices in it.
4. Leaving open, unguarded and unlighted after dark the entrance from a street to an elevator well, which is of the same general appearance as the entrance to a hallway leading into the building from which it is separated by a post only a foot wide, will justify a jury in finding the owners of the building, who have control of the elevator, guilty of negligence in an action against them for damages by one who falls into the well while rightfully seeking to enter the building, although his business is with a tenant occupying another part of the building.
5. A person familiar with the premises is not guilty of negligence as matter of law in falling into an elevator well by the side of the entrance to a building, into which he was attempting to go, if the place was dark and the entrance to the elevator well, which was usu-

ally guarded by a gate or chain, was at the time unprotected, and he, after stepping upon the sill, felt for obstructions and finding none concluded he was in the right place and took the next step, which precipitated him to the bottom of the well.

(November 26, 1890.)

REPORT from the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence, in which a verdict had been directed for defendants—if the order was correct the verdict to stand, otherwise a new trial to be granted. *New trial granted.*

The facts sufficiently appear in the opinion.

Mr. John D. Long, for plaintiff:

Plaintiff was not a trespasser (*Parker v. Barnard*, 185 Mass. 116), nor uninformed, as in *MoIntire v. Roberts*, 4 L. R. A. 819, 149 Mass. 450.

He entered defendant's building under an invitation and in the discharge of his duty.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368; *Davis v. Central Cong. Society*, 129 Mass. 367; *Looney v. McLean*, Id. 33-36; *Learoyd v. Godfrey*, 188 Mass. 315.

Whether or not plaintiff was exercising due care was a question for the jury.

Wheelock v. Boston & A. R. Co. 105 Mass. 208.

Previous knowledge of existence of dangerous condition is not conclusive of lack of due care.

Looney v. McLean, 129 Mass. 83, and cases cited.

making, but in keeping it safe and secure. *Dickson v. Hollister*, 123 Pa. 421.

A traveler has a right to assume that, not only the public, but private owners, have performed their duty, unless there is something reasonably apparent to give him notice or cause some apprehension of danger. *Ibid.*

Liability for negligence in leaving a ladder on a narrow sidewalk in a gangway where people were accustomed to pass is not excused by the fact that the gangway was private property belonging to other persons, and was dangerous. *Clarke v. Rhode Island Electric Lighting Co.* 16 R. I. —.

Where a police officer in pursuit of a disorderly person fell over the unprotected edge of a lot, which had been left as a result of the city's act in grading down the street, the owner of the lot is not liable for injuries sustained by his death. *Woods v. Lloyd* (Pa.) Nov. 5, 1888.

No recovery can be had against the owners of the premises for the death of a watchman in the employment of a private detective agency, by falling into an area from an alley through which it was his duty to pass hourly at night, where the area was separated from the alley by a stone coping seven inches high and two feet wide, and from its location between buildings, which came out flush with the alley, he could always determine where it was, even on a dark night, and there is nothing to show how he came to fall therein. *Bond v. Smith*, 113 N. Y. 878.

An area three feet wide and eight feet deep, between the rear of a building and an alley which is used only by persons having business with the rear ends of buildings abutting thereon, and almost exclusively during business hours in the daytime, into which it is impossible for anyone to fall from the street without going over a stone coping seven inches high and two feet wide, while the sides are 9 L. R. A.

inclosed by the walls of buildings,—is not a nuisance, and the owner is not liable for negligence in leaving it in that condition. *Ibid.*

A woman who entered a public dining-room by the usual door, to which she was accustomed, and, after dining at a table further in the rear than that at which she usually took her meals, opened a door in the side of the apartment, for the purpose of retiring therefrom, and was precipitated down a flight of stairs leading to the cellar, cannot recover against the keeper of such dining-room. *Gaffney v. Brown*, 150 Mass. 470.

Duty and liability of landlord to keep premises in safe condition. See notes to *Perez v. Raybaud* (Tex.) 7 L. R. A. 620; *Schmidt v. Bauer* (Cal.) 5 L. R. A. 580.

In order to render the owner of property liable for injuries sustained by a person coming upon the property the person injured must have come upon the premises by invitation of the owner, either express or implied, as where a customer enters a shop for the purpose of purchasing goods. *Freer v. Cameron*, 4 Rich. L. 223; *Ackert v. Lansing*, 50 N. Y. 646; *Nave v. Flack*, 80 Ind. 205; *Chapman v. Rothwell*, El. Bl. & El. 168.

Where a man invites the public to use a part of his land by connecting it with a sidewalk, he must exercise due diligence to keep it in a reasonably safe condition. *Tomle v. Hampton*, 129 Ill. 379.

A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or impliedly induces persons to enter on or pass over his premises he thereby assumes an obligation that they are in safe condition. *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 378; *Nicholson v. Erie R. Co.* 41 N. Y. 525.

No duty owed to trespassers.

The owner of a private building being erected on a private lot owes no duty to trespassers or idlers,

It is negligence to allow such an unguarded exposure as the one in this case to exist.

Davis v. Central Cong. Society, 129 Mass. 367.

Defendants had not let the whole building and were so far the occupiers of the building that they were liable. It was "their duty" and they had "the right without the consent of the tenants" to make the elevator entrance safe.

Mellen v. Morrill, 126 Mass. 545; *Kirby v. Boylston Market Asso.* 14 Gray, 249; *Readman v. Conway*, 126 Mass. 874. See *Larus v. Farsen Hotel Co.* 116 Mass. 67, a case very much in point; also *Elliott v. Pray*, 10 Allen, 878.

Mr. William A. Gaston, for defendants: The opening in the wall of the building for access to the elevator from the street was outside the limit of the street, and the plaintiff did not enter by the invitation of the defendants.

McIntire v. Roberts, 4 L. R. A. 519, 149 Mass. 450.

This case, in the absence of evidence of the control of this entry, and of evidence showing knowledge by the defendants of the use made of it, resolves itself simply into the case of one towards whom the defendants owe no obligations, who falls into an excavation made on the property of the defendant, and must be decided by *Howland v. Vincent*, 10 Met. 871.

The fact that the defendants knew that the doorway into 619 Albany Street would be used, and that a person in the exercise of due care might in the night-time, while intending to use it, fall into the unguarded elevator shaft, does not make them liable.

or to persons visiting the premises merely for their individual benefit or for curiosity, other than that he shall inflict upon them no willful or wanton injury. *Campbell v. Lunsford*, 33 Ala. 512.

A land owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty. *Frost v. Eastern R. Co.* 4 New Eng. Rep. 527, 64 N. H. 220.

A trespasser ordinarily assumes all risk of danger from the condition of the premises, and in order to recover must show that an injury was wantonly inflicted, or that the owner, being present, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Clark v. Manchester*, 62 N. H. 577; *State v. Manchester & L. R. Co.* 62 N. H. 623; *Morgan v. Hallowell*, 57 Me. 375; *McAlpin v. Powell*, 70 N. Y. 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76; *Gavin v. Chicago*, 97 Ill. 66; *Wood v. Independent School Dist.* 4 Iowa, 27; *Gramlich v. Wurst*, 86 Pa. 74; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 96 Pa. 393; *Gillespie v. McGowan*, 100 Pa. 144; *Mangan v. Attenton*, L. R. 1 Exch. 239; *Frost v. Eastern R. Co.* 4 New Eng. Rep. 523, 64 N. H. 220.

In cases where certain duties exist infants may require greater care than adults, or a different care, but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike. *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461; *Frost v. Eastern R. Co.* 4 New Eng. Rep. 529, 64 N. H. 220.

Merely suffering or permitting the use of a lot by children, and abstaining from driving them off, is not an invitation which would impose any duty or responsibility for the condition of the lot. *Davis v. Central Cong. Society*, 129 Mass. 367; *Morrissey v. Eastern R. Co.* 126 Mass. 877; *Severy v. Nickerson*, 130 Mass. 306; *Carleton v. Franconia I. & S. Co.* 99 L. R. A.

Howland v. Vincent, *supra*; *Reardon v. Thompson*, 149 Mass. 267.

Plaintiff was not in the exercise of due care. When he did not find, when he reached out his hand, the protection from the danger which he knew existed, he should not have gone ahead, and he was careless in proceeding before he had ascertained where safety and where danger were.

Taylor v. Carew Mfg. Co. 1 New Eng. Rep. 210, 140 Mass. 150; *Gilbert v. Guild*, 4 New Eng. Rep. 648, 144 Mass. 601, 604; *Fletcher v. Fitchburg R. Co.* 3 L. R. A. 743, 149 Mass. 127, 132, 133; *Probert v. Phipps*, 149 Mass. 258; *Gaffney v. Brown*, 150 Mass. 479; *Bond v. Smith*, 113 N. Y. 878; *Wilkinson v. Fairrie*, 9 Jur. N. S. 280.

Defendants' obligations would not extend to persons entering in the darkness. The two openings were very dissimilar in appearance. The difference between them was plain and obvious. The building was let for manufacturing purposes only, and not for offices. The workmen would have no reason for entering after dark; the building was to be entered by no purchasers. It could not have been anticipated that persons might attempt to enter after business hours. In other words, there were no reasonable grounds for anticipating a mistake in the opening, for, during all hours when it could be expected that persons might lawfully enter, there was no possibility of mistake. A mistake could only be made when a use was made of the building not contemplated.

Zoebisich v. Tarbell, 10 Allen, 885; *Felch v. Allen*, 98 Mass. 572; *Mellen v. Morrill*, 126

Mass. 216; *Galligan v. Metacomet Mfg. Co.* 3 New Eng. Rep. 705, 143 Mass. 527.

Owner owes no duty to mere licensee.

Where a person comes upon the premises of another as a bare licensee and without invitation, and the owner passively acquiesces, he is not liable for negligence by reason of a mere defect in the premises, as such person has taken all the risk upon himself. *Cusick v. Adams*, 115 N. Y. 55.

But an owner would be liable for bringing force to bear upon the licensee's person; as by running him down without proper warning. *Byrne v. New York Cent. & H. R. Co.* 6 Cent. Rep. 302, 104 N. Y. 862; *Taylor v. Delaware & H. Canal Co.* 4 Cent. Rep. 623, 118 Pa. 162, 175; *Metcalf v. Cunard S. S. Co.* 6 New Eng. Rep. 309, 147 Mass. 66; *Batchelor v. Fortescue*, L. R. 11 Q. B. Div. 474.

A hole in a bridge constructed by a person charged with no affirmative act in relation thereto, which has existed unconcealed for several years, is not a trap rendering innocent persons subject to injury, so as to create a liability upon the person maintaining it for damage to a mere licensee of its use. *Cusick v. Adams*, *supra*.

The failure to prohibit passage over an eight-foot strip of land between two houses which have no other passage directly between them does not constitute invitation or license sufficient to charge the owner with liability for injuries to a person going thereupon from falling into an excavation. *Reardon v. Thompson*, 149 Mass. 267.

One owes no duty to a mere licensee to keep safe his premises. See *note to Schmidt v. Bauer* (Cal.) 5 L. R. A. 580; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 257; *Blackmore v. Toronto Street R. Co.* 39 U. C. Q. B. 173.

As to the distinction between what is due to one on the premises by invitation and a mere licensee,

Mass. 545; *Mistler v. O'Grady*, 132 Mass. 189; *Gaffney v. Brown*, 150 Mass. 479.

The landlord is under no common-law liability to persons entering his building in execution of a government duty.

Parker v. Barnard, 185 Mass. 116.

A licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole which is not concealed otherwise than by darkness of night is a danger which a licensee must avoid at his peril.

Zoeblisch v. Tarbell and Reardon v. Thompson, *supra*.

Devens, J., delivered the opinion of the court:

In order that the plaintiff should maintain his action, in which he relied solely on the common-law counts of his declaration, it was necessary that he should offer evidence which would have justified the jury in finding that he entered or attempted to enter upon the defendants' premises by some invitation or authority from them; that he was injured in so doing by some want of due care for which they are responsible in the construction or the management of the approach to the entrance he was authorized

to use, by means of which neglect he was injured, and that he was himself in the exercise of due care. It is not necessary to decide that upon the evidence offered the jury should have found in the plaintiff's favor on these three propositions. If it was sufficient, if believed, to have authorized them so to do, the case should have been submitted to them.

The plaintiff was a United States letter carrier; the place which he sought to enter was known as No. 619 Albany Street. It was always open, having no door to close it. Ascending from its threshold, which itself constituted the first step, was a flight of four or five steps to a door which opened upon an entry or hallway, in which were three or four boxes, placed there for the accommodation of the plaintiff by the tenants of the defendants, who occupied the various stories of the building, for the reception of their mail matter. Among the rest was a box for that purpose for the mail matter of Mellish, Byfield & Co., who were the tenants at will of the defendants of the third and fourth floors of the building, and for whom the plaintiff had a letter, which he was seeking to deliver by placing it in their box. The hallway into which the plaintiff sought to enter had a flight

see *Sullivan v. Waters*, 14 Ir. C. L. 466, a case where an aperture in defendant's loft was permitted to remain unguarded.

Contributory negligence defeats recovery.

It is the duty of every person to take care of his own safety, and not to walk along in the dark without a light to disclose to him any danger. *Wilkinson v. Fairrie*, 1 Hurlst. & C. 663.

If the plaintiff's want of common care and prudence is the cause of the injury, he cannot recover damages. *Pierce v. Whitcomb*, 48 Vt. 127; *Whittaker's Smith*, Neg. 223.

A person who moves around in the dark in a strange room, into which he has entered of his own accord and without direction from the owner, is himself responsible for his own misfortune, if injured. *Bedell v. Berkey*, 76 Mich. 435.

An open hole in land, which is not concealed otherwise than by darkness, is a danger which a licensee must avoid at his peril. *Reardon v. Thompson*, 149 Mass. 267; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 383, 372; *Zoeblisch v. Tarbell*, Id. 885; *Heinlein v. Boston & P. R. Co.* 6 New Eng. Rep. 323, 147 Mass. 126; *Files v. Boston & A. R. Co.* 149 Mass. 204; *Hounsell v. Smyth*, 7 C. B. N. S. 781; *Sullivan v. Waters*, 14 Ir. C. L. 460; *Parker v. Portland Pub. Co.* 60 Me. 173.

All persons who stray about other people's premises at their own will must look out for their own safety. *Bedell v. Berkey*, *supra*.

One who occupies a part of a building assumes all risks arising from the proper and ordinary use of the remainder of the building by its other occupant, under whom he enters. Hence, where one renting a portion of a planing-mill, with the right of ingress and egress, was injured by being struck by timbers thrown from the upper story, in the ordinary course of the other occupant's business, there being no negligence on the latter's part, he had no right of recovery. *Allen v. Johnson*, 4 L. R. A. 784, 76 Mich. 31.

A stranger who comes to a manufacturing establishment on business or otherwise has no right to choose for himself his means of ingress and egress, and determine where bulky articles shall be unloaded, or to unload them without inquiry and notice; and if he does so it is at his own risk. *Bedell v. Berkey*, *supra*.

9 L. R. A.

In *Forsyth v. Boston & A. R. Co.*, 103 Mass. 513, a passenger on defendant's cars at night, instead of walking along the platform voluntarily stepped from it intending to go obliquely across the track to the highway, and when he stepped off fell into a cattle guard across the track and was injured; the darkness was such that he felt with his foot to find the edge of the platform but did nothing to ascertain what would be found on stepping from the platform. It was held that he could not recover.

Accidents at elevator shafts.

One who maintains an elevator shaft opening to a sidewalk on a city street, but separated therefrom by a stone lintel three inches high and eighteen inches thick, the opening being five or six feet wide, is not liable for injuries to a passer-by who is pushed into such shaft by reason of the backing up on the sidewalk of a horse attached to a wagon being unloaded in front of the premises. *McIntire v. Roberts*, 4 L. R. A. 519, 149 Mass. 450.

A tenant approaching an elevator shaft kept in the building for the use of tenants, and operated by the landlord or his servants, is not, as matter of law, guilty of contributory negligence in stepping through the door of the shaft without looking or listening for the elevator, where it is opened on the outside by a boy who has often had charge of the elevator, and whom the defendant supposes to be on the elevator, the elevator shaft not being lighted. *Tousey v. Roberts*, 114 N. Y. 812.

In an action by a passenger against a hotel proprietor for injury caused by the fall of a hydraulic elevator, where it is shown that the elevator had all known safety appliances, and defendant had no knowledge or reasonable cause to believe there was any danger from air coming from the street pipe, he would not be liable, even if he knew that the water was being shut off from the street main. *Shattuck v. Rand*, 2 New Eng. Rep. 373, 142 Mass. 83.

Where plaintiff, while lawfully in defendant's warehouse, fell into an elevator well which he knew of and could have avoided, his testimony that, when near the elevator, something fell and struck him and he fell upon his back, without proof that anything was out of place, or other evidence of negligence, will not make defendant liable. *Huey v. Gahlenbeck*, 121 Pa. 233.

of stairs which led to the next story. The defendants occupied the building, and there was nothing which tended to show that this hallway was leased or that they did not have the entire management of it. A watchman also employed by them had the general charge of the building during the night, taking control of it from six in the evening until six in the morning. How long these letter boxes had been in the entry, or how often the plaintiff had visited them on his duty as a letter carrier does not fully appear by the report, but their existence in so public a place, which was, so far as appears, entirely in the control of the defendants, could not have been without their knowledge, and, whatever the rights of the tenants or their servants may have been in the entry, afforded some evidence that the boxes were there by their authority and permission, and that the letter carrier in visiting them in the performance of his duty came there by the implied invitation of the defendants for the convenience of their tenants, or at least that he was authorized to believe that he came there by such an invitation. While the building was intended for work-shops and while there were no offices in it, it was still one where, to some extent, at least, the tenants received letters, and there was a preparation and adaptation of the entry or hallway for the plaintiff's use which might well lead him to believe that he might safely enter in the performance of his duty. *Baker v. Barnard*, 135 Mass. 116; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368; *Leary v. Gaffney*, 138 Mass. 315; *Larue v. Farren Hotel Co.* 116 Mass. 67.

If the plaintiff was authorized and induced to enter this hallway there was also evidence of a want of due care in the management of the elevator well down which the plaintiff fell. It opened directly upon the street about twenty inches back from the line of the street by a doorway framed in granite, its threshold being some eight inches high from the flagging of the street. Separated from this elevator doorway by a stone post one foot wide was the entrance of about the same dimensions and construction which led up to the hallway of which we have already spoken. Its threshold was at the same height as that of the elevator entrance, and was a continuation of it, but was not quite so wide. The elevator entrance was provided with an up-and-down sliding door, which, when down, closed the entrance, and with a chain, which, when hooked, hung loosely across it. The evening when the accident occurred the elevator door was opened and the chain unhooked. It was quite dark, there was no light on the outside of the building, although there was a gas light at about a distance of sixty feet and an electric light at a distance of a hundred and twenty feet. The sidewalk in front of the building did not extend in front of either the elevator entrance or that of number 619, the intervening space being the flagging of the street so that teams could back up to both of these entrances. Upon this state of facts there was evidence of a want of due care in leaving the elevator entrance thus exposed, and the plaintiff's testimony tended to show that while seeking to enter at number 619 he stepped into the elevator entrance and was precipitated down the well. He had a right to

suppose that when seeking to enter when he had a right he would not be exposed to this danger, and that an entrance by its side, easily to be mistaken for it, would not be left open and uninclosed by any barrier at a time when it was not in use. Without any light directly upon it, with the door open directly upon the elevator well with the chain unhooked, it might certainly be held by a jury that there was a carelessness in its management which would expose anyone to serious danger who was lawfully approaching the entrance to the hallway. There was also evidence that for this condition of things the defendants were responsible. While their tenants had the authority to use this elevator it was their duty to see that while not in use by them it was in a safe condition for those who were passing in the street or lawfully seeking access to their building. They furnished the power by which the elevator was run, although the tenants used it for freight purposes during the day. But the defendants' servant, the watchman, was, in the language of the report, "supposed to shut the elevator at six o'clock at night." By this we understand that it was his duty so to do, and on the night of the accident he was at the building before the accident happened. It was thus apparently by the neglect of their own servant that the elevator entrance was in the exposed condition in which it was found. While the defendants permitted their tenants to use the elevator during the day, they had not let to them nor relinquished to them the control of it. They had not let the whole of their building, but were themselves in occupation of the part that was not let, and, so far as appears, had full authority to make the well safe. It is said by defendants that the hole into which plaintiff fell was not on the premises let to Byfield & Co., and that there can be no liability on their part for an injury which did not arise from any defect either of the leased premises or premises over which the tenants had the right of inviting customers, so that even if they would be liable to plaintiff for an injury if he had received it in the hallway by a defect existing there, they are not liable for an injury incurred by reason of any negligence in the management of an excavation not on the leased premises. This is to limit the liability of defendants quite too narrowly. If the defendants had induced or invited, through their tenants, the plaintiff to enter No. 619 Albany Street, so far as the access thereto was under their own control, it was their duty to see that this access was not endangered by their negligence in the management of the other parts of their building, in order that a person rightfully seeking to enter should not be exposed to the liability of a fall into an opening so constructed that it might well be mistaken for the proper entrance. *Elliot v. Pray*, 10 Allen, 385; *Readman v. Conway*, 128 Mass. 374; *Larue v. Farren Hotel Co.* *supra*.

There remains the question whether the plaintiff offered any sufficient evidence of due care. He knew the character and description of the premises; he had passed them many times and was aware that the two entrances were close to each other; but his previous knowledge of their dangerous proximity is not conclusive that he was not exercising due care

in attempting to enter. *Looney v. McLean*, 129 Mass. 83.

He describes the care with which he moved, his feeling his way, his effort to ascertain when he stepped upon the threshold that he was in the right entrance. To some extent he might calculate that at that hour either the chain would be across or the door closed at the elevator entrance, and putting his knee and hand forward discovered neither. The character of his conduct depending upon this and other cir-

cumstances is such that it is not possible to say, as a matter of law, that, viewed in the light of common knowledge or experience, he was lacking in due care. *Wheelock v. Boston & A. R. Co.* 105 Mass. 203.

We are therefore of opinion that the learned judge who presided was in error in withdrawing the case from the jury, and that the questions of fact involved should have been submitted to their experience and judgment.

Case to stand for trial.

ALABAMA SUPREME COURT.

MOBILE SAVINGS BANK, *Appt.*,

Kate McDONNELL *et al.*, *Respts.*

(....Ala....)

1. When a conveyance of land, made by an insolvent debtor to one of his creditors in satisfaction of an antecedent debt, is attacked by other creditors of the grantor, the grantee must show that the consideration for it was both valuable and adequate.
2. The assumption by a grantee of a debt due to a third person from his grantor, who is in failing circumstances, is a valuable consideration for a conveyance of real estate by the grantor to the grantee, within the rule that such consideration must exist to uphold the conveyance against the attacks of other creditors of the grantor; and it is immaterial

whether such third person accepts the grantee as his debtor in place of the grantor or not.

3. The assumption by a grantee of a debt due from his grantor to a third person may be relied on as a consideration to support a deed, although the consideration recited therein is the payment of cash and such recital is subsequently qualified by a statement that the true consideration was satisfaction of a debt due from the grantor to the grantee.

4. Requested charges which undertake to call the attention, and invite the consideration, of the jury to facts and circumstances developed in evidence tending to cast suspicion on certain transactions, and which are supposed to be persuasive of fraud, are properly refused as being mere arguments.

5. Where a transfer of real estate by a failing debtor in satisfaction of an ex-

NOTE.—*Conveyance fraudulent as to creditors; badges of fraud.*

That the consideration of a conveyance of land by a debtor was a debt previously discharged by decree in bankruptcy is a badge of fraud. *Newman v. Kirk*, 45 N. J. Eq. 677.

That the consideration of a conveyance of land by a debtor is overstated in the deed, and grossly inadequate as compared with the real value of the property, is a badge of fraud. *Ibid.*

That the incumbrances on property are overstated in a conveyance of land by a debtor, is a badge of fraud. *Ibid.*

A sale by a failing debtor of all his property to an irresponsible purchaser, on long and unusual credit without security, is an unmistakable badge of fraud. *Robinson v. Frankel*, 85 Tenn. 475.

Where the debtor transferred all his property, real and personal, to his children, it was regarded as a badge of fraud. *Scott v. Hartman*, 26 N. J. Eq. 87; *Venable v. United States Bank*, 27 U. S. 2 Pet. 112, 7 L. ed. 366; *Hoboken Bank v. Beckman*, 36 N. J. Eq. 83.

A conveyance by debtor during the pendency of a suit against him is a badge of fraud. *Venable v. United States Bank*, *supra*; *Stoddard v. Butler*, 20 Wend. 507; *Jackson v. Mather*, 7 Cow. 801; *Callan v. Stratham*, 64 U. S. 23 How. 477, 16 L. ed. 532; *Low v. Wartman* (N. J.) 5 Cent. Rep. 644.

Retention of possession by vendor.

A sale will be presumed simulated by the vendor remaining in possession and control of the property after the execution and date of the written transfer. *Cole v. Cole*, 39 Ia. Ann. 373.

That a debtor conveying land took from his grantee a power of attorney, retaining full control of the property and deriving all the benefit from it, 9 L. R. A.

is a badge of fraud. *Newman v. Kirk*, 45 N. J. Eq. 677.

Proof of a reconveyance without consideration to the wife of the first grantor, and of the fact that he remained in possession, claiming ownership, is prima facie evidence of fraud as to his creditors. *Cooper v. Davison*, 86 Ala. 387; *Low v. Wartman* (N. J.) 5 Cent. Rep. 644; *Twyne's Case*, 8 Coke, 80b; *Bump, Fraud. Conv.* 83; *Luers v. Brunjes*, 34 N. J. Eq. 19.

This rule will not be changed by the fact that the right thus to occupy the property conveyed is a part of the consideration of the sale. Every such secret trust is a badge of fraud. *Low v. Wartman*, *supra*; *Sayre v. Fredericks*, 16 N. J. Eq. 207.

A transfer of property by the debtor in his own interest, where he retains the control or management of it, is fraudulent as against a prior honest creditor. *Van Campen v. Ingram* (N. J.) 10 Cent. Rep. 679.

The law will not permit a debtor in failing circumstances to sell his land, convey it by deed without reservations, and yet secretly reserve to himself the right to occupy it for a limited time, for his own benefit. *Lukins v. Aird*, 73 U. S. 6 Wall. 73, 18 L. ed. 750.

Reserving the possession for one year free of rent, as part of the consideration for the property, was the creation of a secret trust for the benefit of the grantor to the extent of the interest reserved, and rendered the conveyance fraudulent as to creditors, and void. *Ibid.*

When a vendor remains in possession after conveyance, alleged to have been in fraud of creditors, his declarations as to his title are admissible. *Osgood v. Eaton*, 1 New Eng. Rep. 114, 63 N. H. 355.

In the case of a judicial sale, no inference of fraud arises from the fact that the owner whose

isting debt is attacked by creditors, the question of the sufficiency of the consideration for the transfer should be submitted to the jury.

6. Declarations of a grantor who has retained possession of the land conveyed after the execution of the conveyance made during his possession, and explanatory thereof, to the effect that he held for another, are admissible on an issue as to whether or not such conveyance was fraudulent.

(April 8, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Mobile County in favor of defendants in an action brought to recover possession of a certain piece of real estate. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Thomas A. Hamilton and S. Palmer Gaillard for appellant.

Messrs. G. L. Smith and H. T. Smith for respondents.

McClellan, J., delivered the opinion of the court:

This is an action of ejectment prosecuted by the Mobile Savings Bank against Kate McDonnell *et al.*, who claimed through James McDonnell, deceased. The Bank was a creditor of John O'Donnell on July 30, 1885, at which date he conveyed the land in controversy to said James McDonnell, upon a consideration which, according to the leading recital of the deed, was \$1,644.50 in money paid; but this recital was qualified by a subsequent clause of the instrument, which is in the following lan-

guage: "This conveyance is made in payment of a debt due by said John O'Donnell to said James McDonnell for the sum of sixteen hundred and forty-four and 50-100 dollars." Subsequent to the execution of this conveyance the claims of the Bank against O'Donnell were prosecuted to judgment, and at a sale under execution issued on the judgment the Bank became the purchaser, and received the sheriff's deed to the property. It appeared in evidence that O'Donnell continued in possession of the land, exercising acts of ownership over it, up to the time of the sheriff's sale; but on the other hand, evidence was introduced which tended to explain this fact, and to show that O'Donnell's continued possession was as the agent of McDonnell. The facts above outlined, as also the deed of the sheriff to the Bank and of O'Donnell to McDonnell, were adduced in evidence by the plaintiff on the trial below, and, on the assumption that the consideration of the deed from O'Donnell to McDonnell was the payment of an antecedent debt, a prima facie case was thus made out entitling the plaintiff to a verdict without further proof, unless the defendants showed that the consideration which passed from McDonnell to O'Donnell was both valuable and adequate. *Hodges v. Coleman*, 76 Ala. 108; *Pollak v. Searcy*, 84 Ala. 259; *Roswald v. Hobbs*, 85 Ala. 78; *Morrison v. Morris*, Id. 106.

In discharging the *onus* thus cast upon them the defendants introduced evidence which tended to show that the consideration consisted of the extinguishment of the grantor's liability on two certain notes. One of these notes was

title was sold remained in possession of the real estate sold, nor is it evidence of fraud that the purchaser agreed with such prior owner that he would reconvey to him the property upon being reimbursed for all the money he had expended. *Mead v. Conroe*, 5 Cent. Rep. 216, 113 Pa. 220.

Circumstances leading to inference of fraud.

While inadequacy of consideration is not a ground of relief of itself, unless so gross as to shock the conscience, when connected with suspicious circumstances or misrepresentations of material facts, it is a strong, if not conclusive, evidence of fraud. *Cofor v. Moore*, 87 Ala. 705.

A party indebted may make a conveyance without encountering the presumption of a covinous design; but to rest entirely upon the naked assertion of payment of consideration, without any proof in support, is a circumstance leading to unfavorable inference. *Zimmer v. Miller*, 1 Cent. Rep. 702, 64 Md. 296.

The fact that the price paid for property conveyed by an insolvent debtor was less than it was worth, while it is a relevant circumstance, if true, is no evidence of fraud, unless it is so small as to make the conveyance substantially a voluntary one. *Fraser v. Passage*, 6 West. Rep. 359, 63 Mich. 551.

The presumption of good faith on a conveyance by a husband in falling circumstances to pay a debt due his wife may be overcome by circumstances supplying ground for a legitimate inference that the conveyance is a voluntary one fraudulent as to creditors, although there be no actual fraud. *Heaton v. Shanklin*, 115 Ind. 595.

Conveyance to creditor to extinguish antecedent debt.

A conveyance of a farm to grantor's sons, who have worked for him for several years, in fulfillment of a promise to pay them a certain amount each year for their labor, is not in fraud of grantor's other creditors; and the fact that the sums due to each son differed widely cannot be complained of by third parties. *Donly v. Ray* (Miss.) May 20, 1890.

If a conveyance by an insolvent overstates the amount of the indebtedness which it purports to extinguish, it is conclusive evidence of fraud, unless explained; but a mere mistake in overstating the amount will not make it fraudulent. *Freybe v. Tiernan*, 76 Tex. 283.

If any portion of a debt alleged to constitute the consideration of a conveyance by a debtor to a relative did not exist, or if, having once existed, it had been previously paid in whole or in part, the conveyance is fraudulent. *Brasher v. Jamison*, 75 Tex. 130.

If the indebtedness is in part fictitious, whereby a larger amount of property is conveyed than is reasonably necessary to pay or secure the debt, the whole conveyance is void. *State v. Excelsior Dyeing Co.* 2 West. Rep. 430, 20 Mo. App. 31.

The common-law right of an embarrassed or even insolvent debtor to prefer one or more creditors to the exclusion of all others still exists in Illinois, except as it is restricted by the Statute governing voluntary assignments. *Cary & M. Co. v. McKey*, 40 Fed. Rep. 368.

Purchase from debtor by creditor.

A purchaser of property in good faith in extinguishment of a pre-existing debt is a purchaser for value. *Ladnier v. Ladnier*, 64 Miss. 368.

A purchase from a debtor by a creditor of more property than is necessary to pay the debt, and with knowledge of the debtor's insolvency, is fraudulent as to other creditors, where its effect is to hinder and delay the latter, although the excess

made by the grantor, indorsed by the grantee, and payable to one Kapahn. The other appears to have been a note executed by Peter Burk, indorsed by the grantor, and payable to the grantee. The Kapahn note was \$1,644.50. The agreement between O'Donnell and McDonnell, which the evidence tends to establish with respect to this note, was that the former should reduce the amount by payment to \$1,000, and that the latter should assume the payment of that balance. There was no evidence that this balance had ever been paid, or that the payee ever released O'Donnell from liability for it; but, on the contrary, it appears that the note for the reduced amount was renewed subsequent to the conveyance of July 30, 1885, by O'Donnell, and the renewed paper indorsed by McDonnell, as had been the original. It will have to be considered, therefore, that the tendency of the evidence, with respect to this liability of O'Donnell, goes no further than to afford a basis for the inference that between him and his indorser, McDonnell, the debt was to be solely that of the latter, but that they both remained bound to Kapahn; and that the consideration of the conveyance, so far as it resulted from that transaction, was the obligation of the grantee to pay this debt, which the grantor primarily, and himself as surety, owed to Kapahn. The rulings of the trial court, on instructions given and refused, raise the inquiry whether this was a valuable consideration for the conveyance. In our opinion, it was. It has been several times ruled by this court that a conveyance made in consideration of the grantee's discharging a debt due from

the grantor to a third person should be upheld when assailed for fraud on the alleged infirmity of a lack of a valuable consideration. *Estbridge v. Abrahams*, 61 Ala. 184; *Rankin v. Vandiver*, 78 Ala. 562.

It is equally well settled that the fact that the purchase money of property sold by an insolvent debtor has not been paid, but, on the contrary, time is agreed on in which it should be paid, and notes executed for its payment at such time, do not subject the transaction to an imputation of fraud or invalidate it as against creditors of the vendor. *Shealy v. Edwards*, 75 Ala. 411, 78 Ala. 176; *Caldwell v. King*, 76 Ala. 149.

It would seem to logically result from these two established propositions that a sale of property by a debtor in failing circumstances will be sustained, so far as the character of the consideration is concerned, against the attacks of creditors, when it appears that the grantee has legally obligated himself to pay a debt due by the grantor to a third person; and, on principle, it would further appear to be immaterial whether such third person had assented to the substitution or not, since in any event the grantor would have the purchaser's obligation to pay the sum agreed on. But the conclusion need not be rested on deduction from other adjudged propositions. The question itself has been the subject of judicial inquiry and determination. Thus in Indiana, under statutory provisions similar to those in Alabama, it has been held that "where a surety assumes the debt of his principal, and mortgages his real estate to secure it, and, in consideration of

was subsequently used in the payment of the debts of some of the creditors. *Willis v. Yates* (Tex.) Oct. 15, 1889.

A bona fide creditor, knowing that his debtor is embarrassed, or insolvent even, may use extraordinary haste in collecting his demand, to the extent of purchasing everything the debtor has, leaving nothing for other creditors; but he must pay a reasonably fair price for the goods or property purchased, and secure no benefit to the debtor which the law would not give him in the absence of the contract. *Leinhardt v. Frenkle*, 80 Ala. 136.

Where a creditor receives from his debtor a transfer of property exceeding in value the amount of his debt, and pays cash or gives a negotiable instrument for the excess, or advances his debtor a sum of money and leaves it subject to the latter's control, and attempts to secure its repayment, in the same transaction, by taking a mortgage on the debtor's property, the transaction is fraudulent as against other creditors, especially where the mortgage authorizes the creditor to enter into possession of and sell the goods in due course of trade. *Gallagher v. Goldfrank*, 75 Tex. 552.

A sale of a debtor's entire property to one of his creditors as an entirety, each kind of property being an integral part, should not be declared fraudulent because the parties may have placed on one kind of property a valuation materially less than its real value, if the valuation placed on the other kinds of property exceeded their value to such extent that the market value of the entire property does not exceed the consideration paid. *Chipman v. Stern* (Ala.) April 8, 1890.

Sufficiency of consideration.

A pre-existing indebtedness is a sufficient consideration to support a purchase of real estate, either at private or judicial sale; and the person so

purchasing will be regarded as a bona fide purchaser. Such transactions are, however, subject to the same tests as to good faith and regularity generally as are other contracts and sales. *McMurtree v. Riddell*, 9 Colo. 497.

Although the purchase may exceed the amount of the purchaser's debt, the fact of such excess does not invalidate the transaction, when reasonably necessary for attaining the lawful purpose of satisfying the debt; but this means, not a necessity created by the debtor's unyielding demand for cash, but a reasonable necessity arising from the nature, situation or condition of the property. *Levy v. Williams*, 79 Ala. 179.

Where a purchaser of land pays all the price but a sum which the vendor has been indebted to him, but which is barred by limitation and has not been recognized between them, the conveyance is voluntary and fraudulent as to creditors, to the extent of the amount of such barred debt; but it is valid as to the rest, where there is no showing of fraudulent intent. *Gaar v. Hart*, 77 Iowa, 597.

A purchaser from a fraudulent grantor can protect himself only by alleging and proving that he paid a valuable consideration for the property, and by showing that at the time of such payment he had no notice of the outstanding equity or fraudulent intent, and that he acted in good faith. *Weber v. Rothchild*, 15 Or. 383.

Where there is actual intent to defraud, no form of transaction can shield the property from claims of creditors, even though an adequate consideration passes; so, where a mortgage, given to secure a valid pre-existing debt, was made to hinder and delay creditors, and was received with full knowledge of the intent, it is void as against creditors, under N. Y. Rev. Stat., pt. 2, chap. 7, title 3. *Billings v. Sawyer*, 2 Cent. Rep. 143, 101 N. Y. 323.

Where an insolvent conveyed land to one of his

these acts, personal property is conveyed to him by the principal, the transaction rests upon a valuable consideration; and the conveyance cannot be set aside, unless it be made to appear that both buyer and seller were guilty of fraud." *Powell v. Stickney*, 88 Ind. 810.

In discussing a like question, *Rice, Ch. J.*, in *Reynolds v. Crook*, 81 Ala. 687, says: "We do not doubt that a valid conveyance of personal property, to provide indemnity for the sureties on a guardian's bond, may be made." But under our statutes, "it is essential to the validity of such a conveyance that at least its whole purpose should be the devotion of the property, bona fide, to the indemnification of the sureties. If a part of its purpose is that it shall avail or be used for the ease or favor of the grantor, it is void as to creditors." And in that case the conveyance was held void, because of the reservation of a benefit; while the doctrine that the assumption of liability by the surety for the debt of the grantor constituted a valuable consideration was fully recognized. That, it would seem, is the principle involved here, and it is further and more directly supported by later adjudications of this court. This agreement, with respect to the Kapahn note, in our opinion, therefore, was a valuable consideration for the conveyance. Whether it was such a consideration as could be relied on, in view of the recitals in the deed of a different consideration, is a question which the assignments of error require us to determine. The rule appears to be well settled that a consideration, differing in kind from that recited in the deed, as where the recital is of a good consideration, and it is proposed to show a valuable consideration, cannot be proved. *Houston v. Blackman*, 66 Ala. 559; *Potter v. Gracie*, 58 Ala. 307.

But it is equally well settled that, under a

deed reciting a money consideration, or a consideration resting in the payment of a debt, or any other valuable equivalent, it is competent to support the conveyance by parol proof of any consideration, however differing from the recital, which is valuable as distinguished from a merely good consideration, since thereby the effect and operation of the instrument are not changed, and the rule against varying or altering writings by parol testimony is not offended. *Wait, Fraud. Conv.* § 221; *Hubbard v. Allen*, 59 Ala. 297; *Stringfellow v. Ivis*, 73 Ala. 209; *Mobile & M. R. Co. v. Wilkinson*, 73 Ala. 286; *Manning v. Pippen*, 86 Ala. 357; *McKinster v. Babcock*, 26 N. Y. 878.

So much for the Kapahn indebtedness. As to the other debt which is relied on as constituting in part the consideration of the deed, it must be confessed that the evidence is exceedingly meager. Yet we are unable to concur with appellant's counsel that there was no testimony from which the jury could have inferred that such a liability existed, and that it was discharged by the conveyance to McDonnell. O'Donnell swears: "I owed the Kapahn note, and was to reduce the Kapahn note to under a thousand dollars, and the balance was paid for a note which he [McDonnell] held of Peter Burk." This note is referred to in the examination as the note of Burk to McDonnell, indorsed by O'Donnell, and the latter further testified that he paid "on the indorsed note the balance of \$600." The jury had a right to consider this testimony, and to reconcile it with what appears further on in the examination to have been contradictory of it; or, failing in that, to elect which part of his evidence they would believe. The sum thus paid, together with the balance of the Kapahn note assumed by McDonnell, amounted to about the

creditors in payment of a specific debt, a mortgage made by the latter is not void for providing that surplus on foreclosure shall be rendered to mortgagor. *Fuller Electrical Co. v. Lewis*, 2 Cent. Rep. 481, 101 N. Y. 674.

Agreement to pay debts of vendor.

A conveyance by a merchant of his entire property to certain of his creditors in consideration of the satisfaction of his indebtedness to them, and of their promise to pay debts due by him to other creditors, is not fraudulent as to the latter where the value of the whole property does not exceed the consideration paid. *Chipman v. Stern* (Ala.) April 8, 1890.

A conveyance by a debtor of his land, which is about to be sold under execution and foreclosure, for more than the market value of the land, to his brother and his attorney, who agree to pay his debts, giving notes for the balance of the price, and who clear the land and sell it in lots at a profit,—is legal. *Davis v. Stith*, 11 Ky. L. Rep. 218.

A sale for a fair price to a third party, who agrees to pay the consideration upon certain specified debts owed by the seller, is not fraudulent as against the latter's creditors; nor is it made so because the excess of value is received by him in a horse which is subject to forced sale, and which as a matter of fact he transferred in satisfaction of another bona fide debt. *Sweeney v. Conly*, 71 Tex. 643.

Mortgage by debtor to secure creditor.

A debtor may mortgage his property to secure one bona fide creditor, where he has no dishonest intent. *Stevens v. Breen*, 75 Wis. 593.

9 L. R. A.

A deed intended as a mortgage, given to secure an antecedent indebtedness in pursuance of a parol agreement entered into several months prior to its delivery, the grantor being insolvent at the time of its delivery, will be treated, in the absence of fraud, as delivered at the time it was agreed to be made. *Broughton v. Vasquez*, 73 Cal. 825.

A mortgage executed for a sum larger than the debt, to protect property from creditors, is void. *Mitchell v. Sawyer*, 2 West. Rep. 821, 115 Ill. 650.

If a mortgage, by mistake or want of knowledge at the time, has been given for more or less than the actual indebtedness, and no deception or fraud was intended by either party, it will not have the effect to invalidate the mortgage. *Lyon v. Ballentine*, 5 West. Rep. 720, 63 Mich. 97.

A mortgage deed executed to secure a valid pre-existing debt, with no fraudulent intent on the part of the mortgagee, is valid, though the mortgagor executed it for the purpose of defrauding creditors. *Battle v. Mayo*, 102 N. C. 413.

A deed of land to a creditor for the purpose of securing money due the latter, and of securing to the wife of the debtor an opportunity of retaining possession of the premises for herself and husband, upon an agreement that she would purchase it at the expiration of a given time by paying the amount agreed to be allowed by the creditor, who subsequently executed a lease to her for the same period, under which she and her husband continued in possession,—is a mortgage, and the lease and agreement for conveyance are void as to other creditors. *White v. McGill* (N. J.) Sept. 23, 1890.

recited consideration; and there was some evidence that this gross sum was a fair equivalent for the property.

Without reviewing the action of the court below in giving the charge requested by the defendants, and refusing charges numbered 2, 3, 4, 14, 15 and 16 requested by the plaintiff in detail, it will suffice to say that its ruling in each particular is justified under the view we have taken of the tendencies of the testimony, and the law applicable thereto. The exception in each instance proceeds on some theory of fact which the record does not support, or of law which we have endeavored to demonstrate is unsound; as, for example, that there was no proof of a valuable consideration, or that the agreement of the grantee to pay the debt of the grantor was not such a consideration, or that there was no evidence of the grantor's liability to the grantee as indorser for Burk, or that it was necessary for defendants to show that the property had been paid for in money according to the first recital of the deed, or that a debt due from the grantor to the grantee had been paid according to the qualifying recital of the deed, or, generally, that the defense failed if there was a variance between the recited consideration and that which the evidence tended to establish, and this though each was a valuable consideration.

Charges 13 and 14, requested by the plaintiff, were properly refused. They undertook to call the attention and invite the consideration of the jury to sundry facts and circumstances developed in evidence tending to cast a suspicion on the transaction, and which were supposed to be persuasive of fraud. Charges of this character have been time and again condemned by this court as mere arguments proper to be made by counsel, but not proper to be given to the jury by the court, whose office is to instruct the triers of facts as to the law applicable to the facts, but not as to deductions and inferences to be drawn from them. *Hussey v. State*, 86 Ala. 84; *Snider v. Burks*, 84 Ala. 59; *Birmingham F. B. Works v. Allen*, 86 Ala. 185.

This disposes of all assignments of error predicated on charges given and refused, except that which relates to charge No. 12, requested by the plaintiff. That ought in our opinion to have been given.

The case made by the recitals of the deed, and the case relied on by the defendants, and which alone their testimony tended to establish, was that of a conveyance made in consideration of the payment of an antecedent debt. The plaintiff, as we have seen, made out a prima facie case, and was entitled to a verdict on that showing, unless the defendants should prove certain facts. The *onus* thus cast on the defendants involved, as we have also seen, and as is settled by the authorities cited, proof to the satisfaction of the jury of two things with respect to the consideration: *first*, that it was valuable; and, *second*, that it was adequate. If they failed in either particular they failed to rebut the prima facie case made by the plaintiff, and to defeat its right to a verdict. This conclusion is a necessary resultant, not only from the language of this court in formulating the rule as to the burden of proof, but also from its well-established

and many times repeated doctrine that while a creditor of a failing debtor may save himself by taking property in payment of his debt, and this regardless of the actual intent as to other creditors which may characterize the transaction, he will in no case be allowed to take more than is necessary to his indemnification, and, if he transcends this limitation,—takes property of the debtor worth more than the amount of his claim,—he puts himself, as to the entire transaction, beyond the pale of the law's protection from the just demands of other creditors. *Pritchett v. Pollock*, 82 Ala. 169; *Levy v. Williams*, 79 Ala. 171; *Knowles v. Street*, 87 Ala. 357; *Hodges v. Coleman*, 76 Ala. 108; *Leinkauf v. Frenkle*, 80 Ala. 186; *Lehman v. Greenhut*, 88 Ala. 478.

The effect of the rule fixing the burden of proof as to adequacy of consideration upon the defendant in this class of cases, and prescribing the boundaries beyond which the creditor of an insolvent debtor cannot go in taking property in payment of his debt, is to raise up for all practical purposes a presumption of the *mala fides* of the sale which purports to be in discharge of the debt; and to meet this presumption, and impress the transaction with the attribute of fair dealing and good faith as against attacking creditors, a valuable, and at least measurably adequate, consideration must be shown. *Moog v. Farley*, 79 Ala. 252; *Calhoun v. Hannan*, 87 Ala. 277.

If this is shown, all inquiry, as has been many times ruled by this court, into the actual intent of the parties is foreclosed. If it is not shown bad intent is presumed, and the question as to what purpose really actuated the parties becomes immaterial. So that it seems to be a necessary resultant from our decisions that the inquiry into the good or bad faith of the parties as a matter of fact, and dissociated with presumptions of law, is for all practical purposes wholly eliminated in cases like this. Badges of fraud may doubtless be looked to when they tend to impeach the consideration, but not as establishing a covinous intent having no connection with the character or sufficiency of the price paid.

The conclusion to which the authorities referred to thus lead us is, we think, supported by the logic of the situation, so to speak. If the debt thus sought to be paid is in point of fact unjust, I apprehend that the utmost good faith, the most implicit belief in its correctness, on the part of both buyer and seller, would not validate the transaction. On the other hand, if the debt is just, but in amount only one half or one third the value of the property, should the purchasing creditor be allowed to thus pay himself twice or thrice over merely because it is shown ever so clearly that he acted in good faith, and owing, it may be, to some peculiar opinion of his own as to the value of property, or of the particular property, or ignorance of its value, honestly believed he was paying an adequate price for it? In all reason, it would seem that other creditors are entitled to some protection against the ignorance or intellectual idiosyncrasies of such a purchaser, and that this protection should be found in the judgment of the jury as to whether the buyer had received greatly more than he has paid for by the satisfaction of his debt, or, what is the same

thing, has satisfied a debt grossly less in amount than the value of the thing he has received. And while "the law will not weigh considerations in diamond scales," nor so closely balance the property against the price as to leave no room for the ordinary differences of opinion as to values, yet when the jury can see that the disparity amounts to a gross inadequacy, their verdict should be against the transaction. The charge under consideration, when referred, as it must be, to the evidence, properly submitted this inquiry to the jury. It was not abstract. The disparity between the whole price and the whole property, which a part of the evidence tended to show was as \$1,600, is to \$2,500; or if the price paid for the whole property, including that in controversy with other parcels, be apportioned to the property sued for, the difference, according to plaintiff's testimony, is as \$1,800 is to \$2,000. We are not prepared to affirm that this disparity is not gross as hypothesized in the charge. We are fully aware that the view we have taken is something of a departure from the generally received doctrine in other courts, as well as former dicta of this court, which are to the effect in general terms that mere inadequacy of price short of a disparity so gross as to shock the conscience of mankind is only a badge of fraud, and of itself is not to be taken as establishing the existence of evil intent; but, in our jurisprudence, that doctrine, if any weight is to be given to our repeated enunciations on the subject, or to the reasons upon which our decisions are based, is and must be confined to sales other than in the payment of antecedent debts by insolvent debtors. It would be a contradiction in terms to say that the requirement of our adjudged cases that the defendant claiming under such a sale must, as against a bona fide creditor, prove an adequate consideration, is met and fulfilled by proof of a grossly inadequate consideration, and it were palpable stultification to so hold. We do not think the court below erred in admitting the declarations of O'Donnell, while in possession of the land sued for after the conveyance, explanatory of his possession, and to the effect that he held for another. *Perry v. Graham*, 18 Ala. 822; *Johnson v. Boyles*, 26 Ala. 576; *Humes v. O'Bryan*, 74 Ala. 79.

For the error pointed out above the judgment of the Circuit Court must be reversed, and the cause remanded.

Thomas A. MACK, Appt.,
v.

DE BARDELEBEN COAL & IRON CO.
et al.

(.....Ala.....)

1. Before a stockholder of a corporation can maintain a bill in his own

name to restrain a rival corporation, which has acquired a majority of the stock of the other, from voting such stock at a stockholders' meeting, he must request the bringing of a suit by and in the name of the corporation itself, unless it is manifest that such request, if made, would be denied; hence a bill which shows that the board of directors consists of seven members of whom three were elected and are controlled by the rival, while the others are independent of its control except one, who is alleged to have been a director before the interest of the rival was acquired, and to have no interest in either corporation, is fatally defective, unless it avers a previous request for a suit by the directors in the name of the corporation, notwithstanding an allegation that such director holds his stock and acts in all things in the interest of the rival.

2. A limitation as to the number of votes which a single stockholder of a corporation is entitled to cast in the direction of its affairs cannot be evaded by another corporation holding stock in the former by the gratuitous transfer of blocks of stock to its own directors individually for the purpose of having each vote the stock standing in his name in its interest.

3. A certificate of affirmance of a chancellor's decree dissolving an injunction will not be withheld for the purpose of giving complainant an opportunity to amend his bill so as to give it equity under the decree of affirmance.

(June 19, 1890.)

A PPEAL by complainant from a decree of the Chancery Court for Jefferson County dissolving an injunction granted to restrain defendant from voting certain shares of stock which it held in the Eureka Mining Company. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Tompkins & Troy, R. H. Pearson and Hewitt, Walker & Porter, for appellant:

Here are men admitting that they knew the charter of the Company prohibited any stockholder from voting more than one fourth of its stock; also that they were in the act of willfully and knowingly violating the law and thereby committing a legal fraud on the rights of the minority stockholders, asking the court to dissolve an injunction because they deny under oath that they had a wrong purpose in knowingly violating the law. Such a proposition would be monstrous.

2 High, Inj. § 1518; *Teasey v. Baker*, 19 N. J. Eq. 61; *Coleman v. Hudspeth*, 49 Miss. 562; *Richardson v. Lightcap*, 52 Miss. 508; *Hughes v. Tinsley*, 80 Va. 259; *Hayden v. Thrasher*, 20 Fla. 715; *Smith v. Loomis*, 5 N. J. Eq. 60, 10 Am. & Eng. Encyclop. Law, p. 1015.

The purchase and holding of the stock of the Eureka Company by the De Bardeleben Company, and the attempt through such stock to control the management and business of the former company, was in direct violation of the

NOTE.—Corporation cannot purchase shares of stock of other corporations.

A corporation has no implied power to purchase shares of capital stock of another corporation. *Green's Brice*, Ultra Vires, 2d ed. 91; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah, G. etc. R. Co.* 43 Ga. 18; *Elkins v. Camden & A. R. Co.* 9 L. R. A.

86 N. J. Eq. 5; *Nassau Bank v. Jones*, 96 N. Y. 115; *First Nat. Bank v. National Exch. Bank*, 28 U. S. 122, 28 L. ed. 679; *Franklin Co. v. Lewiston Inst. for Sav.* 68 Me. 43.

This matter is, however, in many of the States, regulated by statute. *Cook, Stock and Stockholders*, § 81A.

constitutional prohibition and was a usurpation and void.

1 Morawetz, Priv. Corp. § 481; *Elkins v. Camden & A. R. Co.* 86 N. J. Eq. 5, 9 Am. & Eng. R. R. Cas. 590; 2 High, Inj. § 1224; Greenhood, Pub. Pol. 580-583.

The authority of one corporation to hold stock in another does not carry with it the right to vote such stock.

Memphis & O. R. Co. v. Woods, 7 L. R. A. 605, 88 Ala. 680.

Defendant should be enjoined from voting more than one fourth of the stock, and should be enjoined from transferring any of it except by permission of the court, because it has shown its purpose to evade the law if it is possible for it to do so.

Campbell v. Poultney, 6 Gill & J. 94; *Webb v. Redgely*, 88 Md. 864; *State v. Hunton*, 28 Vt. 595; 2 High, Inj. §§ 1231, 1232.

If there was ever a case in which a court of equity could be called upon to grant such an injunction as is here prayed, it does seem that this is one, the majority of the stock and the directors both being the defendants.

Nathan v. Tompkins, 82 Ala. 487; *Moses v. Tompkins*, 84 Ala. 618.

The law does not require one to make an application where, from the facts, it appears it would be useless. He need not ask a majority of the directors and stockholders to sue themselves.

Nathan v. Tompkins, *supra*; *Chicago v. Cameron*, 9 West. Rep. 507, 120 Ill. 447; *Rogers v. Lafayette Agric. Works*, 52 Ind. 296; *Townsend County v. Farmers L. & T. Co.* 12 Fed. Rep. 752; *Kelsey v. Sargent*, 40 Hun, 150; *Currier*

v. New York, W. S. & B. R. Co. 85 Hun, 855; *Rothwell v. Robinson*, 89 Minn. 1, 21 Am. & Eng. Corp. Cas. 408; 1 Morawetz, Priv. Corp. § 252; *Davis v. Gemmell*, 70 Md. 856; *Tipppecanoe County v. Lafayette, M. & B. R. Co.* 50 Ind. 85.

The main acts complained of are not those of the directors, such as a wrongful misuse or a wrongful exercise of corporation franchises, but they are such as directly and primarily affect the interests of the minority stockholders in their shares of stock by impairing their proprietary rights. In such cases, the corporation is not the proper party to bring the suit; it is not affected by the wrongs, and the rule invoked has no application.

8 Pom. Eq. § 1091; *Dewing v. Perdicaries*, 96 U. S. 198, 24 L. ed. 654; 1 Morawetz, Priv. Corp. § 279; *Heath v. Erie R. Co.* 8 Blatchf. 847; *Nathan v. Tompkins*, *supra*.

If a state of facts has been alleged in the bill from which the law would infer that Smith would act in the interest of and as requested by De Bardeleben, Mack will be excused from applying to the board of directors.

1 Morawetz, Priv. Corp. § 242; *Heath v. Erie R. Co.* *supra*; *Salomons v. Laing*, 12 Beav. 377; *Rogers v. Lafayette Agric. Works*, 52 Ind. 293; *Currier v. New York, W. S. & B. R. Co.* 85 Hun, 855.

All amendable defects, *pro hac vice*, should be regarded as cured by amendment, and the inquiry made, whether, if the facts were well pleaded, the case would be of equitable jurisdiction, and an injunction the appropriate remedy.

East & W. R. Co. v. East Tennessee, V. & G.

A railroad company in Kansas has the lawful right to purchase and hold stock of a connecting road. *Atchison, T. & S. F. R. Co. v. Cochran*, 7 L. R. A. 414, 43 Kan. 226; *Atchison, T. & S. F. R. Co. v. Davis*, 84 Kan. 209; *Atchison, T. & S. F. Co. v. Fletcher*, 85 Kan. 226.

The word "unlawful," as applied to the purposes for which corporations are formed, is not used exclusively in the sense of *malum in se* or *malum prohibitum*, but is also used to designate such acts, powers and contracts as are *ultra vires*. *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 263; *State v. Nebraska Distilling Co.* (Neb.) May 27, 1890.

Where a corporation is organized under a general statute, a provision in the declaration of its corporate purpose, the necessary effect of which is the creation of a monopoly, is void as against public policy. *People v. Chicago Gas Trust Co.* *supra*.

A corporation formed under the Illinois General Incorporation Act, for a purpose other than that of dealing in stocks, cannot exercise the power of purchasing and holding stock in other corporations, where such power cannot be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect. *Ibid*.

A corporation organized with the object of purchasing and holding all the shares of the capital stock of any gas company in the city or State is not a corporation organized for a lawful purpose, within the meaning of the Illinois General Incorporation Act (Ill. Rev. Stat. Chap. 22, § 1), providing that corporations may be formed for any lawful purpose with the exception stated therein. *Ibid*.

A gas company formed for the purpose of erecting or operating gas works and manufacturing and selling gas has no power to purchase and hold or

sell shares of stock in other gas companies as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation. *Ibid*.

Equity jurisdiction over corporations.

A court of equity has power to restrain trustees or directors from fraudulent dispositions of the corporate property, or a misapplication of the funds. *Howe v. Deuel*, 43 Barb. 508; *Robertson v. Bullions*, 9 Barb. 122; *Munt v. Shrewsbury & C. R. Co.* 3 Eng. L. & Eq. 144.

It has power to prevent a corporation and its officers from a willful misapplication of the funds of the corporation, to the injury of the shares or the dividends of the stockholders, and from waste and misconduct which amounts to a breach of trust on the part of the managers, and from such acts as tend to the destruction of the franchises of the corporation, and to compel the officers to account for such waste or misconduct amounting to a breach of trust. *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 428; *Hardon v. Newton*, 14 Blatchf. 879; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 15 L. ed. 401; *Bacon v. Robertson*, 59 U. S. 18 How. 420, 15 L. ed. 490; *Heath v. Erie R. Co.* 8 Blatchf. 847; *Pond v. Vermont Valley R. Co.* 12 Blatchf. 290; *Scott v. Depeyster*, 1 Edw. Ch. 513, 6 N. Y. Ch. L. ed. 229; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, 6 N. Y. Ch. L. ed. 68; *Glaslington v. Thwaites*, 1 Sim. & Stu. 124; 1 Story, Eq. Jur. § 697.

It will interfere to prevent the officers of the corporation from misapplying the property contrary to the end and purposes of the institution; because the corporators are, as to the trustees, in a sense, *cestui que trust*, and such conduct is a violation of the compact, for which there could be no

R. Co. 75 Ala. 280. See also, directly applicable, *Chambers v. Alabama Iron Co.* 87 Ala. 353; *Alabama & F. R. Co. v. Kenney*, 39 Ala. 307; *Nelson v. Dunn*, 15 Ala. 501.

This is not a case where the primary ground for relief "consists in a wrongful dealing of any kind, or in any manner with the corporate property, or, with the corporate franchises;" but being such a case no application need be made to the directors.

8 Pom. Eq. § 1091; *Heath v. Eris R. Co.* and *Salomons v. Luig*, *supra*; *Brewer v. Boston Theatre*, 104 Mass. 378.

Messrs. Smythe & Lee, with *Messrs. Webb & Tillman* and *Wetherly & Percy*, for appellees:

This bill cannot be maintained, no prior application having been made to directors or stockholders.

Nathan v. Tompkins, 82 Ala. 444; *Cook, Stock and Stockholders*, §§ 646, 741; *Taylor, Corp.* § 560; *Hodges v. New England Screw Co.* 1 R. I. 312, 53 Am. Dec. 624, 646, and *note*; *Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 367, 569, *note*; *Haves v. Oakland*, 104 U. S. 455-460, 26 L. ed. 831, 832; *Ang & A. Corp.* § 312; *Merchants & Planters Line v. Waggoner*, 71 Ala. 586; *Greaves v. Ocupe*, 69 N. Y. 154; *Brewer v. Boston Theatre*, 104 Mass. 387, 388; *Dunphy v. Travellers N. P. Assn.* 6 New Eng. Rep. 99, 146 Mass. 495.

An injunction will not be granted upon the ground that the stockholders against whom it is sought are likely to obtain control of the affairs of the company, and that then they will probably misuse their power.

Cook, Stock and Stockholders, § 614; *Camden & A. R. Co. v. Elkins*, 37 N. J. Eq. 276.

The DeBardeleben Company is vested, by special Act of the Legislature, with all the property rights of any stockholder. It has, therefore, in the exercise of such rights, the authority to transfer certain of its stock to other persons, even if the effect be to increase the voting power which its shares would otherwise have.

Re Stranton I. & S. Co. L. R. 16 Eq. 559; *Pender v. Lushington*, L. R. 6 Ch. Div. 70; *Moffatt v. Farquhar*, L. R. 7 Ch. Div. 591; *Camden & A. R. Co. v. Elkins*, 37 N. J. Eq. 274; *Cook, Stock and Stockholders*, § 618.

Stone, Ch. J., delivered the opinion of the court:

The Eureka Company is a mining and manufacturing corporation, having its *situs* and business residence in Oxmoor, in Jefferson County. Its history may be briefly stated as follows: There was first an association and incorporation under the general statutory provisions, but it had a different name. By special enactment, approved November 5, 1862 (Sess. Acts, p. 118), it was incorporated as the "Red Mountain Iron & Coal Company." Its declared purposes were "mining for coal and iron, and the making and general manufacture of iron on their lands in Shelby and Jefferson Counties." This Act of Incorporation was somewhat amended by Act approved March 3, 1871 (Sess. Acts, p. 257). By statute, its name was changed to the "Eureka Mining Company of Alabama." Sess. Acts 1866-67, p. 558.

remedy at law, without a multiplicity of suits. *Robertson v. Bullions*, *supra*; *Robinson v. Smith*, 3 Paige, 232, 3 N. Y. Ch. L. ed. 122; *Butts v. Wood*, 4 Trans. App. 433; *Greaves v. George*, 49 How. Pr. 63.

There is no wrong or fraud which directors of a joint-stock company incorporated or otherwise can commit which cannot be redressed by appropriate and adequate remedies. *Cross v. Sackett*, 16 How. Pr. 70, 6 Abb. Pr. 285, 2 Bosw. 653; *Walburn v. Ingilby*, 1 Myl. & K. 61; *Foss v. Harbottle*, 2 Hare, 461; *Benson v. Heathorn*, 1 Younge & C. 228.

Equity will grant relief to a corporation against the fraudulent acts of the directors (*Ellsworth Woolen Mfg. Co. v. Faunce*, 4 New Eng. Rep. 679, 79 Me. 440); or the willful neglect of a known duty. *Ramsey v. Erie R. Co.* 39 How. Pr. 60, 57 Barb. 406, 8 Alb. Pr. N. S. 184; *Brinckerhoff v. Bostwick*, 88 N. Y. 59, 99 N. Y. 193.

Liability of directors of corporation.

The directors of a corporation occupy a fiduciary position. They are trustees and agents of the corporation and stockholders. In general they are governed by the same rules as are applied to trustees and agents. *Bent v. Priest*, 1 West. Rep. 751, 86 Mo. 475; *Parker v. Nickerson*, 112 Mass. 195; *European & N. A. R. Co. v. Poor*, 59 Me. 277; *York & N. M. R. Co. v. Hudson*, 19 Eng. L. & Eq. 365; *Perry, Tr.* § 207. See *note* to *Marshall v. Farmers & M. Sav. Bank (Va.)* 2 L. R. A. 634.

The relation between directors of a corporation and its stockholders is that of trustee and *cestui que trust*. *Butts v. Wood*, 38 Barb. 138; *York & N. M. R. Co. v. Hudson*, 16 Beav. 490. See *note* to *Patterson v. Minnesota Mfg. Co.* (Minn.) 4 L. R. A. 745.

They are governed by the same rules as are applied to trustees and agents as to all matters in regard to the discharge of their duties. *Bent v. Priest*, 1 West. Rep. 751, 86 Mo. 475; *Wardell v. Union* 9 L. R. A.

Pac. R. Co. 103 U. S. 637, 658, 26 L. ed. 511, and cases, 4 Dill. C. C. 330; *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 106; *Jones v. Morrison*, 31 Minn. 140; *Bedford R. Co. v. Brower*, 48 Pa. 29; *Ward v. Davidson*, 6 West. Rep. 367, 89 Mo. 445; *Bennett v. St. Louis Car Roofing Co.* 1 West. Rep. 736, 19 Mo. App. 349; *Abbott v. American Hard Rubber Co.* 53 Barb. 578; *Bliss v. Matteson*, 45 N. Y. 22, 52 Barb. 335; *Robinson v. Smith*, 3 Paige, 232, 3 N. Y. Ch. L. ed. 122; *Koehler v. Black River Falls Iron Co.* 67 U. S. 3 Black, 715, 720, 17 L. ed. 339, 342; *Overend Gurney Co. v. Gibb*, 42 L. J. Ch. 67, L. R. 5 H. L. 480; *Filcroft's Case*, L. R. 21 Ch. Div. 519, 52 L. J. N. S. 27; *Charitable Corporation v. Sutton*, 2 Atk. 404; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 588.

Where they willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, they are personally liable as trustees to make good that loss; and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. *Brinckerhoff v. Bostwick*, 88 N. Y. 62; *Cumberland C. & I. Co. v. Hoffman Coal Co.* 30 Barb. 159.

They are liable for their illegal or fraudulent application of the funds of the company. *Lyman v. Bonney*, 101 Mass. 563; *Curran v. Arkansas*, 56 U. S. 15 How. 304, 14 L. ed. 705; *Scott v. Eagle F. Ins. Co.* 7 Paige, 198, 4 N. Y. Ch. L. ed. 122.

For investing the funds of the corporation in the stock of a new company pursuant to a sham arrangement, the directors may be held liable as for a breach of trust, under a bill filed by the corporation. *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381.

Directors of corporations are liable for their frauds and breaches of trust. See *note* to *Marshall v. Farmers & M. Sav. Bank (Va.)* 2 L. R. A. 584.

They are personally liable on their contracts (see

By Act approved December 6, 1878 (Sess. Acts, 189), some additional provisions were enacted in reference to said corporation.

What we have stated above we have gleaned from private enactments, which, with the exception of a clause in the Act of 1878, to be considered further on, are not before us in such form as that we can consider them. They are introductory to the opinion which follows, and will make it more easily understood. This is the sole purpose of their insertion here. No ruling will be based on their provisions, save the one clause in the Act of 1878. The DeBardeleben Coal & Iron Company is another corporation in Jefferson County, engaged in substantially the same lines of business and trade, and has its business *situs* nine miles from that of the Eureka Company. In the further progress of this opinion we will characterize them as the "Eureka Company" and the "De Bardeleben Company." The present bill was filed by Mack, a stockholder and director of the Eureka Company. It sets forth that the stock of the Eureka Company consists of 8,308 shares, of which complainant, Mack, owns 3,185 shares. That in October, 1889, the DeBardeleben Company purchased and became the owner of 4,673 shares of the Eureka Company's stock, being a majority of the whole number of shares. That soon thereafter a meeting of the Eureka Company was held in Cincinnati, Ohio, at which three of its directors, including its president, resigned, and H. F. DeBardeleben, D. Roberts and A. T. Smythe were elected in their stead, DeBardeleben being made president, and Roberts secre-

tary. De Bardeleben was president of the DeBardeleben Company, and Roberts and Smythe were directors in that corporation. A clause in the bill contains, we suppose, a clerical error, which renders it difficult to be understood. It should probably be read as follows: "That they [the controlling board of the De Bardeleben Company], in this way had sufficient number of themselves to assume the office of directors of said Eureka Company, to make a majority of the board, and in this way unlawfully and illegally assumed to act as directors, and at once took absolute charge and control of all the property of the Eureka Company." The import of this averment is that, in the election at Cincinnati, the De Bardeleben Company, through its majority voting power, acquired a majority of the governing body, by electing, through its majority of the stock in the Eureka Company, three of its own board (De Bardeleben, Roberts and Smythe), and that these three constituted a majority of the board of directors of the Eureka Company. Based, as we suppose, on the assumed truth of this averment, the present bill was filed, and seeks to enjoin the De Bardeleben Company, an alleged rival corporation, from voting its majority stock in an election of directors for the Eureka Company, soon to come off. The bill makes no averment that complainant, before instituting his suit, made any attempt, or preferred any request, to have the wrongs he complains of redressed by a suit instituted by and in the name of the corporation, and it is not pretended that he made such request. If it were true that De Bardeleben, Roberts and

note to McKenney v. Edwards (Ky.) 8 L. R. A. 397; and for their acts done without authority. See note to Metropolitan Elevated R. Co. v. Kneeland (N. Y.) 8 L. R. A. 253.

Liability of directors defined and restricted.

Where the liability arises from the wrongful act of the parties, the complainant may recover from any one of them for the whole loss, and he will have no claim against the others for contribution. Mill v. Fenton, 11 Paige, 20, 5 N. Y. Ch. L. ed. 41; Atty-Gen. v. Wilson, 4 Jur. 1174; Van Kleeck v. Reformed Dutch Church, 6 Paige, 607, 3 N. Y. Ch. L. ed. 1121.

Each case is distinct, depending upon the evidence. It is therefore not necessary to make all those who may more or less have joined in the act complained of parties; but the directors guilty of the frauds and illegal acts, injuriously affecting the rights of the plaintiff, should be made parties. Fisher v. World Mut. L. Ins. Co. 47 How. Pr. 457, 607, 15 Abb. Pr. N. S. 871; Wilkinson v. Dodd, 40 N. J. Eq. 133; Boyd v. Gill, 19 Fed. Rep. 148; Mayne v. Griswold, 38 Sandf. 474, 9 Leg. Obs. 32; 2 Pom. Eq. Jur. 660; Van Dyck v. McQuade, 86 N. Y. 46; Seddon v. Connell, 10 Sim. 79; Stainbank v. Fernley, 9 Sim. 558; More v. Rand, 60 N. Y. 208; Smith v. Rathbun, 22 Hun, 150.

If there are several trustees who are all implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against all of them, or against any one of them separately, at his election, the tort being treated as several as well as joint. Heath v. Erie R. Co. 8 Blatchf. 411.

The rule in respect to wrong-doers is the same in equity as at law. Pierson v. McCurdy, 61 How. Pr. 137.

They are liable to the stockholders for misconduct, or gross or fraudulent mismanagement of its

affairs, or for a fraudulent breach of trust. Carpenter v. Danforth, 52 Barb. 585; Smith v. Rathbun, 66 Barb. 405.

But they cannot, in the absence of any fraudulent conduct, embezzlement or misappropriation of funds, or realization of profit, not common to all stockholders, be made to account to the stockholders for losses arising from mismanagement merely; or be made liable for mistakes of judgment, or want of skill or knowledge. Sperring's App. 71 Pa. 11, 10 Am. Rep. 682.

Corporation primarily interested, and must bring the suit.

For a fraudulent breach of trust by the directors of a corporation the corporation is the primary party to sue, being the party injured. Forbes v. Whitlock, 3 Edw. Ch. 446, 6 N. Y. Ch. L. ed. 720; Robinson v. Smith, 3 Paige, 223, 3 N. Y. Ch. L. ed. 128; Cogswell v. Bull, 39 Cal. 320; Smith v. Poor, 40 Me. 415; Franklin F. Ins. Co. v. Jenkins, 3 Wend. 130; Branch Bank of Mobile v. Collins, 7 Ala. 95; Godbold v. Branch Bank of Mobile, 11 Ala. 191; Atty-Gen. v. Utica Ins. Co. 2 Johns. Ch. 389, 1 N. Y. Ch. L. ed. 420; Citizens Loan Assn. v. Lyon, 20 N. J. Eq. 110; Deaderick v. Wilson, 8 Bart. 103.

The stockholder, having no estate, legal or equitable, in the corporate property, has no *locus standi* in the courts, while the corporation is able and willing to sue for protection. See note to Patterson v. Minnesota Mfg. Co. (Minn.) 4 L. R. A. 745.

Where the agents of a corporation have acted fraudulently, the wrong is primarily committed against the corporation, and until it is shown that the corporation is incapable of obtaining redress, or that it improperly or collusively refuses to do so, the stockholders cannot bring suit for a redress of the wrong. Hersey v. Veazie, 24 Me. 2.

It is well settled that whenever the officers of a

Smythe, president and directors of the De Bardeleben Company, constituted a majority of the board of directors of the Eureka Company, this would excuse Mack for not requesting proceedings for redress through the corporate authorities of the latter corporation. Elected as they were by the De Bardeleben Company, holding the majority of the stock as it did, the presumption that a request of suit would be denied is so strong as to relieve Mack of the necessity of making it. The law never requires a vain ceremony. *Tuscaloosa Mfg. Co. v. Coz*, 68 Ala. 71; *Merchants & Planters Line v. Wagoner*, 71 Ala. 591; *Nathan v. Tompkins*, 82 Ala. 437; *Rothwell v. Robinson*, 39 Minn. 1; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605; *Hawes v. Oakland*, 104 U. S. 450 [26 L. ed. 827].

In consequences of certain denials contained in the answer it became necessary to file an amended bill, which was done February 8, 1890. By that amendment it is shown that the board of directors of the Eureka Company consists of seven members, only three of whom (De Bardeleben, Roberts and Smythe) were elected after the De Bardeleben Company became the owner of a majority of the Eureka's stock. Four of the directors (Mack, M. H. Smith, L. E. Miller and J. W. Means) were directors in the Eureka Company before and at the time of the purchase, and are still directors. It is not charged that either of these four is a stockholder or director in the De Bardeleben Company. The charge in reference to M. H. Smith is as follows: "That the said 4,683 shares also includes the ten shares of stock now

standing on the books of the Eureka Company to M. H. Smith, who is one of the directors of the said Eureka Company, but who has no interest in said company or its stock, but who holds the same in the interest of said De Bardeleben Coal & Iron Company, and who acts in all matters connected with said Eureka Company in the interest of and as requested by the defendant H. F. De Bardeleben." If said M. H. Smith had not been a director before the De Bardeleben Company's purchase of the stock in the Eureka Company, but, like De Bardeleben, Roberts and Smythe had been elected after the purchase, possibly the presumption would be that he would exercise his power in the interest of the company to which he owed his election. And, possibly, in such case, no request for suit by the corporation would be necessary as a prerequisite to a suit by a stockholder. We need not decide these questions, as this case does not raise them. According to the averments of the bill, Smith had no interest in either corporation, and he was not indebted to the De Bardeleben Company for his election. We cannot presume that he will contribute to or sanction bad faith in the government of the corporation. It is only when interest antagonizes duty that equity will stretch forth its restraining hand. *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605; *Cook, Stock and Stockholders*, § 618; *Moses v. Scott*, 84 Ala. 608.

We think the bill, as amended, is fatally defective in not averring a previous request or appeal to the majority of the directors to institute proceedings in the name of the corpora-

corporation misappropriate the corporate funds, or are guilty of any kind of wrongful dealing with the corporate property, the corporation is primarily interested, and can alone seek redress, unless it is made to appear that it is necessary for the stockholders to bring the action in order to prevent a complete failure of justice; and to bring the case within the exception, it must be made to appear that the corporation refuses to bring a suit or permit the same to be brought in the corporate name after reasonable application has been made to it for that purpose; and in every such case it is indispensably necessary that the corporation should be made a party defendant. 8 Pom. Eq. Jur. 1068 *et seq.*; *Cogswell v. Bull*, 39 Cal. 320; *Memphis v. Dean*, 75 U. S. 8 Wall. 73, 19 L. ed. 323; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 345, 15 L. ed. 401, 406; *Davenport v. Dows*, 85 U. S. 18 Wall. 623, 21 L. ed. 933; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 23 L. ed. 492; *Newby v. Oregon Cent. R. Co.* 1 Sawy. 63; *Heath v. Erie R. Co.* 3 Blatchf. 347; *Byers v. Rollins*, 13 Colo. 26, 27.

When stockholders may sue.

Where a corporation for any cause refuses to bring suit to redress injuries inflicted upon the stockholders by the managing agents or officers, stockholders will be permitted to sue in their own names, making the corporation a party defendant. *Colquitt v. Howard*, 11 Ga. 556; *Ryan v. Leavenworth, A. & N. W. R. Co.* 21 Kan. 365; *Peabody v. Flint*, 6 Allen, 52; *Wilcox v. Bickel*, 11 Neb. 154; *March v. Eastern R. Co.* 40 N. H. 543; *Brown v. Vandyk*, 8 N. J. Eq. 795; *Butts v. Wood*, 37 N. Y. 317; *Ithaca Gas-Light Co. v. Treman*, 30 Hun, 216; *Hodges v. New England Sorew Co.* 1 R. I. 312; *Hazard v. Durrant*, 11 R. I. 196; *Newby v. Oregon Cent. R. Co.* Deady, 619; *Waring v. Catawba Co.* 2 Bay, 109; *Deadrick v. Wilson*, 3 Bart. 103; *Dodge v. Woolsey*, 59 U. S. 18 L. R. A.

8, 18 How. 331, 15 L. ed. 401; *Allen v. New Jersey Cent. R. Co.* 49 How. Pr. 13; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, 6 N. Y. Ch. L. ed. 68; *Bayless v. Orne*, 1 Freem. Ch. (Mass.) 161; *Spering's App.* 71 Pa. 1; *Slatery v. St. Louis & N. O. Transp. Co.* 8 West. Rep. 745, 91 Mo. 217; *Brewer v. Boston Theatre*, 104 Mass. 399; *Pond v. Vermont Valley R. Co.* 13 Blatchf. 230; *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300; *Pom. Eq. Jur.* § 1066; *Salomons v. Lang*, 13 Beav. 339; *Gregory v. Patchett*, 35 Beav. 595; *Ang. & A. Corp.* § 512.

If the corporation is still under control of the same directors, one or more of the stockholders may sue in equity in behalf of themselves and others similarly situated. *Neall v. Hill*, 16 Cal. 145; *Allen v. Curtis*, 23 Conn. 456; *Colquitt v. Howard*, *Peabody v. Flint* and *Bayless v. Orne*, *supra*; *Greaves v. Gouge*, 69 N. Y. 154; *Spering's App.* *supra*; *Musina v. Goldthwaite*, 34 Tex. 125; *Colman v. Eastern Counties R. Co.* 10 Beav. 1; *Menier v. Hooper's Tel. Works*, L. R. 9 Ch. Div. 350; *Mason v. Harris*, L. R. 11 Ch. Div. 97; *Davidson v. Tulloch*, 3 Macq. 783.

A stockholder may sue in his own name without suing on behalf of the others, as well as himself, where he seeks to restrain the corporation from doing acts which are *ultra vires*. *March v. Eastern R. Co.* 43 N. H. 515; *Hoole v. Great West. R. Co.* L. R. 3 Ch. App. 322.

Request of corporation to sue; neglect or refusal to comply.

In general it should appear that the board of directors or other managing body has actually refused to bring or permit an action in its own name. *Davenport v. Dows*, 85 U. S. 18 Wall. 623, 21 L. ed. 933; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 23 L. ed. 492; *Memphis v. Dean*, 75 U. S. 8 Wall. 64, 19 L. ed. 323; *Forbes v. Memphis, R. P. & P. R. Co.* 3

tion, to restrain the apprehended abuse of power by the De Bardeleben Company, through its ownership of a majority of the stock of the Eureka Company. We announce this principle as the logical result of our ruling in the case of *Memphis & C. R. Co. v. Woods*, not because of alleged wrongs perpetrated. We place it on broader grounds than that. It is our intention to adhere literally to the doctrine there announced. The answers of the defendant, while they do not dispute the alleged intention of the De Bardeleben Company to vote its entire stock in the election of directors for the Eureka Company, deny every charge of partiality and maladministration in the government of its affairs. The chancellor dissolved the injunction on the denials of the answers, and from that order the present appeal is prosecuted. He erred only in the reasons he gave for his ruling. The bill, as we have shown above, was prematurely filed, in not first seeking redress through the corporate authorities. For that reason the injunction was rightly dissolved, and the decretal order of the chancellor must be affirmed.

Many other questions material to the future government of the Eureka Company have been well and ably argued, and we feel it our duty to notice some of the more important of them. In the Act to amend the charter of said company, approved December 6, 1873 (Sess. Acts, 189), is this language: "No stock [holder] either in his own right or as proxy or agent of others, shall be entitled to cast more than one fourth of all the votes at any election of directors." This clause is set forth in the amended

bill, and is in that way brought before us. We hold this language means one fourth of all the votes the shares of stock authorize to be cast. One fourth of the votes in the Eureka Company, with its present number of shares, is 2,077. It is averred, and not denied, that the De Bardeleben Company, as a corporation, is the owner of more than 4,600 of the Eureka's shares. The amended bill charges that "the defendant H. F. De Bardeleben, as president of the De Bardeleben Coal & Iron Company, and acting as president of the Eureka Company, and David Roberts, as secretary of both of said companies, and with the knowledge and connivance of the defendant A. T. Smythe, a short time prior to the 19th of January, 1890, had a large lot of the stock of the Eureka Company . . . which was owned and held by the De Bardeleben Coal & Iron Company, . . . transferred into their individual names; that is to say, they had transferred to each of the following persons, who were at that time directors of the De Bardeleben Company, or large stockholders in said Company, the following number of shares: H. F. De Bardeleben, 600 shares; David Roberts, 600 shares; A. T. Smythe, 360 shares; F. J. Pelzer, 300 shares; M. B. Lopaz, 423 shares; Robert Adger, 300; A. M. Adger, 300 shares,—leaving in the name of the De Bardeleben Coal & Iron Company 1,900 of the 4,623 shares. . . . That the said stock so transferred . . . was and is now the stock and property of the De Bardeleben Coal & Iron Company. . . . That the transfers to said persons were so made . . . for the purpose of avoiding and getting around the

Woods, 323; *Heath v. Erie R. Co.* 8 Blatchf. 347; *Memphis G. Gas Co. v. Williamson*, 9 Helsk. 314; *Young v. Drake*, 3 Hun, 61; *Bogers v. Lafayette Agric. Works*, 52 Ind. 236; *Maroh v. Eastern R. Co.* 40 N. H. 543; *Hodges v. New England Screw Co.* 1 R. L. 312; *Atwood v. Merryweather*, L. R. 5 Eq. 464 n.; *Mason v. Harris*, L. R. 11 Ch. Div. 97; *McDougall v. Gardiner*, L. R. 1 Ch. Div. 13; *Duckett v. Gover*, L. R. 6 Ch. Div. 82; *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. Div. 350; *Benson v. Heathorn*, 1 Younge & C. 323; *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 596.

The refusal to sue must be made distinctly to appear; and the avails of the litigation, if there be any, go to the corporation, and are a part of its means, as if it had itself sued and recovered. *Dewing v. Perdicarles*, 96 U. S. 193, 24 L. ed. 656; *Foss v. Harbottle*, 2 Hare, 461; *Hersey v. Veazie*, 24 Me. 1; *Smith v. Hurd*, 12 Met. 371; *Austin v. Daniels*, 4 Denio, 299.

If the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant. *Heath v. Erie R. Co.* 8 Blatchf. 394; *Hersey v. Veazie* and *Hodges v. New England Screw Co.* *supra*; *Anderton v. Wolf*, 41 Hun, 571; *Robinson v. Smith*, 3 Paige, 223, 3 N. Y. Ch. L. ed. 128; *Ang. & A. Corp.* 304, 305.

It must be alleged that the corporation was requested to bring the suit; but where the corporation is shown to be under the control of the parties to be sued the showing of such request and refusal may be dispensed with. *Heath v. Erie R. Co.* 8 Blatchf. 347; *Mussina v. Goldthwaite*, 34 Tex. 125.

An averment of refusal by the officers of a corporation, upon request, to take appropriate legal proceedings to prevent the unlawful voting of corporate stock, will authorize the entertainment of a suit by stockholders in their own names for the ac-

complishment of that object. *Memphis & C. R. Co. v. Woods*, 7 L. R. A. 605, 33 Ala. 630.

Where the circumstances are such that it would be unnecessary for the plaintiffs to say that they demanded of the board of directors to commence an action, such demand before commencement of the action is unnecessary. *Rogers v. Lafayette Agric. Works*, 52 Ind. 306.

It would be wholly contrary to established principles of justice to permit the authors of a wrong to conduct a litigation against themselves, as agents of the complainant. *Crumlish v. Shen. Valley R. Co.* 23 W. Va. 633; *Morawetz, Priv. Corp.* § 336; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theatre*, 104 Mass. 373, 387.

When stockholder may sue alone, in his own name.

For fraudulent misappropriation and conversion of the corporate property suit can only be brought by a stockholder in his own name after application to and refusal on the part of the corporation to bring the action. *Anderton v. Aronson*, 3 How. Pr. N. S. 213; *Leah v. Lorillard*, 31 Hun, 305.

There must be a clear default involving a breach of duty to authorize a stockholder to institute a suit in his own behalf or for himself and others. *Tippecanoe County v. Lafayette, M. & B. R. Co.* 50 Ind. 102; *Bronson v. La Crosse & M. R. Co.* 69 U. S. 2 Wall. 233, 17 L. ed. 725; *Dodge v. Woolsey*, 59 U. S. 13 How. 331, 15 L. ed. 401.

Where the contract exceeds the powers of the corporation, and cannot be confirmed against a dissenting stockholder, his authority to file such a bill is supported upon this ground alone, the usual and more improved form of such a suit being that of one or more stockholders to sue in behalf of the others. *Gray v. New York & V. S. Co.* 8 Hun, 391; *Mahoney v. People*, 5 Thomp. & C. 329; *Hazard v. Durant*, 11 R. L. 126; *Bayless v. Orne*, 1 Freeman

section of the charter and by-laws of said Eureka Company above set out. Said transfers of said stock were so made in fraud of the minority of stockholders of said Eureka Company, and to enable all of said stock to be voted in the interest and for the benefit of the De Bardeleben Coal & Iron Company." The substantial averments of fact in the foregoing extract are not denied in the answers. It is contended for the appellees that the said transferees of the De Bardeleben Company's stock in the Eureka Company are of right entitled to vote the several shares standing in their names, notwithstanding the statutory inhibition copied above. They rely on the following authorities as supporting their contention: *Re Stranton I. & S. Co.* L. R. 16 Eq. 559; *Pender v. Lushington*, L. R. 8 Ch. Div. 70; *Moffatt v. Farquhar*, L. R. 7 Ch. Div. 591; *Camden & A. R. Co. v. Elkins*, 37 N. J. Eq. 278.

The English authorities quoted do lend some countenance to their argument, but we cannot follow them. The New Jersey case is not fully in point. We think the statutory restraint on the voting power of the stockholders was enacted for very wise and conservative purposes, and that it should be upheld in its integrity. It is perhaps to be lamented that our Organic Law does not contain a provision applicable to all business corporations aggregate, that no one person, whether natural or artificial, can ever exercise a controlling voice in their organization or government.

Giving due consideration to the sworn denials and averments of the answers in this case, we find no ground for imputing vicious purposes in the government of the Eureka Company; but the power one corporation acquires by the ownership of a majority of the stock of another corporation with which it has business connections opens an inviting door for

very pernicious possibilities, which the virtues of the manipulators and speculators have not always enabled them to withstand. The provision we are considering was conceived in the interest and for the protection of minority stockholders, and deserves to be upheld with a strong hand. The highest function of the law is the protection of the weak against the mighty. On principle, it would seem that the restrictive clause in the amended charter of the Eureka Company is too pronounced and emphatic to be disobeyed or evaded. What cannot be done directly cannot be accomplished by indirection. No one, except in matters of official trust, can confer on another authority to do what he cannot do himself. What one does by another, he does by himself. But we are not without authorities in support of our views. *Campbell v. Poultney*, 6 Gill & J. 94, presented the identical question we have in hand. The question arose on a bill filed to prevent gratuitous transferees of stock made that the stock might be voted in the interest of the transferrer, who still remained the owner, from voting such stock as an independent stockholder. The court ruled that the transferrer could not increase his voting power by any such device, and chancery would enjoin the casting of a greater number of votes than the transferrer himself could have cast.

In *Webb v. Ridgely*, 38 Md. 364, the same doctrine was asserted. 2 High, Inj. § 1231.

In *State v. Hutton*, 28 Vt. 594, a proceeding by *quo warranto* to test the question of the election of certain persons as directors of a bank, similar principles were declared. It was ruled that, when the transferrer could not vote the stock, his gratuitous transfer to another, that the latter might vote it in his interest, and according to his wishes, conferred on that other no greater power than he himself could

Ch. (Miss.) 161; *Cunningham v. Pell*, 5 Paige, 607, 3 N. Y. Ch. L. ed. 850; *Butts v. Wood*, 38 Barb. 181, 37 N. Y. 317; *Spring's App.* 71 Pa. 1.

Where the shareholders are numerous, the suit may be brought by one or more in behalf of all. *Brinckerhoff v. Bostwick*, 88 N. Y. 60; *Jones v. Johnson*, 10 Bush, 661; *Butts v. Wood*, 37 N. Y. 317; *Heath v. Erie R. Co.* 8 Blatchf. 347.

In declining to take effective measures of prevention, by refusing to apply for an injunction, the directors abdicated their controlling powers, and any stockholder became entitled to intervene for the interests of himself and his associates. *Dodge v. Woolsey*, 50 U. S. 18 How. 386, 15 L. ed. 416; *Luling v. Atlantic Mut. Ins. Co.* 30 How. Pr. 75; *Walker v. Devereaux*, 4 Paige, 256, 8 N. Y. Ch. L. ed. 426.

A bill by a stockholder will not be defeated because it does not show a previous effort to obtain redress within the corporation by appeal to the directors or stockholders, where it is brought against the directors themselves and other stockholders, charging them with doing an unlawful act in their own interest in fraud of plaintiff's rights. *Barr v. Pittsburgh Plate-Glass Co.* 40 Fed. Rep. 412.

Corporation itself a necessary party.

To an action brought by a stockholder against the president, trustees or directors of a corporation for an illegal conversion or misappropriation by them of corporate property, the corporation itself is a necessary party. *Greaves v. Gouge*, 52 How. Pr. 60; *Smith v. Poor*, 3 Ware, 152; *Gardiner v. Pol- 9 L. R. A.*

lard, 10 Bosw. 678; *Mead v. Mall*, 15 How. Pr. 349; *Seizer v. Mall*, 6 Abb. Pr. 270, note; *Cazeaux v. Mall*, 25 Barb. 578; *Cunningham v. Pell*, 5 Paige, 607, 3 N. Y. Ch. L. ed. 850; *Smith v. Hurd*, 12 Met. 371; *Lyman v. Bonney*, 101 Mass. 563; *Peabody v. Flint*, 6 Allen, 52; *Curran v. Arkansas*, 56 U. S. 15 How. 304, 14 L. ed. 706; *Scott v. Eagle F. Ins. Co.* 7 Paige, 198, 4 N. Y. Ch. L. ed. 122; *New York & N. H. R. Co. v. Schuyler*, 7 Abb. Pr. 59; *Hazard v. Durant*, 11 R. I. 207; *Allen v. Curtis*, 26 Conn. 456; *Stetson v. Faxon*, 19 Pick. 155; *Smith v. Hurd*, 12 Met. 371; *Hodsdon v. Cope- land*, 16 Me. 814.

In all cases the corporation is a necessary party either as complainant or defendant. *Zinn v. Mendel*, 9 W. Va. 583; *Greaves v. Gouge*, 16 Abb. Pr. N. S. 332, 52 How. Pr. 60; *Davenport v. Dows*, 35 U. S. 18 Wall. 627, 21 L. ed. 938; *Hersey v. Veazie*, 24 Me. 12, 41 Am. Dec. 387; *Charleston Ins. & T. Co. v. Sebring*, 5 Rich. Eq. 342; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Bagshaw v. Eastern Union R. Co.* 7 Hare, 114-131; *Van Kleeck v. Reformed Dutch Church*, 6 Paige, 607, 3 N. Y. Ch. L. ed. 1121; *Smith v. New York C. S. Co.* 18 Abb. Pr. 422.

Where the corporation fails or refuses to bring suit, it should be made a party defendant. *Davenport v. Dows*, 35 U. S. 18 Wall. 626, 21 L. ed. 937; *Samuel v. Holladay*, 1 Woolw. 400; *Cogswell v. Bull*, 39 Cal. 320; *Greaves v. Gouge*, 69 N. Y. 154; *Charleston Ins. Co. v. Sebring*, 5 Rich. Eq. 342; *Huntington v. Palmer*, 104 U. S. 432, 26 L. ed. 833; *Brewer v. Boston Theatre*, 104 Mass. 373; *Kennebeck & P. R. Co. v. Portland & K. R. Co.* 54 Me. 173; *Ferguson v. Wilson*, L. R. 2 Ch. Div. 77.

exercise. The court, among other things, said: "The law is not to be outwitted by cunning devices."

Our conclusions are that neither the De Bardeleben Company nor any other stockholder of the Eureka Company can, either directly or indirectly, vote more than one fourth of all the votes at any election of directors; that in a proper case chancery will enjoin that Company from casting more than one fourth of the votes; that if by reason of votes cast in excess of this restriction any person or persons are declared elected directors, on a proceeding in *quo warranto* the illegal votes will be disallowed; and if such disallowance reduces the number of votes cast for such director or directors below a majority of the votes lawfully cast, then a judgment shall be awarded against them removing them from said office of trust.

We have not commented on the election held at Cincinnati, Ohio, in October, 1889. That election was irregular, if not void. Act approved February 27, 1889 (Sess. Acts, 76).

The decretal order of the chancellor is affirmed.

Stone, Ch. J.:

After this court announced its opinion affirming the decretal order of the chancellor, which had dissolved the injunction granted at the instance of Mack, motion was made in behalf of complainant that the certificate of af-

firmance be withheld, and the judgment suspended until complainant can amend his bill so as to give it equity according to the ruling of this court. Accompanying the motion counsel made a statement which, if averred and proved, would probably heal the imperfection on account of which this court held the bill to be without equity. There have been cases before us, appealed from decretal orders overruling motions to dissolve, in which, differing from the chancellor, we have reversed his ruling, and remanded the cause, without entering any decree in this court dissolving the injunction. In making such rulings we have been influenced by the consideration that it did not appear the bill could not be amended, and the injunction thereby rightfully preserved. In cases of this class our rule has been to direct the court below to dissolve the injunction unless an amendment of the bill should be made curing the imperfection. The motion in this case asks us to go entirely beyond the rule stated, and to reinstate the injunction, not on averments now in the bill, but on others which it is proposed to make. We say this is the motion, because without reinstating the injunction the relief sought cannot be obtained. The motion must be denied. Complainant, after amending his bill, will have to renew his application for injunction, before a proper judicial officer, as he may be advised. Motion denied.

INDIANA SUPREME COURT.

Amos C. JACKSON *et al.*, *Appts.*

v.

CITY NATIONAL BANK.

(.....Ind.....)

Mere knowledge on the part of a person loaning money that the borrower intends to use it by engaging in the purchase of options on

grains in the market of another State, or investing it in wagering or gambling contracts, will not defeat an action by the lender to recover back the amount loaned.

(October 10, 1890.)

A PPEAL by defendants from a judgment of the Circuit Court for Elkhart County in

NOTE.—Contract, remotely connected with illegal transaction, not void.

It is not every contract which is forbidden by law that is void. *Wheeler v. Hawkins*, 16 Ind. 515.

A contract may be valid notwithstanding it is remotely connected with an independent, illegal transaction, which, however, it is not designed to aid or promote. *Ocean Ins. Co. v. Polleys*, 38 U. S. 13 Pet. 157, 10 L. ed. 105.

An assignment, for a good consideration, of a fund arising out of an illegal contract, subsequent, collateral to and wholly independent of the illegal transactions upon which the principal contract was founded, is valid and binding. *McBlair v. Gibbs*, 48 U. S. 17 How. 232, 15 L. ed. 132.

Whether or not Ind. Rev. Stat. 1881, § 4950, making void notes, etc., any part of the consideration of which is money or other valuable thing won on the result of any wager, or to repay money loaned at the time of such wager, etc., applies to a note in the hands of an innocent holder, given and payable in that State for speculation in futures, it will not be construed to invalidate a note in the hands of such a holder if executed and made payable in New York, to be used in purchasing options, or to be put up as a margin in cotton speculations in that State. *Sondheim v. Gilbert*, 5 L. R. A. 433, 117 Ind. 71.

9 L. R. A.

Simple knowledge by the lender of money that the borrower was likely to, or was going to, use it in gambling is not enough to prevent a recovery of the money loaned. To defeat the action the lender must be implicated as a confederate in the transaction. *Waugh v. Beck*, 5 Cent. Rep. 540, 114 Pa. 422; 1 *Wharton*, Cont. 341, 343; *Oxford Iron Co. v. Spradley*, 46 Ala. 99; *Whitlock v. Workman*, 15 Iowa, 351; *Barnard v. Field*, 45 Me. 523; *Savage v. Mallory*, 4 Allen, 422; *Adams v. Couillard*, 102 Mass. 167; *Michael v. Bacon*, 49 Mo. 474; *Frank v. O'Neil*, 125 Mass. 473; *Lewis v. Alexander*, 51 Tex. 573; *Waugh v. Morris*, L. R. 8 Q. B. Div. 202; *Feret v. Hill*, 15 C. B. 207; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 279, 6 L. ed. 474; *Planters Bank v. Union Bank*, 38 U. S. 16 Wall. 423, 21 L. ed. 473; *McBlair v. Gibbs*, 48 U. S. 17 How. 232, 15 L. ed. 132; *Brooks v. Martin*, 39 U. S. 2 Wall. 80, 17 L. ed. 735; *Bunswick v. Valteau*, 50 Iowa, 120; *Foster v. Thurston*, 11 Cush. 322; *M'Intyre v. Parks*, 3 Met. 207; *Walker v. Jeffries*, 45 Miss. 160; *Hill v. Spear*, 50 N. H. 259; *Powell v. Smith*, 65 N. C. 401; *Williams v. Carr*, 30 N. C. 294; *Lestaples v. Ingraham*, 5 P. 71; *Thomas v. Brady*, 10 Pa. 164; *Wallace v. Leach*, 12 S. C. 579; *McGavock v. Puryear*, 6 Coldw. 3, *Handerson v. Waggoner*, 2 Lea, 123; *Kottwitz v. Alexander*, 34 Tex. 639; *Aiken v. Blaisdell*, 41 Vt. 653.

favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are fully stated in the opinion.

Mr. H. C. Dodge for appellants.

Messrs. John H. and Francis E. Baker, for appellee:

Before money loaned in this State can be forfeited by the use to be made of it in another State it must be shown by averment that the intended use is unlawful there and that money loaned in that State for the same uses could not be recovered.

Patterson v. Carrell, 60 Ind. 128; *Rogers v. Zook*, 86 Ind. 237; *Alford v. Baker*, 53 Ind. 279; *Schurman v. Marley*, 29 Ind. 458; *Scott v. Duffy*, 14 Pa. 19; *Harris v. White*, 81 N.Y. 544; *Webber v. Donnelly*, 83 Mich. 471; *Kling v. Fries*, Id. 275; *O'Rourke v. O'Rourke*, 43 Mich. 58; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 223; 1 Dan. Neg. Inst. §§ 891 a, 892.

The loaning of money in this State to be used for gambling purposes in Illinois is not sufficient to defeat a recovery here.

Cummings v. Henry, 10 Ind. 109; *Bickel v. Sheets*, 24 Ind. 1; *Sondheim v. Gilbert*, 5 L. R. A. 433, 117 Ind. 71; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 272, 6 L. ed. 472; *Waugh v. Peck*, 114 Pa. 422, 60 Am. Rep. 356; *Brunswick v. Valleau*, 50 Iowa, 120, 32 Am. Rep. 122; *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516; *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383; *Ross v. Mitchell*, 6 Colo. 102, 45 Am. Rep. 520; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 302, note; *Webber v. Donnelly*, 33 Mich. 469; *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, note; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Scott v. Duffy*, 14 Pa. 20; *McBlair v. Gibbs*, 58 U. S. 17 How. 286, 15 L. ed. 181; *Lestapius v. Ingraham*, 5 Pa. 81; *Planters Bank v. Union Bank*, 83 U. S. 16 Wall. 499, 21 L. ed. 479.

Olds, J., delivered the opinion of the court:

The appellee sued the appellants upon a promissory note dated May 6, 1887, due on June 28, 1887, for \$1,500, with 8 per cent interest, and payable at the City National Bank of Goshen, Ind. The appellant Amos C. Jackson filed a separate answer in one paragraph, in substance as follows: He admitted the execution of the note to the City National Bank, as alleged in the complaint, but averred that, on November 7, 1881, he borrowed the money represented by said note of and from said plaintiff, and executed his note therefor, with his co-defendant as surety, due in ninety days from said date. Hitherto, until the date of the execution of the note mentioned in the complaint, every ninety days, at the request of the plaintiff, he executed a new note, his co-defendant signing as surety with him for said debt, in renewal of said original note, and took up the note next theretofore executed; and he avers that the indebtedness represented by the note mentioned in the complaint is the same identical indebtedness which he incurred to said plaintiff at the date first above mentioned, and no other, and the note mentioned in the complaint is a renewal of said original loan; that the consideration of said original note and the one

mentioned in the complaint was for money loaned by the plaintiff to the defendant for the purpose, at the time of such loan, of being wagered by the defendant in purchasing options in wheat and other grain, pork, and lard and articles of produce, and in making contracts upon margins, and gaming and wagering upon the future price of wheat, grain and produce, and making good and paying any losses that might and did accrue to defendant in certain wagering, gambling, immoral and illegal contracts entered into by the defendant personally, and by and for his agents, for the purchase of certain margins on wheat and other grain, pork, lard and produce, and options in the same, with the understanding, agreement and intention by the defendant and the parties with whom such illegal, immoral, gambling and wagering contracts were made that the said wheat and other grains, pork, lard and produce, so illegally and immorally contracted for and purchased, was not to be delivered to or received by the defendant; but with the agreement and understanding between said defendant and said contracting parties that at a future day there was to be a settlement between them, when the defendant was to receive from said other contracting parties, or pay to said other contracting parties, the difference between the contract price and the market price of said wheat and other grain, pork and lard, in the City of Chicago, Ill., on the day of the settlement; that the sole and only consideration of said original note was money loaned by the plaintiff to defendant at the time of the making of said wagering and illegal contracts by the defendant, and the sole and only consideration of the note sued upon and mentioned in the complaint is the renewal of said original note as aforesaid, given as evidence of said money loaned; and that, when said money was so loaned, the plaintiff loaned it to the defendant for the purpose of being invested by defendant, as aforesaid, in gambling and wagering contracts so made by defendant as aforesaid, and which purpose, object and intention were then and there fully known by the plaintiff, and plaintiff was fully informed and told at the time said loan was so made by the defendant that he wanted said money to invest in the City of Chicago, in making of illegal, wagering and gambling contracts. It is further averred that all of the money so loaned was invested by the defendant in such illegal, wagering and gambling contracts, and such use of it was agreed to by the plaintiff, and the plaintiff knew that said money was so used, and knew at the time it was so loaned that it was intended to be so used. And it is further averred that the money was all lost to the defendant, and he received nothing of value for the same or any part thereof. It is further averred that his co-defendant, Ira Jackson, is only surety on the note sued upon, and was only surety on the original note and notes given in renewal thereof, and received no part of the money or any consideration. The appellant Ira Jackson filed a separate answer in one paragraph, alleging suretyship and that the note was executed without consideration. The appellee filed a separate demurrer to each of these paragraphs of answer, which was overruled, and the appellee excepted and assigns such rulings as cross-errors. The appellee then filed a

reply in four paragraphs. The first paragraph is a general denial and addressed to the answer of each of the appellants. The second and third paragraphs are addressed to the separate answer of Amos C. Jackson and the fourth paragraph is addressed to the separate answer of Ira Jackson. The appellants severally demurred to the second, third and fourth paragraphs of the reply, which demurrer was overruled, and exceptions reserved by the appellants.

It is proper to consider, first, the cross-errors assigned, since if the answers are bad it is unnecessary to consider the ruling upon the demurrer to the reply. The force of the allegations in the separate answer of Amos C. Jackson is that he borrowed the money of the appellee for the purpose of investing it in wagering and gambling contracts in the City of Chicago, Ill., and that appellee was informed that he was borrowing the money for, and intended to use it for, that purpose, and that it loaned him the money to be used for the purpose of investing in such gambling contracts in the City of Chicago, Ill. It is not alleged and does not appear that appellee had any interest in such wagering or gambling contracts, or that it took any part in the making of such illegal contracts, or that it in any way took part in furthering the deal to be made by the appellant Amos C. Jackson, except to loan him the money with the knowledge that he intended to use it in making illegal contracts generally with persons at the City of Chicago, Ill. It presents the question as to whether or not a bank can recover upon a note taken for money loaned to a person having knowledge, at the time of loaning the money, that the borrower intended at the time to use the money in the purchase of options on grain and produce in another State, or investing in other like gaming contracts.

In speaking of transactions of this character, this court, in the case of *Sondheim v. Gilbert*, 117 Ind. 71, 5 L. R. A. 488, says: "But in the absence of a statute in direct terms prohibiting transactions of the character of that in question, and declaring them unlawful, or expressly declaring promissory notes growing out of such transactions invalid, while the courts will, on general common-law principles, declare such notes invalid between the parties and those who were accessory to the illegal act, yet, in order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and the borrower that the money furnished should be used in aid of, and to promote, the unlawful enterprise, as that the former became *particeps criminis*."

In the case of *Bickel v. Sheets*, 24 Ind. 1, it was held that a contract for the sale of property intended to be used for the purpose of gaming is not void under the statutes then in force in this State, though the seller was informed at the time of sale of the purpose to which the

property was to be applied. The same doctrine was held in the case of *Cummings v. Henry*, 10 Ind. 109. These decisions of our own court are well supported by authority, although there is a line of decisions holding the opposite theory.

In *Webber v. Donnelly*, 83 Mich. 469, it is held that the vendor's knowledge, at the time of the sale, that the vendee intends to make illegal use of goods sold, will not prevent his recovering from the vendee the value of the property. In that case the court says: "The undoubted weight of authority, however, holds that mere knowledge by the vendor that the vendee, at the time of the purchase of property, intends to use it for an illegal purpose, will not prevent his recovering from the vendee the value of the property." *Tyler v. Carlisle*, 79 Me. 210, 4 New Eng. Rep. 409, and authorities there cited; *Brunswick v. Vallevau*, 50 Iowa, 120; *Waugh v. Beck*, 114 Pa. 423, 5 Cent. Rep. 586; *Sprague v. Rooney*, 82 Mo. 493; *Wright v. Hughes*, 119 Ind. 324.

We think the decisions of this court are to the effect that mere knowledge on the part of a person loaning money, that the borrower intends to use it by engaging in the purchase of options or grains in the market of another State, or investing it in wagering or gambling contracts, will not defeat a recovery. In order to defeat a recovery, it must appear that the person loaning the money did something more than loan the money in furtherance of the deal, or in aid of the illegal transaction, and this doctrine is well supported by authorities. It does not appear, from the allegations in the answer of the appellant Amos C. Jackson, that the appellee in this case did anything except to loan the said appellant the money, with the knowledge that he intended to use it by investing in options, and in illegal contracts of some character for the purchase of some kind of grain. The appellee did nothing to consummate such contracts, or to bring the parties to such proposed contract together for the purpose of contracting, nor towards transmitting the money, or delivering the same to the party or parties with whom the appellant intended to contract. It is not even alleged that the appellant had any specific deal in mind at the time he borrowed the money, or person with whom he intended contracting. It appears that the place where the appellant intended to invest and engage in such illegal business was in another State. There was nothing in the contract between the appellant and appellee that required the use of the money for any such unlawful purpose. The appellant had the perfect right to have changed his mind and retained the money when he received it, without violating in any way his contract with the appellee for the loan of the money. We do not think the answer makes a good defense, and the court erred in overruling the demurrer thereto. And, even if the reply to this paragraph was bad, there was no error in overruling a demurrer to the same, for the reason that a bad reply is sufficient to a bad answer.

As to the questions arising upon the demurrer to answer of appellant Ira Jackson, and the demurrer to the reply thereto, admitting that the answer of said appellant is sufficient as a

plea of no consideration, which is questionable, as the answer appears to be framed upon the theory of suretyship, yet the reply is clearly sufficient. It alleges that the first note was given for money loaned, and that the present note was given in renewal. There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Mitchell, J., took no part in the decision of this case.

James N. JOHNSON, Impleaded, etc., *App't.*,
v.

Phoebe ALEXANDER *et al.*

(....Ind.....)

1. An arrangement is not void as a fraud on creditors by which an insolvent debtor, soon after taking out insurance on his own life, payable at his death to his executors, administrators or assigns, assigns the policy to certain of his creditors to secure payment of their claims, taking from them an agreement to pay the premiums and after deducting the amount of such payments and of their claims from the proceeds of the policy to pay the balance to his heirs or to his order. And if no other disposition is made by him the heirs are entitled to such balance as against other creditors of the insured, at least where there is no evidence of actual fraud or that such creditors were actually injured by the arrangement.

2. The fact that the disposition of the balance of the proceeds of a life insurance

policy, which has been assigned to secure a debt, was not absolute, but that payment thereof was directed to be made to the debtor's heirs or to such other person as he should direct, is not alone sufficient to deprive the heirs of such balance, and if the disposition is otherwise sufficient they will take the same in case no other person is designated.

(November 11, 1890.)

A PPEAL by defendant Johnson from a judgment of the Circuit Court for Posey County, directing the administrator of William D. Alexander, deceased, to pay the balance of the proceeds of a policy of insurance on his life to his heirs. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Ernest Dale Owen, for appellant:

The first essential of a gift is that it be fully completed. The thing given must be wholly out of the control of the donor and wholly transferred to the donee, irrevocably and without condition. So long as the donor has control of the thing, or may revoke or rescind, it is not a gift.

1 *Parsons*, Cont. *p. 234, chap. 15, § 1, and notes; *Smith v. Ferguson*, 90 Ind. 229, 232; *Smith v. Dorsey*, 88 Ind. 451, 453.

It cannot be said this was a conditional gift. A gift cannot be conditional, for a condition interposed destroys the character of a gift.

Smith v. Dorsey, *supra*.

To make the gift complete between Alexander and his heirs he must have delivered to them and they must have accepted.

Parsons, Cont. *235.

NOTE—Life policy is assignable.

It is lawful for one who has his own life insured by a policy payable to himself to sell or dispose of it as any other chose in action, if the policy was valid in its inception. *Murphy v. Red*, 64 *Mass.* 614; *Amick v. Butler*, 9 *West. Rep.* 844, 111 *Ind.* 578.

A policy of life insurance without restrictive words is assignable by the insured for a valuable consideration equally with any other chose in action, when the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 *U. S.* 457, 24 *L. ed.* 251; *Etna L. Ins. Co. v. France*, 94 *U. S.* 561, 24 *L. ed.* 267; *Fitzpatrick v. Hartford L. & A. Ins. Co.* 6 *New Eng. Rep.* 180, 56 *Conn.* 133; *New York Mut. L. Ins. Co. v. Armstrong*, 117 *U. S.* 591, 29 *L. ed.* 997; *Warnock v. Davis*, 104 *U. S.* 775, 26 *L. ed.* 924; *Murphy v. Red*, *supra*.

This rule prevails in Massachusetts, New York and Rhode Island, also in England. *Mutual L. Ins. Co. v. Allen*, 138 *Mass.* 24; *Valton v. National Fund L. Assur. Co.* 20 *N. Y.* 82; *Rawls v. American Mut. L. Ins. Co.* 27 *N. Y.* 282; *Clark v. Allen*, 11 *R. I.* 439; *Ashley v. Ashley*, 8 *Sim.* 149; *Fitzpatrick v. Hartford L. & A. Ins. Co.* 6 *New Eng. Rep.* 180, 56 *Conn.* 133.

Under Acts 1962, chap. 9, and Acts 1873, chap. 200, the insured may assign a life policy to his wife and children, free from his creditor's claims. *Earnshaw v. Stewart*, 2 *Cent. Rep.* 641, 64 *Md.* 513.

An assignment, by the father of an illegitimate child, of a certificate of insurance on his life, to the child's mother for the purpose of securing the support of the child, will be sustained against his administrator. *Brown v. Mansur*, 2 *New Eng. Rep.* 857, 64 *N. H.* 38.

Assignable by delivery.

A life insurance policy is but a chose in action for the payment of money, and may be assigned as
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such, under Maryland Act 1829, chap. 51, without regard to any insurable interest in the assignee. *Rittler v. Smith*, 2 *L. R. A.* 844, 70 *Md.* 261; *Souder v. Home Friendly Society (Md.)* June 19, 1890.

It may therefore be assigned by indorsement and delivery, and a mere verbal assignment with delivery is sufficient. *Bushnell v. Bushnell*, 62 *Ind.* 503; *Hutson v. Merrifield*, 51 *Ind.* 24, 19 *Am. Rep.* 722; *Harley v. Heist*, 86 *Ind.* 193, 44 *Am. Rep.* 235; *New York L. Ins. Co. v. Flack*, 3 *Md.* 341, 56 *Am. Dec.* 742; *Pierce v. Nashua Fire Ins. Co.* 50 *N. H.* 297; *Powles v. Innes*, 11 *Mees.* & *W.* 10; *Chapman v. Mollwrath*, 77 *Mo.* 83; *Manning v. Bowman*, 3 *Nova Scotia Dec.* 42; *Bacon, Ben. Societies*, 462.

And so, very informal assignments have been held sufficient to vest in the assignee the equitable right to the proceeds. *Scott v. Dickson*, 108 *Pa.* & *Greene v. Republic F. Ins. Co.* 84 *N. Y.* 572.

Generally to make a valid assignment there must be a delivery of the policy. *Ballou v. Gile*, 50 *Wis.* 614; *Dexter Sav. Bank v. Copeland*, 77 *Me.* 263.

But it is not always necessary that delivery be made; any act carrying out the intention of the insured and communicated to the insurer is enough in equity. *Marcus v. St. Louis Mut. L. Ins. Co.* 63 *N. Y.* 623; *Fortescue v. Barnett*, 3 *Myl. & K.* 36; *Re Trough's Estate*, 3 *Phila.* 214; *Chowne v. Baylis*, 31 *Beav.* 351.

When not assignable.

One whose life is insured for the benefit of another, who pays the premium, has in the policy no interest which he can assign; and an assignment by such person cannot affect the rights of the parties to whom the amount of the insurance is payable. *Ferdon v. Canfield*, 6 *Cent. Rep.* 203, 104 *N. Y.* 142.

A beneficial interest in a life insurance policy procured by a father for the benefit of and payable to his minor son vests in the son upon delivery of the policy; and the father's subsequent assignment

The policy of insurance was payable to the executors, administrators and assigns of William D. Alexander. It became, then, as much the property of the estate of Alexander as any other piece of property.

The creditors had a right to look to this fund for their debts, and to divert it to his heirs as much a fraud upon his creditors as the assignment to them of any other chose in action to become due at his death.

2 Parsons, Cont. *285.

Messrs. William Loudon and F. P. Leonard for appellee.

Olds, J., delivered the opinion of the court: William D. Alexander, in his lifetime, in 1886, procured from the Mutual Life Insurance Company of New York a policy of insurance upon his own life for the sum of \$5,000, payable at his death to his executors, administrators or assigns. On the 8th day of April, 1887, said Alexander being indebted to Welburn, Pearse, Hutchinson and Spencer in the sum of \$3,385, with the consent of the company assigned and transferred by indorsement in writing said policy of insurance to his said creditors to secure said indebtedness, and delivered said policy to them, taking back from said assignees an agreement in writing stipulating that the assignment was made to secure them the amount due from the assignor, and containing an agreement on the part of the assignees to keep up said insurance, and, upon the death of said Alexander and the payment to them of the amount due them, with interest and all premiums paid and expenses incurred on account

of said insurance out of said insurance, to pay the balance remaining to the heirs of the said Alexander or to his order; which agreement was signed by the assignees and delivered to Alexander. The said assignees paid the premiums and kept up said policy. William D. Alexander died in September, 1887, without making any other disposition of said policy or giving any further orders as to the disposition of the proceeds. After the death of said William D. Alexander, Marion Aldrich was by the Posey Circuit Court appointed administrator of his estate. The company paid the full amount of the policy, \$5,000, to the assignees of the policy and the administrator, the assignees receiving the amount due them, and the administrator receiving the residue, \$1,115.10. The appellees, the widow and children of said William D. Alexander, and being his sole heirs, file their petition in this case in the Posey Circuit Court, alleging the facts and asking an order upon the administrator to pay to them the said sum of \$1,115.10 in his hands so received on said policy; also alleging that appellant Johnson claimed to have a lien upon said money by virtue of an execution issued from the Circuit Court of Posey County for \$2,500, in his favor. Appellants demurred to the complaint, which was overruled and exceptions reserved. Appellant Johnson also filed an answer and a demurrer was sustained to it, and, failing to plead further, a judgment was rendered, ordering the administrator to pay the money to the appellees. The administrator does not appeal, but Johnson alone appeals, and assigns as error the overruling of his demurrer to the complaint and the

of the policy as security for his own debt conveys no title. *City Sav. Bank v. Whittle*, 2 New Eng. Rep. 294, 68 N. H. 587.

A man who obtains insurance upon his life for the benefit of his wife and children cannot, while they are alive, exercise any power of disposition over it without their consent; nor has he any interest therein of which he can avail himself. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370.

Endowment policy.

An endowment policy on the life of her husband, in favor of the wife, is not assignable, except in cases authorized by statute. *Baron v. Brummer*, 1 Cent. Rep. 708, 100 N. Y. 872.

An endowment policy of insurance, payable to the assured or his assigns at a certain date, or, if he should die before that time, to his legal representatives, is assignable by the assured, where the assignment is not made to cover a mere speculative risk; and the insurance passes to the assignee, though the assured dies within the endowment period. *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 561, 29 L. ed. 907.

Assignee must have an interest in life of insured.

An assignment of a life insurance policy to a person who has no insurable interest is void. *Roller v. Beam* (Va.) 6 L. R. A. 136; *Warnock v. Davis*, 104 U. S. 775, 28 L. ed. 924.

It is contrary to public policy to allow anyone having no insurable interest in the life of a human being to become the owner by assignment or otherwise of insurance upon such life. *Schonfeld v. Turner*, 7 L. R. A. 189, 75 Tex. 324.

The assignment of a policy to one having no expectation of benefit or advantage from the continuance of the life of the insured, founded on pecuniary relations or those of blood or marriage, 9 L. R. A.

—to one who is interested in the death of the insured rather than in his life,—is obnoxious to all the objections which exist to the issue of the policy originally to such person. *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329.

One having no insurable interest in the life of the beneficiary takes nothing by the assignment; and the wife and children of insured are entitled to the money, less the amount paid on account of the certificate. *Price v. Supreme Lodge K. of H.* 68 Tex. 361.

A policy assigned by a pre-arranged plan to one who assigns it to a third person having no insurable interest in the insured, the latter paying all the premiums, is void, notwithstanding the one to whom the policy was issued had such an interest. *Keystone Mut. Ben. Asso. v. Norris*, 7 Cent. Rep. 204, 115 Pa. 443.

Where neither of three assignees of a life insurance policy has an insurable interest in the life of the insured, the last assignee in good faith for value has the superior right to the proceeds. *Connecticut Mut. L. Ins. Co. v. Fisher*, 30 Fed. Rep. 662.

Where a policy was issued on the life of the wife in favor of her husband, and subsequently the policy was assigned to two persons who had no insurable interest therein, in an action by the husband against them jointly, defendants could not show that they had a separate interest in the policy, and received the money as on account of such separate interest, and not jointly. *Speck v. Hettinger* (Pa.) 8 Cent. Rep. 800.

The sale and transfer of a policy by the beneficiaries thereof, during the life of the insured, to one who has no insurable interest in the life of the insured, either as a relative or as a creditor, is a fraud upon the insurance company by which it was issued. *Missouri Valley L. Ins. Co. v. McCrum*, 38 Kan. 144.

sustaining of a demurrer to his first and third paragraphs of answer.

It is contended on the part of the appellant that there was not such a disposition of the policy as to give to the widow and children, who are the heirs of the deceased, the right to the excess above paying the amount due the assignees; that it was in the nature of a gift to the heirs, and by the terms of the agreement Alexander retained the right to make some other disposition of the surplus, and order it paid to other persons: hence the donor did not relinquish all control over the fund and it did not constitute such a delivery as to make a valid gift. Also, that the policy having been made payable to the personal representatives of the deceased, Alexander being insolvent, a gift of any portion of it to his heirs is in fraud of his creditors and therefore void. It is upon this theory that it is contended that the court erred in its rulings.

The law favors the making of a reasonable provision by a man for his family and those who are dependent upon him; and it is not a violation of the statute and in fraud of creditors for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family.

In *Pence v. Makepeace*, 65 Ind. 845, it is held that only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent debtor on a policy of insurance upon his life for the benefit of his wife and children be recovered by his creditors; and in no event can any excess over the amount of the premium so paid be recovered.

A life insurance policy is not assignable to one who has no insurable interest in the life of the deceased, and who could not have taken out a policy in his own name. On this point there is a conflict in the decisions of the state courts. *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

Such an assignment has been held to be against public policy. *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 118; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 99; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Stevens v. Warren*, 101 Mass. 564.

The decisions of the New York Court of Appeals, however, are opposed to this view, and hold that a valid policy on one's own life is assignable like an ordinary chose in action without regard to interest in life of insured. *St. John v. American Mut. L. Ins. Co.* 18 N. Y. 31; *Valton v. National Fund L. Assur. Co.* 20 N. Y. 32.

When insurance is obtained by a person on his own life, and made payable, originally or by assignment, to another having no, or only a limited, insurable interest in his life, it is immaterial what amount of insurance was taken out, as the surplus will go to the party whose life was insured. *Equitable L. Assur. Society v. Hazlewood*, 7 L. R. A. 317, 75 Tex. 338.

Assignment as security for debt.

The assured may assign the policy as security for moneys advanced on it. Such assignment will be invalid only beyond what was required to refund those sums with interest. *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244.

An absolute assignment of a policy of insurance may be held an assignment only as a security for money loaned where such is fairly shown to have been the intent. *Page v. Burnstine*, 103 U. S. 664, 26 L. ed. 538.

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In *Central Nat. Bank v. Hume*, 128 U. S. 195 [32 L. ed. 370], it is held that a man may rightfully devote a moderate portion of his earnings to insure his life and thus make reasonable provision for his family, and though he be insolvent, such payment is not a fraudulent transfer of his property, and that after his decease his creditors will have no interest in the policy.

In *McOutcheon's App.*, 99 Pa. 183, it is held that when a person takes out a policy of insurance upon his own life in his own name, and subsequently assigns the same to his wife, child or other dependent relative, the mere fact that the assignor in such case is insolvent at the time of making the assignment does not warrant the inference that the assignment was in fraud of creditors.

In *Bigelow on Fraud*, vol. 2, p. 129, it is said: "A debtor, though insolvent, may use his earnings to pay for insurance on his life in favor of his family."

The authorities recognize the distinction between policies taken in the name of the debtor, and afterwards, when they have become valuable choses in action, assigned, and those taken originally in the name of the wife, child or other dependent; but hold that in either case it is valid if made in good faith.

In this case it is not shown what amount of premiums were paid by Alexander before the transfer; at most, it was not kept up by him but a few months. After that the premiums were paid by the assignees. The unsecured creditors were injured by the transfer only to the extent of the amount paid by him

A transfer by a debtor to his creditor of a life insurance policy, by a bill of sale absolute on its face, entitles the creditor to no greater interest in the policy than the payment of his debt and interest, together with the premiums paid by him and interest thereon. *Cawthon v. Perry*, 76 Tex. 383.

A creditor to whom the debtor makes an absolute assignment of a life insurance policy derives title only to sufficient of the proceeds to satisfy his debt and disbursements, with interest. *Lewy v. Gilliard*, 76 Tex. 400.

Where policies were assigned to a bank as security for future premiums to be paid by the bank for the benefit of the insured, who afterwards made a general assignment to C. for the equal benefit of all his creditors, and after his death the bank collected the money, and satisfied its claim out of the proceeds, it was held that the balance passed to the assignee by the assignment, and not to the executor. *Rhode Island Nat. Bank v. Chase*, 5 New Eng. Rep. 758, 16 R. I. —.

The holder of a life insurance policy, who assigns it as equitable collateral security for a loan, is still under the duty of keeping it alive by payment of the premiums; and where the company itself is the assignee of the policy as security for a loan to the insured, and obtains a verdict, when sued on the policy, it is error for the court to thereupon render judgment for the plaintiff for the amount of premiums paid by the insured after such assignment of the policy. *Grant v. Alabama G. L. Ins. Co.* 76 Ga. 575.

The creditor can hold the proceeds of the policy only to the extent of the sums actually advanced by him. *Roller v. Beam (Va.)* 6 L. R. A. 136.

Where a person notoriously insolvent transfers a policy of life insurance as collateral security for a pre-existing debt to a creditor who, after the death of the insured, receives the amount of the

in premiums, or, at least, not to exceed the value of the policy at the time of the transfer; and what such value was is not shown. The deceased took out the policy and held it but a short time, until he transferred it to secure certain creditors whose claims then amounted to near \$3,400, and took an agreement from them by which they were to pay the premiums from that time forward, and from the proceeds, when paid, retain the amounts due them, including principal and interest of their claims and all premiums paid and expense incurred on account of the policy, and pay any surplus over to his heirs. Had the insured lived but a few years there would have been no surplus to be accounted for. It was no doubt by reason of the arrangements made that the premiums were paid and the policy kept in force. There are no facts shown either in the complaint or the answers that cast any suspicion on the transaction or go to show that the transfer which might result in a possible benefit to his widow and children was not made in the utmost good faith, or that go to show that his unsecured creditors were in fact injured. If at the time he was a resident householder of this State he was entitled to \$600 as exempt from the demands of creditors; this amount at least he had the right to have disposed of as he pleased. Had Alexander taken insurance on his life to the amount in controversy in this case, and had the policy issued in the name of his wife and children, for their benefit, and paid for it, though insolvent at the time, there could be no

question, under all the authorities, but that the wife and children could collect and hold the same free from all demands of creditors; and we can see no reason why they do not acquire the same rights under the facts in this case, though the policy was made payable to Alexander himself, as he held it but a short time, when he transferred it to some of his creditors, they to pay all future premiums. He had the right to prefer his creditors, and by the arrangements which he made the creditors received much more than the amount taken from his estate to pay premiums. In our opinion, the transfer was not in fraud of creditors, and was valid and transferred the surplus to his heirs.

As to the point made, that it was an incomplete transfer, we do not think it is well taken. The policy was assigned by an indorsement in writing and delivered. The agreement provided in effect that any surplus remaining should be paid to his heirs, unless he made some further order in regard to it. He died making no further order, and the legal liability of the assignees was to pay the surplus to his heirs. Upon this question the case of *Supreme Lodge K. of P. v. Schmidt*, 98 Ind. 874, is in point. In that case it was held that, when one takes a life policy on his own life in a mutual society, payable upon his death to a person named, or to such other person or persons as he may subsequently direct, the beneficiary named is entitled to recover. In that case the court says: "From the time of the

insurance, any other creditor may bring an action to set aside the assignment and compel payment of the money into court for distribution among the creditors generally. *Prentice v. Steele* (Super. Ct.) 4 Montreal L. Rep. 819.

Assignees of a policy of insurance, who receive the money thereon jointly and give a joint receipt, must account for it jointly. The fact that they hold separate interests, acquired at different times and from different persons, makes no difference. *Speck v. Hettinger* (Pa.) 8 Cent. Rep. 600.

Policy made payable to wife.

Where the decedent in his lifetime procured a policy of insurance upon his life, payable to his wife, the fact that decedent gave the policy to his wife by which could have no effect to change the contract, which was evidenced by the policy itself, or to determine in whom was the right to its benefit. *Pinneo v. Goodspeed*, 9 West. Rep. 479, 120 Ill. 524.

A policy issued to a wife on the life of her husband, in 1890, was not assignable by her, and she may avoid her assignment against a subsequent assignee of her assignee, who had surrendered the policy to the company, upon paying premiums due thereon. *Frank v. Mutual L. Ins. Co.* 8 Cent. Rep. 414, 103 N. Y. 268.

The Act of 1879, which authorizes the wife to assign the policy with the consent of her husband, has no application where there is no such consent. *Baron v. Brummer*, 1 Cent. Rep. 708, 100 N. Y. 372.

The joining by the husband in the execution of an assignment, by his wife, of a policy of insurance on his life for her benefit, satisfies Laws 1879, chap. 243, requiring his written consent to such assignment; and where the policy was payable, in case the wife died before the husband, to her children, and the wife survived her husband and the maturing of the policy (an endowment policy), the fact that she had children at the time of the assign-
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ment does not render it void. *Anderson v. Goldsmith*, 5 Cent. Rep. 787, 108 N. Y. 617.

Act 1870, chap. 80, concerning non-assignability of policies taken by the wife on the husband's life, is not confined to cases where premiums are paid with the husband's funds. *Frank v. Mutual L. Ins. Co.* *supra*.

An ordinary paid-up policy of life insurance, effected by the husband on his life for the benefit of his wife, is assignable by the wife during the life of her husband, when the assignment is made with his concurrence. *Ford v. Travelers Ins. Co. of Hartford* (D. C.) 6 Mackey, 384.

Where a husband made a policy of life insurance payable to his wife, it became her property, and if she transferred it to a creditor of her husband to secure his debt, such transfer was valid; and a ratification after his death, without any new consideration, will not render it valid. *Smith v. Head*, 75 Ga. 755.

Where a policy was obtained by a wife on her husband's life, payable to her assigns, she was entitled to recover the amount thereon, although assignments had been obtained from her by fraud. *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 12 West. Rep. 535, 68 Mich. 116.

Where the wife never knew her husband had dealings in her name with a bank, and where it appears that her signature to the assignments of the policies to the bank was procured without her knowing what the instruments were, the evidence is not sufficient to entitle the bank to claim the policies. *Ibid*.

A policy of insurance made payable to the wife of the insured, providing that in case of her death before her husband it should be payable to her children, can be enforced by the children for their own benefit, where the wife died before her husband, although both husband and wife had united in assigning the policy to a third person. *Brown's App.* 125 Pa. 308.

issuance of the certificate until Schmidt's death, Mrs. Schmidt and her co-appellees were, in legal contemplation, the owners of it, subject only to the right of Schmidt to ultimately substitute other beneficiaries by will or in such manner as the rules and regulations of the order might permit."

So, in this case the heirs of Alexander were the owners of the surplus, if any should remain, subject only to the right of Alexander to order it paid to some other person or persons, and he never made any order concerning it. It is but carrying out his intention to make such slight provision as was in his power to do for his widow and children at his death to give to them the sum so remaining after paying the assignees.

Some question is made as to the complaint on the ground that the agreement taken by Alexander from the assignees is not properly an exhibit to the complaint; that it is not the basis of the action, but that the proper form of action is upon a common count for money had and received.

We cannot agree with this theory. The action is properly an application to the court for an order requiring the administrator to turn over to the appellees the money received on the policy, and the agreement is the basis of the appellees' right to have such order made.

There is no error in the record.

Judgment affirmed, with costs.

James WELSH, *Appt.*,
v.
STATE OF INDIANA.

(.....Ind.)

1. An affidavit charging a person with the unlawful sale of "beer" contrary to the form of the statute in such cases made and provided is not subject to the objection that it does not charge the sale of malt or intoxicating liquor.
2. The courts of Indiana have jurisdiction to try and punish persons selling intoxicating liquors in violation of its laws upon boats anchored in the Ohio River, where such river constitutes the southern boundary of the State.
3. The fact that no provision is made by law for the granting of licenses for the sale of intoxicating liquors upon rivers which form part of the boundaries of a State, and which are within its jurisdiction, does not authorize sales thereon without a license where it is made unlawful to sell such liquors within the jurisdiction of the State without a license so to do.
4. Restricting the right to obtain licenses for the sale of intoxicating liquors to the male inhabitants of the State does not render a law obnoxious to U. S. Const., art. 4, § 2, which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.
5. An instruction the wording of which would lead the jury to believe that they had the discretion to fine defendant or not to fine him if they found him guilty of

violating the statute is properly refused where the statute prescribes a fine in all cases of guilt.

6. A defendant should not be relieved from the payment of costs when found guilty of violating a penal statute without some reason for so doing.
7. An instruction is properly refused in a criminal case which requires the jury to acquit if they find that a former jury has been impeached and sworn to try defendant on the same charge, without regard to the facts which may have led to the discharge of such jury.
8. A prisoner who was out on bail at the time of his trial cannot be heard to complain that the verdict of the jury was received in his absence.
9. An inference that a prisoner was not present in court at the time the verdict of a jury against him was received will not be permitted to overcome the legal presumption that everything was rightly done in court.

(November 15, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Harrison County, entered upon a verdict convicting him of unlawfully selling intoxicating liquor without a license. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Charles D. Kelso for appellant.

Messrs. L. T. Michener, Atty-Gen., J. L. Suddith and J. H. Gillett for the State.

Coffey, J., delivered the opinion of the court:

This was a prosecution instituted by the State against the appellant, before a justice of the peace, for an alleged violation of the provisions of § 5320, Rev. Stat. 1881. That section provides that any person, not being licensed according to the provisions of the Act of which it constitutes a part, who shall sell or barter, directly or indirectly, any spirituous, vinous or malt liquors in a less quantity than a quart at a time, or who shall sell or barter any spirituous, vinous or malt liquors to be drunk, or suffered to be drunk, in his house, out-house, yard, garden or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc.

The affidavit in this cause charges that on, etc., at the County of Harrison and State of Indiana, James Welsh . . . did then and there unlawfully sell to one Andrew J. Glaze, at and for the price of 5 cents, a less quantity than a quart of beer, at a time, to wit: one glass of beer containing a half pint, he the said James Welsh not then and there having a license to sell intoxicating liquors in a less quantity than a quart at a time, in force at the time according to the laws of said State, contrary to the form of the Statute in such cases made and provided, etc.

The appellant was convicted before the justice and appealed to the circuit court, where he was again convicted and now appeals to this court, seeking a reversal of the judgment rendered against him in the circuit court.

His first contention is that the affidavit above set out is defective because it is not charged

that the beer therein named was malt beer, or that it was intoxicating.

Section 5313, Rev. Stat. 1881, enacts that the words "intoxicating liquor," shall apply to all spirituous, vinous or malt liquor, or to any intoxicating liquor whatever, which is used or may be used as a beverage.

In the case of *Myers v. State*, 93 Ind. 251, it was held by this court that the primary meaning of the word "beer" is fermented liquor made from any malted grain, with hops or other bitter flavoring matter; in other words, it means a malt liquor. The affidavit before us, therefore, charges that the appellant sold malt liquor, which is declared by our Statute to be within the words "intoxicating liquor." An affidavit like this, charging a person with the unlawful sale of "beer," contrary to the form of the Statute in such cases made and provided, is not, in our opinion, subject to the objection that it does not charge the sale of malt or intoxicating liquor.

The court did not err in overruling the appellant's motion in arrest of judgment.

It is disclosed by the evidence in the cause that the beer in question was sold from a boat, anchored in the Ohio River near the south line of Harrison County, in this State. There is some conflict in the evidence as to whether the boat was anchored north or south of the line known as low-water mark. It is contended by the appellant that low-water mark on the Ohio River at this point is the southern boundary of the State; and that for this reason it does not appear that the beer was sold in Harrison County or in the State of Indiana.

Where the Ohio River constitutes the boundary between the States of Kentucky and Indiana, low-water mark on the north side of the river is the southern boundary of the State of Indiana. *Indiana v. Kentucky*, 136 U. S. 479 [34 L. ed. 329].

But assuming that the appellant's boat, from which he sold the beer in question, was anchored south of the south line of the State, we do not think it follows that he may not be charged, tried and convicted in Harrison County, Indiana.

Section 1, art. 14, of our Constitution provides that the State shall be bounded on the south by the Ohio River, from the mouth of the Great Miami River to the mouth of the Wabash.

Section 2 of the same article declares that the State shall possess jurisdiction and sovereignty co-extensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction in civil and criminal cases with the State of Kentucky, on the Ohio River, and with the State of Illinois, on the Wabash River, so far as said rivers form the common boundary between this State and said States respectively.

Section 1578, Rev. Stat. 1881, provides that when an offense is committed in this State, or on the boundary thereof, on board a boat or vessel navigating a river, lake or canal, or lying therein, the jurisdiction is in the county within or opposite to which the offense was committed.

Section 1579 provides that the proper courts of the several counties in this State bordering on the Ohio River, and on the Wabash River so far as said river forms the boundary line between this State and the State of Illinois, 9 L. R. A.

shall have jurisdiction of all offenses committed against the penal laws of this State on said rivers opposite to said counties respectively.

The right of the State of Indiana to exercise both civil and criminal jurisdiction concurrent with the State of Kentucky is secured by an Act of the Commonwealth of Virginia entitled "An Act Concerning the Erection of the District of Kentucky into an Independent State," passed December 18, 1789. 1 Va. Rev. Laws, p. 59.

By reason of the constitutional provisions above referred to, and statutory provisions similar to those here set out, it has been held by this court that where a violation of the criminal laws of this State occurs on the Ohio River, it is proper to charge in the indictment that the offense was committed in the county opposite the place where the act was committed constituting the crime. *Carlisle v. State*, 83 Ind. 55; *Dugan v. State* (Ind.) 9 L. R. A. 821.

It will thus be seen that the criminal laws of the State extend to and are in force on the Ohio River where such river constitutes the southern boundary of the State. The contention of the appellant that because no provision is made, by law, for granting a license to sell intoxicating liquors upon the Ohio River, he has a right to sell without a license, is not tenable. As it is made unlawful to retail intoxicating liquor, within the jurisdiction of the State, without a license so to do, and as there is no law authorizing the granting of a license to sell upon the waters of that stream, it may be that as to the space between low-water mark on the Indiana shore and low-water mark on the Kentucky side, we have absolute prohibition in so far as the right to sell liquors by retail is involved. The difficulty attending the detection, arrest and punishment of violators of the law, engaged in the retail liquor business on the water, would seem to furnish a sufficient reason to the Legislature for withholding a license to sell upon the Ohio or Wabash Rivers where such rivers constitute the boundary of the State.

It is to be observed that we are not dealing with a person navigating the Ohio River, engaged in interstate commerce; but the case before us is one where the offender, not engaged in navigation, anchors his boat near the Indiana line, and engages in the business of retailing intoxicating liquor without a license. Such a case, in our opinion, falls both within the letter and the spirit of our Statute; and it is no defense to say that the law makes no provision for granting a license to sell at that place.

It is further contended that our law providing for the granting of license to sell intoxicating liquor is in conflict with § 2, art. 4, of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.

It is contended that, as the law withholds a license from all persons except male inhabitants of the State, it denies to citizens of other States the same rights that are enjoyed by the people of Indiana, and for this reason the law is void.

The argument is that beer and other intoxicating liquor are property, as much so as hogs, horses, grain or any other personal property; and that under the Federal Constitution the

citizens of any State in the Union have the right to sell such property anywhere within the United States where the sale of such property is tolerated; and that a citizen of a sister State can be deprived of no right to sell which is enjoyed by the citizens of the State where he offers his property to the public.

It is undoubtedly true that the common law does not recognize any difference between intoxicating liquors as property and any other species of property. But while it is true that intoxicating liquor is property, still its inherent character is such that it is the proper subject of the police power. *Harrison v. Lockhart*, 25 Ind. 112; *Hedderich v. State*, 101 Ind. 564.

Were it not for statutory restrictions and prohibitions every person would be as free to engage in the business of manufacturing and selling intoxicating liquor as they would be to engage in the manufacture and sale of any other property. It is not true, as is sometimes argued, that the citizen derives his right to sell intoxicating liquor from the particular State in which he sells. In selling he is but exercising his common-law right.

All laws regulating and imposing burdens on the business are prohibitory in their character. There is no difference between an absolute Prohibitory Law, a law providing for local option and License Law, except in the extent to which they prohibit the manufacture and sale of intoxicating drinks. An absolute Prohibitory Law deprives all within its reach from engaging in the business, a Local Option Law prohibits all within a given locality from selling within that locality, while a License Law prohibits all within the State who have not obtained a license from engaging in the business of retailing intoxicating liquors. Each of these is a restriction upon the common-law right of the individual citizen. The first wholly deprives him of the right, while the other two prohibit him to a limited extent. Acting upon the just assumption that the unrestricted sale of intoxicating liquors results in much evil, and that it is detrimental to society, the law-making power of each State in the Union has, in the exercise of its police power, assumed to control, regulate or prohibit the business, as seemed to it best. The extent to which such power shall be exercised must, of necessity, be left to the law-making power of the State exercising such right. That the State of Indiana possesses the power to regulate and control the traffic in intoxicating liquors has never been an open question. It has exercised such right since it first assumed the position of a State in the Union; and the only question now before us is as to whether our present law, assuming to do so, is void for the reasons suggested by the appellant in this case.

The assumption of the appellant that our law providing for the granting of license to retail intoxicating liquor secures to the citizens of this State rights not enjoyed by the citizens of other States, is not true in fact. The law does not require that the person to whom the license is issued shall be a citizen of the State. The law does require that he shall be a male inhabitant, but we need not stop to argue that there is a broad distinction between a citizen and mere inhabitant. It is not an unreasonable requirement that a person who desires to avail

himself of a license to retail intoxicating liquor shall submit himself to the jurisdiction of the State, by becoming an inhabitant thereof, to the end that he may be readily apprehended and punished for any violation of the law in connection with his business. In our opinion, the law providing for the granting of license to retail intoxicating liquor is not subject to the objection urged against it by the appellant in this case. *Wagner v. Garrett*, 118 Ind. 114.

It is also contended that the court erred in refusing to instruct the jury in writing, as requested by the appellant; but it does not affirmatively appear by the record before us that any such request was made before the commencement of the argument in the cause.

The appellant at the proper time prayed the court to give to the jury the following instruction, viz.: "If you should find the defendant guilty as charged, you may, in your discretion, return a verdict assessing a fine against him, and also find that he shall not pay the costs of this prosecution." The court refused to give this instruction, and the appellant excepted.

We do not think the court erred in this ruling. From this instruction the jury doubtless would have been led to believe that if they found the appellant guilty, as charged, they had a discretion to fine him or not to fine him, as they might choose, when in fact they had no such discretion. If they found him guilty, it was their duty to assess a fine against him of not less than \$20. Nor do we think that the matter of relieving a party convicted of a violation of the criminal law from the costs of the prosecution is mere matter of arbitrary discretion.

What particular facts would authorize a court or jury, finding a defendant guilty, to relieve him from the payment of costs, we need not now inquire; but he should not be so relieved without some reason for so doing. This instruction proceeds upon the theory that it is a matter of mere arbitrary discretion, and in this we think it is erroneous.

The appellant also prayed the court to give the jury the following instruction, viz.: "If you are satisfied from the evidence that a jury has heretofore been impaneled and sworn to try the defendant on the charge contained in the affidavit in this cause, you must acquit him for the reason that the State of Indiana has no right to place a man twice in jeopardy for the same offense."

The court did not err in refusing this instruction. If a jury had been previously impaneled to try the appellant on the charge contained in the affidavit in this case, and had been discharged at the appellant's request, or with his consent, or had been discharged after a reasonable time for deliberation, because they were unable to agree upon a verdict, such discharge would not entitle the appellant to an acquittal.

This instruction places the right of the appellant to an acquittal upon the mere fact that a jury had been impaneled to try him, without any regard to the facts which may have led to their discharge, and in this it was erroneous.

Finally it is contended by the appellant that the circuit court erred in receiving the verdict of the jury in his absence. It would seem to be a sufficient answer to this objection to say that it does not affirmatively appear by the record that the appellant was in the custody of the

sheriff, nor does it appear, except by inference, that he was not present in court at the time the verdict of the jury was received. Such inference cannot be permitted to overcome the legal presumption that everything was rightly done in court. If he was on bail, his absence from the court-room when the verdict was returned

was voluntary, and he cannot be heard to complain.

After a careful consideration of all the questions presented, we have reached the conclusion that there is no error in the record.

Judgment affirmed.

OHIO SUPREME COURT.

William R. HERRON, *Piff. in Err.*,

v.

Sarah E. HERRON.

(47 Ohio St.)

***A growing crop, the annual result of agricultural labor,** sown by a husband on his land pending a suit for divorce and alimony brought by his wife, passes by a decree which gives the land to the wife as alimony, although such crop is not, in terms, described or referred to in the decree.

(October 23, 1890.)

ERROR to the Circuit Court for Vinton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for the cutting and hauling away of a crop of wheat from plaintiff's land. *Affirmed.*

Statement by Spear, J.:

The defendant in error brought her action before a magistrate against plaintiff in error, in trespass for cutting and hauling away a crop of wheat upon lands that had been assigned to her as alimony, in an action brought by her against plaintiff in error (her then husband), for divorce and alimony in the Court of Common Pleas of Vinton County. The crop in controversy was sown after the suit was brought, and before decree, and was not mentioned or described therein. The cause was appealed to the Common Pleas Court of Vinton County, where defendant in error had judgment; taken on error to the circuit court and affirmed, and this proceeding is instituted to reverse the judgment of said courts.

Messrs. McGillivray & Coultrap for plaintiff in error.

Messrs. Rannells & Darby for defendant in error.

Spear, J., delivered the opinion of the court:

The question in this case is, whether a crop of wheat, sown on land by a husband after the commencement by his wife of a suit for divorce and alimony, passes to the wife by a decree which gives her the land as alimony, but which does not, in terms, describe or refer to the wheat.

Our Statute relating to alimony provides that where divorce is granted for the aggressions of the husband, the wife shall be allowed such alimony out of her husband's real and per-

sonal property as the court shall deem reasonable, having due regard to the property which came to him by the marriage, and the value of his personal estate at the time of the divorce. It was therefore competent for the court to adjudge this land to the wife as alimony, with the growing crop or without.

Growing crops, the annual result of agricultural labor, are part of the land in some cases, and in some not. Some text-writers say that they are in most cases part of the land. They appear to partake of the nature of realty, inasmuch as they have root in the soil itself, and take up and absorb the substance and strength of the land while growing; and, at the same time, of personalty, as the land must be prepared and the seed sown by the husbandman, and the seed is personalty. This court has said (*Baker v. Jordan*, 8 Ohio St. 438) that they are generally to be considered as personalty. And yet, in a later case, *Youmans v. Caldwell*, 4 Ohio St. 73, Kennan, J., says: "They are generally to be considered as part of the realty." Such crops are subject to levy and sale on execution. They may be sold without writing, and the title will pass. On the death of the ancestor they go to the personal representative, and not to the heir; this because they are treated as the result of labor and outlay incurred at the expense of the ancestor's personal estate. They will not, in this State, pass with the land at judicial sale, nor at partition sale. So, too, such crops may be reserved by parol by the grantee who conveys the land, and if the parties to the deed signify their understanding that, as between them, the crop is personalty, the law will so regard it. *Baker v. Jordan, supra*. But, in case of sale and conveyance by the owner of the land, such crops, where sown by him, as between vendor and vendee, pass with the land unless reserved. A reason given for this rule is that the deed is to be construed most strongly against the grantor, and if the crop be not reserved the grantor is presumed to have intended it to pass with the possession. A further reason is found in the fact that, if it were otherwise, the purchaser of land would be subject to the intrusion of the vendor to gather the crop. In the absence of a reservation of the right to do this, such intrusion would be a trespass, and the anomalous situation would be presented of the ownership by one of personal property upon the land of another without right in the owner to enter and take it.

In the case before us there can be no presumption against the husband of intent to pass title to the wheat, for he resisted the wife's claim throughout. On the other hand the crop cannot be treated as an away-going crop, or

*Head note by the Court.

9 L. R. A.

emblements, and, for that reason, personally, for no relation of landlord and tenant exists between the parties. On the contrary, every relation has been severed by the decree of divorce. Nor do the cases declaring the law as to judicial sales control this case. The reason given for excluding growing crops from judicial sales is that all lands before exposure to sale are required to be appraised, and the sale to be made for a sum bearing some proportion to its appraised value (annual crops are not included in such appraisal, and hence to include them in the sale would be to give to the purchaser property which had not been subject to appraisal); and that the debtor's rights can only be protected by regarding the annual crops as personally requiring a separate levy. *Cassidy v. Rhodes*, 12 Ohio, 96.

This rule must be taken as an exception to the ordinary rule on the subject, for, in States where lands are sold at judicial sale without appraisal, growing crops are uniformly held to pass to the purchaser, and in Indiana, where the Appraisal Laws are similar to ours, they are, nevertheless, held to pass with the land. So it has been held in other States that, as between mortgagor and mortgagee, where the latter obtains the absolute estate in fee of the mortgaged premises by becoming the purchaser under a foreclosure and sale, he is entitled to the growing crops, and may maintain trespass against the mortgagor, or his lessee, for taking them away. *Lane v. King*, 8 Wend. 584; *Shepherd v. Philbrick*, 2 Denio, 174; *Jones v. Thomas*, 8 Blackf. 428. See also 4 Kent, Com. 157.

From the foregoing it may be concluded that, as a general proposition, where the title and possession of land is transferred from one to another in such way as to clothe that other with a full title, the annual growing crops will pass unless the circumstances indicate a purpose to reserve them.

In the light of this principle let us examine the case before us. The decree of the court granting the wife a divorce was absolute. Henceforth their ways parted, and, in law, they were strangers. Considerations of propriety and public policy required, therefore, that as their personal relations had been severed their property rights should in the future be separate and distinct. In this spirit the decree for alimony was made absolute. The court might have limited the estate, or the possessory rights, of the wife in the land, but it chose not to do so. The land was allowed to her as reasonable alimony without reservation or qualification. No appraisal was had, or was necessary. Presumably, the court heard proof as to the extent and value of the husband's possessions, and as to their condition, and was made aware of every circumstance which would enhance the value of those possessions. At least it was the defendant's privilege, not to say duty, to acquaint the court fully with all facts which would enable the court to act intelligently in rendering judgment, and if he neglected that opportunity it is too late now for him to seek to better his case. If a reservation of growing crops was desired, then was the time to speak, just as a vendor,

when making conveyances and giving possession, must then speak.

The legal effect upon the allowance was to grant to the wife the entire interest of the husband in the land. It was not necessary that a conveyance should be made, because the decree itself operated as a conveyance, and the title passed to the wife *eo instanti*. This transfer of title was not by any act of the husband, but by the fiat of the court. Hence it is to the purpose of the court we must look, and not to the purpose of the husband. The decree is not difficult of construction. It explains itself. The title received by the wife was as full and ample as though a conveyance from the husband had been made, and she took a title in fee simple. *Gallagher v. Fleury*, 86 Ohio St. 590. She took as a purchaser.

"There are but two modes only, regarded as classes, of acquiring a title to land: namely, descent and purchase; purchase including every mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted as owner by the act of the law." 8 Washb. Real Prop. p. 4.

Being thus clothed with the full title to the land, and being by the decree put in immediate and unqualified possession of it, her control over it was absolute. She might allow the crop to remain undisturbed until ripened for the harvest, or she might plow it under for the enrichment of the land, or turn on stock to feed upon the young wheat. Any right in a stranger to interfere with this entire control would be inconsistent with the full title and possession which the decree gave her. Again, if the husband could rightfully sow a portion of the land in wheat after the divorce proceeding was commenced, and thus acquire a right to the crop, nothing would, where circumstances favored, prevent his sowing the entire farm in wheat, and thus delay the wife's possession from October—the date of the decree in this case—until the following summer.

Nor is this view, as we think, open to the objection that it discourages agriculture. The crop on the land enhances the value of it; and the greater the value of each acre the fewer in number of acres will the court, having due regard, among other things, to the value of the husband's real and personal estate at the time of the divorce, deem reasonable to be allowed to the wife. At all events, in such case, the husband sows with full knowledge that the land is liable to be adjudged to the wife, and that, when the crop ripens, he may have no right of entry to gather it. He is in the situation of tenant who has by his own act brought his right of occupancy to a termination. He cannot claim profits, for it is by his own folly that he has sowed that which he could not reap.

We are of opinion that the decree gives the wife title to the land as a purchaser, and that she stands in regard to the crop of wheat in the attitude of a vendee receiving title and possession from a vendor without reservation as to the growing crop, and hence the husband had no interest in the crop after the decree, and no right to enter upon the land to gather it.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

J. T. YOUNG, *Reept.*,

v.

WESTERN UNION TELEGRAPH CO.,
Appt.

(.....N. C.....)

Where a telegraph company received the following message: "Come in haste; your wife is at the point of death,"—and failed to deliver the same for eight days, though the receiver's place of business was well known, and within a short distance of the office of the company in the town in which the receiver resided, whereby he was prevented from being present at his wife's death, or attending her funeral,—Held, (1) there was gross negligence, and the receiver was entitled to maintain an action for the tort; (2) the plaintiff is entitled, in addition to the nominal damages, to recover compensation for

*Head note by CLARK, J.

the mental anguish inflicted on him by the negligence of the defendant.

(October 13, 1890.)

A PPEAL by defendant from a judgment of the Superior Court for Craven County overruling its demurrer to the complaint in an action brought to recover damages for its failure to deliver a certain telegraph message within a reasonable time. *Affirmed.*

Statement by CLARK, J.:

This was a civil action tried before Boykin, J., at the Fall Term, 1889, of Craven Superior Court, upon demurrer to the complaint. The complaint alleges in substance that, on the 26th of February, 1889, the step-father of plaintiff's wife, at Greenville, S. C., at whose house the wife was on a visit, delivered to the defendant:

NOTE.—*Telegraph company; degree of diligence required in delivery of message.*

When a dispatch received by a telegraph company for transmission demonstrates upon its face extreme urgency that it shall be delivered immediately, the degree of diligence to be exercised is in proportion to the exigencies of the case as shown by the telegram, regardless of any rules of the company. *Brown v. Western U. Teleg. Co. (Utah) June 21, 1889.*

Injury to feelings an element of damage.

Injury to feelings occasioned by a failure to deliver a message relating to domestic affairs, where the failure is the result of negligence of the company or its servants, is an element of actual damages. *Western U. Teleg. Co. v. Cooper, 71 Tex. 507; Belle v. Western U. Teleg. Co. 55 Tex. 810; Stuart v. Western U. Teleg. Co. 66 Tex. 580; Gulf, C. & S. F. R. Co. v. Levy, 59 Tex. 542; Gulf, C. & S. F. R. Co. v. Wilson, 69 Tex. 739; Hays v. Houston & G. N. R. Co. 45 Tex. 272.*

Mental anguish caused by the failure to reach the bedside of a person before death takes place is a ground for the recovery of substantial damages against the company. A message reading, "My wife is very ill; not expected to live,"—is sufficient to inform the company that mental anguish will probably result from its failure to deliver the message promptly. See *note to Reese v. Western U. Teleg. Co. (Ind.) 7 L. R. A. 563.*

Mental anguish suffered in consequence of delay in delivering a message to a physician, saying, "Come first train to see my wife, very low,"—is a proper element of damages, being suggested by the message itself. *Western U. Teleg. Co. v. Henderson (Ala.) April 8, 1890; 8 Suth. Dam. 645; Field, Dam. 76; Cooley, Torts, 645.*

Mental anguish and suffering may be taken into consideration as elements of damage for delay in delivering a telegraph message. *Western U. Teleg. Co. v. Brosche, 72 Tex. 654; Roberts v. Graham, 73 U. S. 6 Wall. 573, 18 L. ed. 791; Phillips v. Hoyle, 4 Gray, 568; Quigley v. Railroad, 11 Nev. 356.*

To authorize a recovery of damages for mental distress resulting from the nonperformance of a contract, the party liable therefor must have been informed of the peculiar conditions and circumstances of the party for whose benefit the contract was made, which rendered the prompt performance of more than ordinary importance. *Western U. Teleg. Co. v. Simpson, 73 Tex. 423.*

9 L. R. A.

Even though there was negligence on the part of the servants of a telegraph company in delivering a message calling a physician to attend a patient, yet if it could not have been delivered in time for him to have rendered any assistance, no damages can be recovered. *Western U. Teleg. Co. v. Cooper, 71 Tex. 507.*

Measure of damages for neglect to deliver telegraph message. See *note to Reese v. Western U. Teleg. Co. (Ind.) 7 L. R. A. 563.*

Injuries to feelings, when an element of damages. See *note to Western U. Teleg. Co. v. Brown (Tex.) 2 L. R. A. 767.*

Who may recover damages for delay in delivering telegram.

The question as to who may maintain a suit for damages for delay in delivering a telegram does not depend upon the payment of the fee, or upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the despatch is sent, but upon the question, Who was in fact to be served, and who is damaged? *Western U. Teleg. Co. v. Adams, 6 L. R. A. 844, 75 Tex. 531.*

A telegraph company is liable to the addressee of a telegram which is intended for the latter's benefit, for a negligent delay in its transmission and delivery. *Wadsworth v. Western U. Teleg. Co. 66 Tenn. 695; Western U. Teleg. Co. v. Du Bois, 123 Ill. 248; Western U. Teleg. Co. v. Hope, 11 Ill. App. 239; Harkness v. Western U. Teleg. Co. 73 Iowa, 190; West v. Western U. Teleg. Co. 39 Kan. 93; Western U. Teleg. Co. v. Carew, 15 Mich. 525; Elwood v. Western U. Teleg. Co. 45 N. Y. 549; Rose v. United States Teleg. Co. 6 Robt. 305; N. Y. & W. P. Teleg. Co. v. Dryburg, 35 Pa. 238; Aiken v. Telegraph Co. 5 S. C. 363.*

The husband is a proper party plaintiff in an action for personal injury to his wife. *Texas Cent. R. Co. v. Burnett, 61 Tex. 638; San Antonio St. R. Co. v. Helm, 64 Tex. 147; Oliver v. Chapman, 15 Tex. 400; Bradshaw v. Mayfield, 18 Tex. 21.*

The death of a child before birth, and the grief and sorrow of the parents occasioned thereby, cannot be elements of damages in a suit against a telegraph company for failure to deliver a message to a physician summoning him to attend the mother; but a fair and reasonable consideration should be allowed for any increased pain and mental suffering caused her by his absence. *Western U. Teleg. Co. v. Cooper, 71 Tex. 507.*

Telegraph Company the following telegram, paying the sum charged for its transmission:

Greenville, S. C., Feb. 26, 1889.

To J. T. Young, Newberne, N. C.:

Come in haste; your wife is at the point of death.

[Signed] J. W. Rice.

That the telegram was received by the agent of defendant at Newberne on the 27th of February, and, with ordinary care and attention, could have been delivered to plaintiff within a few minutes after its receipt, as the plaintiff's residence and place of business were well known, the latter being on a principal street and within 400 yards of the telegraph office, and plaintiff had been a resident many years, continuously, in Newberne, engaged in business there; that, by the gross negligence of defendant, the plaintiff had no notice of such telegram until the receipt of a letter from the sender on March 5, whereupon he went to defendant's office, on March 6, and demanded the telegram, which was then delivered to him; that the plaintiff was continuously in Newberne, at his usual place of business, from February 26 till March 6, 1889; that had the telegram been delivered with reasonable promptness he could have had the consolation of being with his wife in her last moments and of attending her funeral, but, by reason of aforesaid gross negligence on the part of the defendant, the death and burial of his wife took place without any knowledge thereof on the part of the plaintiff; that the plaintiff had suffered great pain, mental anguish and distress by reason of the gross negligence and delay in transmitting and delivering the telegram, and demands damages. The defendant demurred to the complaint on the ground that "it does not state facts sufficient to constitute a cause of action, in that the only damage which it is alleged that plaintiff has sustained is mental anguish and grief by reason of the plaintiff's not being able, on account of defendant's failure to deliver the message, to be present with his wife during her illness and attend her funeral." The demurrer was overruled, and defendant appealed.

Messrs. Clark & Clark for appellant.

Messrs. Manly & Guion, Simmons & Gibbs and *L. J. Moore* for appellee.

Clark, J., delivered the opinion of the court:

In addition to the ground of demurrer set out in the record, the defendant demurred *overs* *tenus* in this court that the complaint did not state a sufficient cause of action in that the plaintiff was not a party to the contract, and therefore could not maintain an action for its breach. Upon the question whether the receiver can maintain the action, *Shearman & Redfield* on Negligence, § 560, say: "We think, therefore, upon the principle of these decisions, a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damages without any means of redress." There is ample authority to the same effect: *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *Elwood v.*

Western U. Teleg. Co. 45 N. Y. 549; *Ellis v. American Teleg. Co.* 18 Allen, 237; *New York & W. P. Teleg. Co. v. Dryburg*, 85 Pa. 298; *Markel v. Western U. Teleg. Co.* 19 Mo. App. 80, and many others.

This, while not the English rule, is stated by *Gray, Teleg. § 65*; 2 *Thomp. Neg. § 847*; 4 *Lawson, Rights and Remedies, § 1973*, and *Wharton, Neg. § 753*,—to be the invariable rule in this country. The following may be summed up as the reasons assigned therefor: (1) That a telegraph company is a public agency, and responsible as such to anyone injured by its negligence, or at least it is the common agent of sender and receiver, and responsible to each for any injury sustained by them respectively by its negligence. (2) That in a case like this the receiver is the beneficiary of the contract, and the injury, if any, caused by the Company's negligence must be to him. (3) The message is the property of the party addressed in analogy to a consignee of goods. (4) That, upon the face of a message such as this, the sender is the agent of the receiver, and the latter as the principal can maintain an action for breach of the contract, or for a tort, if injury is done him by negligence in performance of the duty contracted for. "The Company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver." 8 *Suth. Dam.* 814.

The author goes on to state that where there is gross or willful negligence the action can be brought either for tort or on contract, and in case of misfeasance the company is liable also to the parties as wrong-doers. Upon authority and reason we think it clear that the plaintiff could maintain the action, and, whether it is an action *ex contractu*, for breach of the contract of speedy and safe transmission, or *ex delicto*, for negligence and violation of the duty which the defendant owed as a public corporation, or as common agent of sender and receiver, at least nominal damages could be recovered. "The principle that for the violation of every legal right nominal damages, at least, will be allowed, applies to all actions, whether for tort or breach of contract, and whether the right is personal or relates to property." 1 *Suth. Dam.* 11.

Where "there is a neglect of duty by a telegraph company, and an infraction of the plaintiff's right to have care and diligence used in the sending and delivery of his message, he is entitled to nominal damages at least." *Ibid.*

The other question, and the one most earnestly pressed upon our consideration, is whether the plaintiff can recover for mental pain and anguish when there has been no physical injury. In *Shearman & Redfield* on Negligence, § 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such

cases the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message." This paragraph was cited and approved by the Court of Appeals of Kentucky, in an opinion filed in June of this year (*Chapman v. Western Union Teleg. Co.* 13 S. W. Rep. 880), in which the court says: "This seems to us to be the true rule,—one which is in accord with reason, and necessary to a proper protection of individual right and the interests of the public." In this case the court held that the plaintiff could recover damages for delay in the delivery of a message announcing the illness and death of the plaintiff's father, and says: "Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract, and whenever a party does so he is liable, at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a quasi public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If in matters of mere trade it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead and will be buried at a certain time, there is no responsibility save that which is nominal. Such rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage and the jury be allowed to consider it. If it be said that it does not admit of

accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element to the actual damages in slander, libel and breach of promise cases, it seems to us it should be equally so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult, added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings, or pecuniary, the act of a violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."

In Indiana and Texas, opinions to the same effect have also been filed during the present year. In the Indiana case, *Ross v. Western U. Teleg. Co.*, 123 Ind. 204, 7 L. R. A. 583, Berkshire, J., says: "Although the telegram had no relation to any business transaction which would have involved dollars and cents merely, this did not justify the appellee in neglecting its duty. It had undertaken for a valuable consideration to deliver the message promptly, and its failure so to do or to make reasonable effort in that direction was negligence, and a violation of its undertaking. The diligence which a telegraph company is required to use in the delivery of a message will be determined to some extent from the character and importance of the message. Upon humane grounds, messages like the one here involved should be promptly delivered, and should be regarded as of more importance to the parties concerned than mere business messages, and, in promptness of delivery, should have preference over messages of the latter class. . . . From the information it had before it when it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the message was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking. . . . The appellant having suffered great mental anguish, because, as he alleges, of the failure to promptly deliver the message, it would be a harsh rule which would deny to him all redress except the mere pittance which he paid to have the telegram transmitted and delivered. Some of the authorities seek to draw a distinction as to the right to recover damages for mental suffering, between cases where there may be a recovery for pecuniary loss, and cases where there is or can be no pecuniary loss, to which class the present action belongs. With this distinction we have no sympathy, and confess we can see no good reason for it to rest upon. If a telegraph company undertakes to transmit and deliver promptly a message wherein dollars and cents are alone involved, and its negligence occasions loss, it is conceded by all the authorities that it may be compelled to respond in damages. Why? Because it has negligently broken its agreement, or, as is sometimes said, failed to perform a duty which

it owed to the sender of the message, or the person to whom it is addressed, as the case may be. For the same pecuniary consideration it undertakes to transmit and deliver a message informing a husband of the dangerous illness of his wife, the wife of her husband, the parent of the child, the child of the parent, and it negligently fails to deliver the telegram, and, as a result, the sick relation dies without having the comforting presence of the husband, wife, father, mother, son or daughter, with all the benefit, physical and mental, which would follow. Is it to be said that, under such circumstances, the most that the telegraph company is liable for is nominal damages, because of greater mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife or child? In our judgment no such rule can or should prevail. In failing to promptly deliver a telegram the telegraph company negligently fails to perform a duty which it owes to the sender of a telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct. It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public. In our opinion, upon the facts stated in the second paragraph of the complaint, the appellant is entitled to recover damages for the mental suffering which he endured, and his measure of damages is the amount paid for the transmission of the message, and, in addition, what would seem to be just as a compensation for his mental anguish." In the other case, *Western U. Telegr. Co. v. Moore*, 76 Tex. 66, the court held that "a message delivered for transmission to a telegraph company, containing the words, 'Billy is very low. Come at once,'—is sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed, and of the fact that mental suffering is likely to result from a failure to transmit the message with diligence and dispatch," and says: "In the case of *Western U. Telegr. Co. v. Adams*, 75 Tex. 531, it was held, in effect, that a recovery could be had for mental suffering resulting from a failure to deliver with diligence a telegraphic message announcing the sickness or death of a relative, provided the language employed in the message was reasonably sufficient to put the company upon inquiry as to the relationship between such person and the party addressed, and to apprise them that its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death. The same principle was affirmed in the case of *Western U. Telegr. Co. v. Feebles*, 75 Tex. 537 (decided at the same term)," and *Western U. Telegr. Co. v. Broesche*, 72 Tex. 654.

In *Western U. Telegr. Co. v. Cooper*, 71 Tex. 507, Collard, J., says: "Appellant claims that its demurrers to plaintiff's petition should have been sustained, because injury to feelings disconnected from an actual personal injury are exemplary damages, and the facts alleged are not sufficient to recover exemplary damages. The very question raised here was before the Supreme Court in the case of *Stuart v. Western U. Telegr. Co.*, 68 Tex. 580, and the court, after discussing the *Relle Case*, 55 Tex. 310, and the *Levy Cases*, 59 Tex. 543, 563, the case of *Hays*

v. Houston & G. R. Co., 46 Tex. 273, and other authorities, use the following language: 'But it is claimed that the mental is an incident to the bodily pain, and that, without the latter, the former cannot be considered as actual damages. In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case; not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to a person.'

"The conclusion derived from the opinion in the case from which the foregoing extract is taken is that injury to the feelings caused by the failure to deliver a message relating to domestic affairs, where the failure is the result of negligence on the part of the company or its servants, is an element of actual damages. The same principle was decided by the commission of appeals in the case of *Gulf, U. & S. F. R. Co. v. Miller* (Tex.) 7 S. W. Rep. 653, erroneously styled in the official reports *Gulf, U. & S. F. R. Co. v. Wilson*, 69 Tex. 789, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered commensurate with the injury."

In *Western U. Telegr. Co. v. Simpson*, 78 Tex. 422, the court reaffirmed the same doctrine as does *Loper v. Western U. Telegr. Co.*, 70 Tex. 639, which is exactly like our case, except the relationship was that of a mother who was prevented from being at her son's death-bed and burial by negligent delay in the delivery of the telegram. In a recent case (1888) decided in the Supreme Court of Tennessee (*Wadsworth v. Western U. Telegr. Co.* 86 Tenn. 695), that court affirms the same doctrine, and Caldwell, J., after quoting the authorities to the effect that damages for mental anguish cannot usually be given in an action for breach of contract, says: "These are but illustrations and applications of the general rule which we have already stated for the estimation of damages in actions for breach of contract. They serve the purpose of showing that, in the ordinary contract, only pecuniary benefits are contemplated by the contracting parties; and that therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that, where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for the breach of contract) is subject to the same general rule; and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance. The messages were sent for a particular purpose, which was disclosed upon their face, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell

anything; no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains. Then her brother died away from her; his body needed her attention, and would have received it, as owned, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her. The messages were proper in language and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings or affection. The defendant contracted that she should have those benefits, and that she should be spared whatever pain or anguish such information, promptly conveyed, would prevent. By all the authorities, including our Code, it was the duty of the defendant to transmit and deliver these messages 'correctly, and without unreasonable delay;' and, in failing to do so, it became responsible for all loss or injury occasioned thereby. Mill. & V. Code, §§ 1541, 1542; *Marr v. Western U. Tele. Co.* 85 Tenn. 529; Gray, Tel. §§ 81, 82, *et seq.*; Cooley, Torts, 646, 647; Whart. Neg. § 787; 3 Suth. Dam. 298-300; Shearm. & Redf. Neg. § 605.

"This rule of damages is enforced by the Supreme Courts of Georgia, Virginia and other States, even where the message is in cipher. *Western U. Tele. Co. v. Fatman*, 73 Ga. 285; *Western U. Tele. Co. v. Reynolds*, 77 Va. 178, 46 Am. Rep. 715, and reporter's note at end of case. It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss; but we cannot agree that for that reason the liability should attach and be enforced in such cases only. Telegraphy is of comparatively recent origin, and the law concerning the duties and liabilities of telegraph companies has hardly passed its infancy, and cannot be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurring decisions. In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart, and so accustomed to the respect of all mankind, as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of this country. To hold that the defendant is not liable, in this case, for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegrams altogether, and to violate the rule of law which authorizes a recovery of damages appropriate to the objects of the contracts broken; and furthermore, such a holding would justify the conclusion that the defendant might, with impunity, have refused to receive and transmit such messages at all, and

that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result, we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons. . . . That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether, for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage. It is very appropriately said, however, in the conclusion of the opinion in *Relle's Case*, that 'great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative, with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which the recovery may be had; and the attention of juries might well be called to that fact.' Nor do we think that the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment as a matter for the consideration of the court in its endeavor to reach a just and sound conclusion. It is rather to be hoped that instances of such dereliction of plain, easy and important duty have not been very numerous in the past, and that they will seldom transpire in the future."

In the United States circuit court, in the case of *Beasley v. Western U. Tele. Co.*, 89 Fed. Rep. 181 (decided in 1899), the court held that, if by cause of the unreasonable delay of a telegram the husband was prevented from reaching his wife's bed before her death, he could recover a proper compensation for his disappointment and mental anguish. The judge (Maxey) very properly adds that caution should be observed by the jury to distinguish between the pain caused the plaintiff by the wife's death, for which the defendant was not responsible, and that caused by being deprived by defendant's negligence of the consolation of seeing his wife before her death. This subject is one of the first impression in this State. It is a matter of importance to the public that it should be settled what legal obligation, if any, rests upon the telegraph companies to deliver promptly messages of a social nature, not concerning pecuniary transactions. To many, and in many instances, they are far more important. If no pecuniary damages can be recovered for a breach of the duty to deliver such messages, beyond the recovery of the petty sum paid for transmission, the usefulness and value to the public of such corporations will be materially diminished. We have therefore cited quite fully from the most recent cases on the subject. There are older cases sustaining the same doctrine.

In *Relle v. Western U. Tele. Co.*, 55 Tex. 308, it was held that a telegraph company is liable for injury to the feelings of a son by delay in delivering to him a message announcing the death of his mother, whereby he was prevented from attending her funeral.

In *Stuart v. Western U. Tele. Co.*, 66 Tex.

590, it is held that where, by gross negligence in delivering a telegram, plaintiff was prevented from seeing his brother in his last illness, and attending his funeral, compensation for injury to feelings may be recovered. The same principle is intimated in *Logan v. Western U. Tele. Co.*, 84 Ill. 468. And there are other authorities.

There are some authorities to be found of a contrary tenor (*West v. Western U. Tele. Co.* 89 Kan. 93, and *Russell v. Western U. Tele. Co.* 8 Dak. 815, and some others), but they fail to satisfy us that they are consonant to justice and the "reason of the thing." Damages for injury to the feelings, such as mental anguish or humiliation, are given, though there may be no physical injury, in many cases. They are allowed where a party is wrongfully put off a train (8 *Suth. Dam.* 259); in actions for breach of promise of marriage; in actions for slander and libel (*Terwilliger v. Wanda*, 17 N. Y. 54); in actions for malicious arrest and prosecution (*Fisher v. Hamilton*, 49 Ind. 341); in actions for false imprisonment (*Stewart v. Maddox*, 63 Ind. 51); for illegally suing out an attachment (*Byrne v. Gardner*, 38 La. Ann. 6); for crim. con., and for seduction, and in other cases. In actions by a father for seduction of a daughter, by a fiction of law, the damage is laid *per quod servitium amisit*, but the recovery is generally out of all proportion to any possible valuation of the services, and it is well understood that in fact compensation is not given for them, but for the wounded and outraged feelings of the parent. Damages for injured feelings were allowed where a conductor kissed a female passenger against her will. *Craker v. Chicago & N. W. R. Co.* 86 Wis. 657.

We see, therefore, no reason why the doctrine of compensation for injury to feelings should not embrace a case like the one before us.

When a passenger, while traveling on the cars, is injured by a collision or other negligence, though there is a breach of the contract of safe carriage, yet the plaintiff can elect to hold the carrier liable in tort for the negligence which caused the injury. *Wood v. Milwaukee & St. P. R. Co.* 82 Wis. 898; *Craker v. Chicago & N. W. R. Co.* 86 Wis. 657-675, and cases cited.

By analogy, when there is an injury caused by negligence and delay in the delivery of a telegram, the party injured is entitled to sue in tort for the wrong done him.

In *Stuart v. Western U. Tele. Co.*, 66 Tex. 590, it is said: "We have no forms of action or technical rules which can prevent a plaintiff upon a statement of the facts of his case from recovering all the damages shown to

be sustained. If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize an action of tort, all the damages for the thing done or omitted, either *ex contractu* or *ex delicto*, may be recovered in the one action." To same effect, *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 547, and *Wadsworth v. Western U. Tele. Co.*, 86 Tenn. 695.

It seems to us that this action is in reality in the nature of a tort for the negligence, and that, as is usually the case in such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and that mental anguish is actual damage. "It is very truthfully and appropriately remarked by a learned author that 'the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other.'" 8 *Suth. Dam.* 260."

And Cicero (who certainly may be quoted as an authority among lawyers) says in his 11th Philippic against Antony: "*Nam quo major vis est animi quam corporis, hoc sunt graviores ea, quae concipiuntur animo quam illa quae corpora.*" "For, as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."

The difficulty of measuring damages to the feelings is very great, but it is submitted to the jury in many other instances, as above stated, and it is better it should be left to them under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy.

Scott & Jarnagin on Telegraphs, § 418, say that damages for gross negligence in the delay of a telegram, whereby the feelings of the parties are outraged, are vindictive or exemplary, and largely in the discretion of the jury; that they are given rather to punish the offender than to recompense the party injured; and some of the authorities above referred to support that view. Our own opinion, however (certainly when no malice is alleged), is that they are awarded as compensation to the plaintiff for the wrong he has sustained in the mental anguish needlessly inflicted on him by the negligence of the defendant. *Sedgw. Dam.* 585.

The demurrer was properly overruled.

Per Curiam:

No error.

MICHIGAN SUPREME COURT.

David HUNT, Appt.,

Frank S. RUMSEY.

(....Mich.....)

1. A note given in part satisfaction of

NOTE.—Nature of contract determines its validity. See notes to *Hess v. Culver* (Mich.), 6 L. R. A. 498; *Evans v. Stuhberg* (Mich.), 6 L. R. A. 501; 9 L. R. A.

a "red-line wheat note" which was void for fraud and failure of consideration, is, if unsupported by any other consideration, itself void in the hands of the original payee or of an indorsee with notice.

2. Testimony as to improper conduct of a witness respecting the trial of a case before a justice of the peace is admissible at the trial of a case upon appeal to the circuit court.

(November 14, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Wayne County in favor of the defendant in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The case sufficiently appears in the opinion. **Mr. B. T. Prentiss**, for plaintiff, appellant:

Fay was a bona fide holder, and his assignee, Smith, and Smith's assignee, Hunt, must be the same.

Wood v. Starling, 48 Mich. 592; *Mayer v. Soulier*, Id. 411.

Smith had no knowledge whatever of what the original note was given for, or of any condition attached to it. And such knowledge is necessary to make him guilty of bad faith or fraud.

Miller v. Finley, 26 Mich. 249; *Borden v. Clark*, Id. 410.

Simply having notice of circumstances which tend to show knowledge on the part of the holder is not sufficient.

Nichols v. Sober, 38 Mich. 678; *Howry v. Elpinger*, 34 Mich. 29.

There is no proof at all of any misrepresentation. It is simply claimed that the payees failed in their agreement to do something in the future. It is only when the representations made in regard to the corporation are false that a recovery upon the note, even by the payee, will be defeated.

McNamara v. Gargett, 12 West. Rep. 650, 68 Mich. 454; *Mace v. Kennedy*, 12 West. Rep. 654, 68 Mich. 889.

"General knowledge" or "reasons to know" that a note was given for red-line wheat, or even that the note was fraudulently obtained, will not prevent a recovery, unless in case of bad faith, or gross carelessness amounting to that.

Davis v. Seeley, 71 Mich. 209.

Neither the note in suit, nor the original note, was a part of the bond transaction.

Smalley v. Bristol, 1 Mich. 153.

Mr. Samuel W. Burroughs, for appellee:

Smith cannot be a bona fide purchaser of the note in suit because he is made the named payee in said note.

Thomas v. Stone, Walk. Ch. 120.

A note void for illegality of consideration is not a sufficient consideration for a new note given instead thereof.

Comstock v. Draper, 1 Mich. 481; *Johnston Harvester Co. v. Miller*, 72 Mich. 268.

The animus, feeling or interest of a witness can always be shown, and if he denies such feeling or interest, he can be contradicted upon that point.

Battisill v. Humphreys, 64 Mich. 503; *Denton v. Smith*, 61 Mich. 438.

Champlin, O. J., delivered the opinion of the court:

Suit was commenced in justice court to recover upon a promissory note, of which the following is a copy:

\$80. Huron, Mich., August 24, 1886.

September first, 1887, I promise to pay to the order of B. H. Smith or bearer eighty (\$80.00) \$ L. R. A.

dollars, for value received, with interest at the rate of 7 per cent per annum.

Frank S. Rumsey.

Defendant pleaded the general issue, and gave notice that the note was a substitute note for what is called a "red-line wheat note," and that the alleged note was without value or consideration, and was obtained by fraud and false pretenses; and also that he never executed and delivered the note in suit for value and consideration. The testimony was such that it cannot be doubted that the note for \$180 originated in one of those transactions which were so frequent in 1886, whereby farmers were duped and defrauded into giving their notes for wheat at a fictitious value, under representations that some bogus seed and cereal company would sell twice the quantity for a like fictitious price, and pay over to the farmer the avails less their commission. We have held that where the parties were in *pari delicto* such notes could not be enforced unless they had passed to an innocent purchaser for value. The question in this case turned almost entirely upon the fact whether plaintiff was such purchaser. All the facts bearing upon this question were put in evidence and submitted to the jury, who found a verdict in favor of the defendant, and, although the circuit court in its instruction to the jury may not have presented the law of the case so as to be unexceptionable, yet, taken as a whole, the point upon which the case must necessarily have turned was given to the jury in such a manner that conveyed to them a proper guidance to enable them to reach a conclusion upon the facts in harmony with the law of such cases. After instructing the jury that, as a matter of law, between the original parties, the note given for the wheat was void, he told them that, if they believed the testimony of the defendant, which tended to show that Hunt, at the time he purchased the note of Smith, knew what the note was given for, the plaintiff could not recover, and that if, on the other hand, they believed that Smith received the note all right, as he said he did, when he gave it to Mr. Hunt for the organ, there was nothing more than what had transpired in an ordinary business transaction, then Mr. Hunt, knowing nothing about the past, knowing nothing about what it was given for, would be a holder in good faith, and he would be entitled to recover, and that their verdict must be for the plaintiff. In view of the testimony embodied in the bill of exceptions, these instructions substantially covered the law in the case, it having appeared in evidence that the original note which was given in the wheat deal was made and delivered by Rumsey, and was for twelve bushels of wheat at \$15 a bushel, and the further agreement that the American Seed & Cereal Company would, on or before September 1 of the next year, sell twenty-four bushels of wheat for Rumsey, at \$15 a bushel, and pay him the avails thereof, less \$5 a bushel for their commission; that afterwards, and before the note became due, this note seems to have been held by one Edwin Fay, who was the man who delivered the wheat to Rumsey. Smith testified that "Edwin Fay held a note for \$175 or \$180 against Rumsey, and that Fay owed him [Smith]; so

Fay and he went to Rumsey, and he [Rumsey] gave this note in suit, and the amount of it was indorsed on the face of the \$175 note, and with this note Fay paid what he owed me." This testimony shows that the only consideration for the note in suit, if any, moved to Rumsey, is the same, and no other, and no different, than that which was the consideration for the \$180 wheat note, and is open to the same defenses as that note in the hands of parties who were aware of the original transaction.

Error is assigned upon cross-examination of the plaintiff with reference to his conversations with defendant, but we discover no error committed by the court in his rulings upon such cross-examination. See *Johnston Harvester Co.*

v. Miller, 73 Mich. 265, and *Goodrich v. McDonald*, 77 Mich. 486.

There was no error in admitting testimony to show that the witness Smith had been guilty of improper conduct respecting the trial before the justice of the peace. *Denton v. Smith*, 61 Mich. 431.

Other assignments of error were discussed upon the argument of the cause and in the brief of counsel, but we do not think they were such as prejudiced the rights of the plaintiff upon the trial of the cause.

The judgment will therefore be affirmed.

Morse and Grant, JJ., did not sit. The other Justices concurred.

INDIANA SUPREME COURT.

Benjamin F. HORN *et al.*, *Appts.*,

v.

INDIANAPOLIS NATIONAL BANK.

(.....Ind.....)

1. An objection that a notice to a non-resident was not published for three successive weeks as required by law, but only for three insertions during two weeks, is not valid where three full weeks after the first publication expired more than thirty days before the first day of the term at which he was notified to appear.

2. An order for publication of notice to a nonresident may be entered nunc pro tunc if no final judgment has been entered in the cause and such entry is necessary to conform the record to the fact.

3. Tender of the amount due a senior lienholder in possession of his debtor's property under a judicial sale is excused in favor of a junior lienholder seeking to redeem the property, where the former has money in his hands exceeding the amount of his claim, which he is equitably bound to apply in discharge thereof.

4. No relief can be had against the officer who made a foreclosure sale upon the

NOTE.—Redemption after foreclosure sale.

One seeking to redeem property after foreclosure sale must tender, not merely the amount of the sale, but the whole mortgage debt, which must be paid into court. *Duke v. Beeson*, 79 Ind. 24; *Collins v. Elggs*, 81 U. S. 14 Wall. 491, 20 L. ed. 723; *Johnson v. Harmon*, 19 Iowa, 56; *Powers v. Golden Lumber Co.* 43 Mich. 468; *Martin v. Fridley*, 23 Minn. 12; *Raynor v. Selmes*, 53 N. Y. 579.

Allowance for improvements.

Where a party is not a bona fide purchaser without notice of respondent's equities, he is not entitled to pay for improvements made without express consent or approval. *Witt v. Trustees*, 55 Wis. 380.

The common law, like the civil law, treats those who expend money or labor upon the property of another, knowing that they are doing wrong, as voluntary servants or agents, and compels them to lose what they thus expend. *Silsbury v. McCoon*, 3 N. Y. 322.

This general rule has been relaxed in cases where improvements were made by one under a bona fide mistaken supposition that he was the absolute owner, and that the equity of redemption had been barred. *Benedict v. Gilman*, 4 Paige, 58, 3 N. Y. Ch. L. ed. 840; *Putnam v. Ritchie*, 6 Paige, 390, 3 N. Y. Ch. L. ed. 1033; *Fraser v. Prather*, 1 McArthur, 217; *Wetmore v. Roberts*, 10 How. Pr. 54; *Roberts v. Fleming*, 53 Ill. 196; *Troost v. Davis*, 31 Ind. 84; *Montgomery v. Chadwick*, 7 Iowa, 114; *Miner v. Beekman*, 50 N. Y. 837; *Mickles v. Dillaye*, 17 N. Y. 80; *Fogal v. Pirro*, 10 Bosw. 100.

So, where he has reason to believe from the form of his conveyance, or other circumstances, that he is the absolute owner. *Bright v. Boyd*, 1 Story, 473; *McSorley v. Larissa*, 100 Mass. 270; *Barnard v. Jenkinson*, 27 Mich. 230; *Bacon v. Cottrell*, 13 Minn. 194; 9 L. R. A.

Vanderhalse v. Hugues, 13 N. J. Eq. 410; *Harder's App.* 64 Pa. 816; *Green v. Dixon*, 9 Wis. 532; *Green v. Wescoat*, 13 Wis. 606.

The purchaser is bound to keep the property without unreasonable deterioration, and is credited with necessary repairs, but has no right to enhance the value of the estate and thus render it more difficult for the mortgagor to redeem. *Quin v. Brittain*, Hoffm. Ch. 353, 6 N. Y. Ch. L. ed. 1170; *Bell v. New York*, 10 Paige, 49, 4 N. Y. Ch. L. ed. 851; 3 Pom. Eq. Jur. 205; *Putnam v. Ritchie*, 6 Paige, 390, 3 N. Y. Ch. L. ed. 1033; *Holmes v. Grant*, 8 Paige, 262, 4 N. Y. Ch. L. ed. 419; *Moore v. Cable*, 1 Johns. Ch. 885, 1 N. Y. Ch. L. ed. 180.

Purchase under statute foreclosure does not cut off the rights of the judgment creditors whose liens were subsequent to the mortgage. But where possession is taken and permanent improvements are made in ignorance of judgments in the hands of third parties, if the party making the improvements has acted bona fide and innocently and there has been a substantial benefit conferred on the owner he ought to receive pay for such benefit. *Troost v. Davis*, 31 Ind. 40; *Story*, Eq. § 1237.

The measure of such compensation will be determined by the increase in the vendible value of the property arising from such improvements. *Clark v. Hornthal*, 47 Miss. 530.

Tender essential on bill to redeem.

A bill to redeem should offer to pay the balance due the mortgagee on accounting. *Still v. Buzzell*, 5 New Eng. Rep. 644, 60 Vt. 478.

A bill alleging a tender of amount due upon a mortgage, which tender proves insufficient, and asking for the discharge of the lien, may be treated as a bill to redeem, where it contains an offer to pay whatever may be found due defendant. *Dayton v. Dayton*, 13 West. Rep. 60, 68 Mich. 437.

ground of his neglect of duty in reference thereto in a suit brought to redeem the property therefrom.

5. Improvements cannot be made by a mortgagee in possession at the expense of redemptioners.

6. Buildings and machinery which have been openly impressed with the character of personality prior to the giving of a mortgage on the realty on which they are located will retain that character as against the mortgagee in the absence of other controlling circumstances.

7. A decree in proceedings to foreclose mortgage liens involving land and buildings thereon, which simply adjudges that the mortgages be foreclosed, the property sold and the equity of redemption therein barred, will not impress the buildings with the character of realty if they had been previously recognized and treated as personality.

8. Bringing suit to redeem from a foreclosure sale will constitute an election on the part of plaintiff to affirm the sale, and will preclude his insisting on its invalidity.

9. A junior mortgagee, who is made defendant to a suit to foreclose the senior mortgage, and whose lien is provided for in the decree, which directs a sale of the property and a distribution of the proceeds among all the lienholders in the order of priority, cannot redeem from the sale under statutes which do not permit a judgment creditor to redeem from his own sale.

(October 14, 1890.)

A PPEAL by defendants from a judgment of the Circuit Court for Hamilton County in

favor of plaintiff in an action brought to redeem certain property from a foreclosure sale. *Reversed.*

Defendant Horn entered a special appearance in the case and moved to quash the process for defects in the notice of nonresidence and the publication thereof, specifying, *inter alia*, the following defects: That said notice was published without any order of the court having been made, as required by law; that the notice was not published for three weeks successively, as required by law, but only for three insertions during two weeks.

The further facts sufficiently appear in the opinion.

Messrs. Thomas J. Kane and Theodore P. Davis, for appellants:

At the November Term, pending the motion of appellants to quash the process, the court had no power to make the order *nunc pro tunc* for the publication of the notice, as of the September Term.

Williams v. Henderson, 90 Ind. 577, 579; *Makepeace v. Lukens*, 27 Ind. 485; *Schoonover v. Reed*, 65 Ind. 318.

The *nunc pro tunc* entry thus made does not profess to be an entry of what was really ordered at the previous term, but not then entered. It was an order made at the time it was entered, but ordered to be entered as of the previous term.

The office of a *nunc pro tunc* entry is to make a record of what was previously done, but not entered; not to make an order now for then, but to enter now for an order previously made.

When redemption from mortgage foreclosure is made by the mortgagor or owner, it is not necessary to produce and file certain copies of the documents showing his title and right to redeem. The production of the original record to the officer is sufficient. *Sardeson v. Menage*, 41 Minn. 814.

A bill to redeem is defective if it does not contain an offer, or an avowment of willingness, to redeem, but may be cured by amendment. *Kopper v. Dyer*, 4 New Eng. Rep. 368, 59 Vt. 477.

On a bill to redeem without first tendering the amount due plaintiff must aver and prove that he has been prevented from making tender by defendant's fault. *Meaher v. Howes (Me.)* 4 New Eng. Rep. 777.

A redemption from mortgage foreclosure is not invalid because payment is made by check, if the money is promptly realized thereon within the redemption period. *Sardeson v. Menage*, *supra*.

A tender implies not only an offer to do the thing proposed, but the power and willingness then and there to do it as offered. In no view is that a tender which the party has not the power or right to perform, in case his offer is accepted. *Champion v. Joslyn*, 44 N. Y. 658.

A certification of a check, without funds on deposit, is irregular, and it may be questionable whether a party might not properly refuse to receive a check thus certified. *Currie v. White*, 45 N. Y. 837; *Reed v. Bank of Newburgh*, 6 Paige, 337, 3 N. Y. Ch. L. ed. 1011.

Time allowed for redemption.

The usual time allowed for redemption from a foreclosure sale is six months, but the time rests in the sound discretion of the court in view of all the circumstances. *Bremer v. Calumet & C. Canal & D. Co.* 127 Ill. 464.

A junior mortgagee may redeem after a sale under 9 L. R. A.

a senior mortgage not less than six months nor more than nine months, without the aid of the clerk; but such redemptioner must, within ten days after the expiration of the nine months, enter on the sale-book the utmost he is willing to credit on his mortgage. *Lamb v. Feeley*, 71 Iowa, 742.

He is not an "assign" of the mortgagor, as the word is used in the Minnesota Statute entitling assigns to redeem within a year from the foreclosure of a prior mortgage. *Cullerier v. Brunelle*, 37 Minn. 71.

Under Cal. Code, § 344, an action to redeem a mortgage may be brought against the mortgagee in possession at any time, unless the mortgagee has maintained an adverse possession for five years after a breach of some condition of the mortgage. *Raynor v. Drew*, 72 Cal. 307.

Redemption by junior incumbrancer.

A subsequent incumbrancer, guilty of no laches, has right of redemption. *Hasselman v. McKernan*, 50 Ind. 444.

He may file his bill to redeem against the purchaser. *Wiley v. Ewing*, 47 Ala. 424; *Swift v. Edson*, 5 Conn. 531; *Judson v. Emanuel*, 1 Ala. 601; 8 Pom. Eq. Jur. 209; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; *Twombly v. Cassidy*, 68 N. Y. 156; *Rogers v. Herron*, 92 Ill. 583; *Hodgen v. Guttery*, 53 Ill. 431; *Beach v. Shaw*, 57 Ill. 17; *Sager v. Tupper*, 35 Mich. 134; *Renard v. Brown*, 7 Neb. 449; *Manning v. Markel*, 19 Iowa, 103; *Scott v. Henry*, 13 Ark. 112; *Hill v. White*, 1 N. J. Eq. 425; *Bigelow v. Cassidy*, 26 N. J. Eq. 557.

A junior mortgagee may redeem only by doing what the senior mortgagee bound the mortgagor to do. *Johnson v. Hosford*, 10 West. Rep. 255, 110 Ind. 573.

A suit of foreclosure, as against younger mortgagees, is a suit to cut off the right of redemption;

Wilson v. Vance, 55 Ind. 394. See also *Chissom v. Barbours*, 100 Ind. 1, 4.

The notice in this case was only published for two weeks. The first insertion was on the 17th day of September, 1886, and the last two weeks later, on October 1. The court will take judicial notice of the fact that September 17, 1886, was Friday, and that October 1, 1886, was Friday, only two weeks to the day after the first insertion. This was not giving notice by publication "for three weeks successively."

Loughridge v. Huntington, 56 Ind. 258, 260.

There is no tender or offer to pay the amount necessary to redeem.

Boone, Mort. § 163; Jones, Mort. §§ 1070, 1072; *Hosford v. Johnson*, 74 Ind. 479; *Duke v. Beeson*, 79 Ind. 24. And see especially *Kemp v. Mitchell*, 86 Ind. 249; *Neabit v. Hanway*, 87 Ind. 400; *Indianapolis First Nat. Bank v. Root*, 5 West. Rep. 286, 107 Ind. 224, 228.

and, where the plaintiff was not made a party defendant in the former suit, the right to redeem was unaffected by the decree and sale under it. *Carpenter v. Brennam*, 40 Cal. 238. *Allen v. Citizen's Steam Nav. Co.* 22 Cal. 82.

A junior mortgagee seeking to redeem a prior mortgage must redeem it entirely. *Calkins v. Munsel*, 2 Root, 338; *Knowles v. Rablin*, 20 Iowa, 101; *Smith v. Conner*, 65 Ala. 871; *Palk v. Clinton*, 12 Ves. Jr. 48.

Effect of want of notice.

A foreclosure by advertisement under the statute, without giving a junior mortgagee notice, does not take away his right to redeem. *Wetmore v. Roberts*, 10 How. Pr. 54; *King v. Duntz*, 11 Barb. 191; *James v. Stull*, 9 Barb. 482; *Pardee v. Van Auker*, 8 Barb. 537; *Vanderkemp v. Shelton*, 11 Paige, 28, 5 N. Y. Ch. L. ed. 45.

If no notice is given to the owner of the equity of redemption on a foreclosure the sale is void as to the holder of such equity. *St. John v. Bumpstead*, 17 Barb. 102.

The only consequence of proceeding to foreclose the mortgage is that the mortgagees become mortgagees in possession. *Walsh v. Rutgers F. Ins. Co.* 13 Abb. Pr. 37; *Slee v. Manhattan Co.* 1 Paige, 42, 3 N. Y. Ch. L. ed. 551.

A junior mortgagee may redeem from foreclosure on a senior mortgage to which he was not a party, without paying the costs of such suit. *Gaskell v. Viqueaney*, 122 Ind. 244. See *Chilver v. Weston*, 27 N. J. Eq. 430.

Right of senior mortgagee to disbursements.

He must keep the property without unreasonable deterioration, but has no right to enhance the value of the estate, and render it more difficult to redeem. *Ruby v. Abyssinian Rel. Society*, 15 Me. 306; *Russell v. Blake*, 2 Pick. 506; *Bell v. New York*, 10 Paige, 49, 4 N. Y. Ch. L. ed. 881; *Benedict v. Gilman*, 4 Paige, 62, 3 N. Y. Ch. L. ed. 348; *Mickles v. Dillaye*, 17 N. Y. 80; *Harper's App.* 64 Pa. 315; *Givens v. McCalmont*, 4 Watts, 480; *Dougherty v. McColgan*, 6 Gill & J. 275; *Neale v. Hagthorpe*, 3 Bland, 590; *Lowndes v. Chiselm*, 2 McCord, Ch. 456; *McCarron v. Cassidy*, 18 Ark. 84.

He may be allowed for repairs and for protecting the title, and is not obliged to lay out anything more. *Wetmore v. Roberts*, 10 How. Pr. 54; *Dexter v. Arnold*, 2 Sumn. 126; *Gordon v. Lewis*, Id. 150; *Morgan v. Walbridge*, 56 Vt. 409; *Sherred v. Cisco*, 4 Sandf. 487.

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If the appellant was chargeable with rents and profits prior to the sale as mortgagee in possession he was entitled to credit for the necessary and valuable improvements by him made while in possession prior to the time named.

Boone, Mort. §§ 168, 170; *Catterlin v. Armstrong*, 79 Ind. 523.

If the parties by conduct and agreement have treated the property as personal property, then in any view of the case the appellee could not recover.

Jones, Chat. Mort. §§ 124, 127, 132; *Ford v. Cobb*, 20 N. Y. 348, 352; *Hubbell v. East Cambridge Five Cents Sav. Bank*, 133 Mass. 447, 42 Am. Rep. 446, and notes.

The conclusions of law are erroneous and should, on the issue tendered by the complaint and on the finding, be stated in favor of appellants.

Boardman v. Griffin, 53 Ind. 101, 106; *Brown v. Will*, 1 West. Rep. 180, 108 Ind. 71;

He is allowed the cost of all ordinary, reasonable disbursements, necessary for the proper management and protection of the estate, as the payment of taxes. *Chalmers v. Wright*, 5 Robt. 725; *Blum v. Mitchell*, 50 Ala. 585; *Quin v. Brittain*, Hoffm. Ch. 353, 6 N. Y. Ch. L. ed. 1170.

He is only bound to make necessary repairs. *Hidden v. Jordan*, 28 Cal. 301, 32 Cal. 397; *Adkins v. Lewis*, 5 Or. 292; *Cook v. Ottawa University*, 14 Kan. 548; *Quin v. Brittain*, *supra*; *Clark v. Smith*, 1 N. J. Eq. 130.

The court will not allow a mortgagee in possession compensation for his trouble in taking care of the estate, even though there is an agreement to that effect. *Schultz v. Jerrard* (N. J.) 2 Cent. Rep. 211; *Clark v. Smith*, 1 N. J. Eq. 122; *Elmer v. Loper*, 25 N. J. Eq. 432; *Eaton v. Simonds*, 14 Pick. 98.

Accounting by mortgagee.

The accounting belongs exclusively to the equitable jurisdiction, and can be enforced only in a suit to redeem brought by the mortgagor or subsequent incumbrancer. *Bell v. New York*, 10 Paige, 42, 4 N. Y. Ch. L. ed. 881; *Jencks v. Alexander*, 11 Paige, 625, 5 N. Y. Ch. L. ed. 258.

He is chargeable with the fair annual value of his possession (*Van Buren v. Olmstead*, 5 Paige, 9, 3 N. Y. Ch. L. ed. 604); and with the net amount of rents and profits after deducting necessary reparations, taxes and assessments charged on the premises. *Hannon v. Osborn*, 4 Paige, 344, 8 N. Y. Ch. L. ed. 463; *Mickles v. Dillaye*, 17 N. Y. 84; *Quin v. Brittain*, Hoffm. Ch. 353, 6 N. Y. Ch. L. ed. 1170; *Story*, Eq. § 1016.

He is not chargeable with profits or increased rents arising from the use of permanent improvements made by him. *Jackson v. Loomis*, 4 Cow. 172; *Catterlin v. Armstrong*, 79 Ind. 523; *Bell v. New York*, 10 Paige, 73, 4 N. Y. Ch. L. ed. 891; *King v. Wilcox*, 11 Paige, 595, 5 N. Y. Ch. L. ed. 245; *Pickering v. Pickering*, 2 New Eng. Rep. 243, 63 N. H. 463; *Green v. Winter*, 1 Johns. Ch. 23, 1 N. Y. Ch. L. ed. 47.

He cannot charge any commissions or other compensation for his services, since they are rendered primarily for his own benefit. 3 Pom. Eq. Jur. § 1217; *Elmer v. Loper*, 25 N. J. Eq. 475; *Clark v. Smith*, 1 N. J. Eq. 121; *Benham v. Rowe*, 2 Cal. 387.

In Massachusetts he is allowed a commission on the rents. *Gerrish v. Black*, 104 Mass. 400; *Adams v. Brown*, 7 Cush. 220; *Tucker v. Buffum*, 16 Pick. 46; *Waterman v. Curtis*, 26 Conn. 241; *Green v. Winter*, 1 Johns. Ch. 23, 1 N. Y. Ch. L. ed. 47, note.

Indianapolis First Nat. Bank v. Root, and other authorities cited *supra*; *Western U. Teleg. Co. v. Brown*, 5 West. Rep. 661, 108 Ind. 588; *Buchanan v. Milligan*, 6 West. Rep. 915, 108 Ind. 438.

Morris. Robert Graham and Lew Wallace, Jr., for appellee:

Regarding this solely as an action to redeem, no proffer of payment need be made, as there could be nothing to pay. Horn's demand had been entirely satisfied.

Jones, Mort. § 1096; *Calkins v. Isbell*, 20 N. Y. 147; *Conaway v. Carpenter*, 58 Ind. 477.

The Bank had the right, during the year of redemption, to have the property, and all of it, preserved intact should it desire to redeem.

Jones, Mort. § 454; *Byron v. Chapin*, 118 Mass. 308.

The notice was published in a weekly paper by three insertions, the first of which was fifty-eight days before the return day. This was undoubtedly sufficient.

Hill v. Pressley, 96 Ind. 447.

Elliot, J., delivered the opinion of the court:

It is alleged in the complaint of the appellee that in suits brought by Benjamin F. Horn and James R. Carson against Eber Teter and George Teter, the appellee recovered judgment for \$5,080, and that a decree was entered foreclosing a mortgage executed by the Teters to the appellee on four acres of land with its appurtenances; that on the land was a barrel-heading factory comprising buildings, engines and machinery. It is also alleged that Horn recovered a judgment for \$10,000, and obtained a decree of foreclosure; that a copy of this decree was issued to the sheriff, who advertised the property for sale; that he sold the property to Horn for \$2,000, which was less than one fifth of its value, and that the sheriff subsequently made a return wherein he stated that Horn purchased the land and buildings without the heading factory or appurtenances, whereas he did in fact purchase the land with its appurtenances.

It is further alleged that the appellee gave notice at the time of the sale that it would contest the right of anyone to hold the property purchased at the sale as personalty; that the Teters are insolvent and that appellee's judgment can only be collected from the property sold to Horn; that Horn threatens to remove the property from the State and will remove it unless enjoined; that he has been in possession of the property since 1885, and that the rental value of the property was from \$2,000 to \$4,000 per annum; that he has given no credit for rent, and that he has removed from the State and converted to his own use property of the value of \$12,000.

Horn entered a special appearance and moved to quash the notice given him by publication as a nonresident. The contention that the notice was not published for the time required must fail. The proof of publication shows that three full weeks of publication expired more than thirty days before the first day of the term at which he was notified to appear, and this was sufficient, as more than fifty-one days elapsed between the first publication and

the first day of the term. *Hill v. Pressley*, 96 Ind. 447.

It was proper to make a *nunc pro tunc* entry of the order of publication. No final judgment had been entered at the time the motion to quash was interposed, so that the case was still pending when the order was entered. The proceedings were therefore in *fieri* at the time the *nunc pro tunc* entry was made, and hence it was clearly within the power of the court to make its record speak the truth. The rule which applies in cases where the action has been fully terminated by a final judgment is not relevant to such a case as this.

The complaint is in the nature of a bill to redeem real property, and the general rule in such cases is that the plaintiff must make an equitable tender of the amount due the senior lienholder. *Nesbit v. Hanway*, 97 Ind. 400; *Kemp v. Mitchell*, 86 Ind. 249.

But while the general rule is that an equitable tender must be made by offering to pay what may be found due upon an accounting, yet there are exceptions to that rule. One of these exceptions exists where it appears that the lienholder has money in his hands, exceeding the amount of his lien, which he is equitably bound to apply to the discharge of his claim. 2 Jones, Mort. § 1096.

The principle which underlies the rule requiring an equitable tender is "that he who asks equity must do equity;" this is the reason for the rule, and where the reason fails, so also, does the rule itself. Beyond doubt, the reason fails where the senior lienholder has money in his hands which it is his duty to apply to the payment of his lien and which exceeds the amount of his claim. As the complaint in this case shows that the senior lienholder had money in his hands which it was his duty to apply to the payment of his lien, the case falls not within the general rule, for that fails, but falls within the exception. We must therefore hold that, as the allegations of the complaint are confessed by the demurrer, failure to make an equitable tender is excused by the facts pleaded. In asserting this conclusion we do not inquire whether Horn was chargeable with the rents received by him, for, leaving the amount of the rent out of consideration, it still appears that he had \$12,000 in his hands. Hence we need not and we do not examine the question of the relevancy of the doctrine declared in the cases of *Gavin v. Graydon*, 41 Ind. 559; *Elwood v. Beymer*, 100 Ind. 504.

We do not at this point decide whether the appellee had any right to redeem, but pass that question, for the reason that it is fully presented on the special finding.

We are unable to discover any theory upon which it can be held that a cause of action is stated against Hawkins. He was, it is true, the sheriff who made the sale, but as the complaint seeks to redeem, it affirms the sale; and, as it does this, there can be no cause of action against the officer who made the sale, even if it be conceded that he did not make a true return. It has been again and again decided that a complaint must proceed on a definite theory and be good on that theory. *Mescall v. Tully*, 91 Ind. 96; *Indianapolis First Nat. Bank v.*

Root, 107 Ind. 224, 5 West. Rep. 286; *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 5 West. Rep. 883; *Ralm v. Deig*, 121 Ind. 238.

The only theory upon which this complaint can be good, if, indeed, it can possibly be good on any, is that it shows a right to redeem from a sale made by a sheriff, and upon that theory it is legally impossible that it can be good against the officer by whom the sale was made. The demurrer filed by Hawkins must be sustained.

The second paragraph of the answer of the appellant Horn is a partial one, and is addressed to so much of the complaint as charges him with the rent of the property of which he was in possession prior to the sheriff's sale. This answer alleges that the appellant made permanent improvements of the value of \$1,500, for which he asks credit. Upon the assumption which we provisionally make, that the complaint was good, the answer was clearly bad. A mortgagee in possession cannot embarrass the right to redeem by making improvements. He may make repairs, but he cannot make improvements at the expense of redemptioners. *Miller v. Curry* (Ind.) 24 N. E. Rep. 219, 374.

The special finding states the facts substantially as follows: On the 7th of May, 1886, Eber Teter and George Teter were the owners, as partners, of four acres of land. Situated on this land and attached to it was a heading factory and appurtenances. On the day named a suit was pending in the Hamilton Circuit Court wherein James R. Carson and Benjamin F. Horn were plaintiffs, and the Teters, the appellee and others were defendants, and in that suit a decree of foreclosure was rendered in which judgment was embodied. Carson recovered \$2,935.80, Horn \$10,889.20 and the appellee \$5,088.63. In June, 1888, and prior to that time, the Teters were partners doing business under the name of Teter & Brother. Their business was that of manufacturing barrel-headings, and they were the owners of a factory properly equipped for that business. The land on which the factory was situated was purchased by the firm of Teter & Bro., but the title was taken in the name of George Teter, trustee. On the 29th day of June, 1888, Teter & Bro. executed a chattel mortgage to James R. Carson on the partnership property in which the property was designated "as the following personal property: one slack barrel-heading factory, consisting of boiler, engine, two planers, two jointers, two heading turners, four saw rigs, two thousand feet of inch gas pipes and connections, and all other property or incidents connected therewith, including pulleys, belts, tanks, etc., now located on part of lot number four of Coles and Jones' Addition to the Town of Cicero, Hamilton County, Indiana."

This chattel mortgage was executed to secure and indemnify the mortgagee against loss as surety upon a promissory note executed by Teter & Bro. for \$5,000; and it was provided in the mortgage that the mortgagors might remove the heading factory to the four acres of ground situated in the Town of Sheridan. This mortgage was duly recorded. During the latter part of the summer of 1888 the factory and appurtenances were removed to Sheridan and attached to the four-acre tract of land.

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Before the removal of the factory to Sheridan, Teter & Bro. became indebted to Horn in the sum of \$5,000, and to secure this indebtedness and also to secure advances that might subsequently be made by Horn, the firm of Teter & Bro. and the trustee, George Teter, executed to him, on the 24th day of October, 1888, a mortgage on the property in Sheridan. This mortgage, after describing the land, recited: "And this sale includes all machinery, pipes and appurtenances connected therewith, on said real estate." It was also declared in the mortgage that it was subject to the mortgage of James R. Carson.

The mortgage to Horn was recorded on the 25th day of October, 1888. On the 20th day of November, 1888, Teter & Bro. and their trustee executed a conveyance to Carson in terms granting all the property to him, but which, by agreement, was in fact a mortgage to secure his claim. On the 17th day of August, 1884, Teter & Bro. were indebted to Horn in the sum of \$9,720.58, to Carson in the sum of \$2,500 and to Smith and Rodman in the sum of \$1,200. On that day these parties agreed that Horn should have a first lien, for his claim, on the land; that the lien of Carson and Horn should be of the same rank, upon the factory and appurtenances; and that Horn and Smith and Rodman should take possession and operate the factory; that they should pay the expense of the business and out of the net earnings pay one half to Horn, one fourth to Carson and the remaining one fourth to Smith and Rodman. This agreement was recorded on the 18th day of August, 1884. On the 28th day of November, 1884, Teter & Bro. executed to the appellee a mortgage on the property in Sheridan to secure an indebtedness of \$4,900, and this mortgage was seasonably recorded. On that day the appellee entered into an agreement with the other interested parties similar to that entered into between the mortgagors and their creditors on the 17th day of August, in so far as concerned the operation of the factory and the division of profits, but stipulating that Smith and Rodman should operate the mill and conduct the business. The factory was operated by Smith and Rodman until October, 1885, but no profits were realized. In that month Horn, with the consent of the interested parties other than the appellee, took possession of the property. The use of the property during the time Horn held possession was of the value of \$1,000. In May, 1886, a decree was rendered upon the several mortgages, and agreements in a suit wherein the mortgagors and all of the mortgagees were parties. The mortgages and agreements "were," as the special finding expresses it, "adjusted and merged in said judgment and decree, save and except the question of the use and possession and the question of repairs made by Horn after October 20, 1885,"—which matters were left by the court for future consideration. The decree states the amount which each of the lienholders was entitled to recover, and adjudges a recovery. It also fixes the order of priority, directs a sale and provides the method of distributing the avails of the sale. The clerk issued a certified copy of the decree to the sheriff; he advertised the property for sale, describing in the notice the land by metes and bounds, and add

ing to such description the following: "Including the heading factory and all appurtenances connected therewith; also the buildings thereon situate, together with all machinery, located at Sheridan, Indiana, formerly known as the "Teter Heading Factory." The appellee gave notice to Horn and to the sheriff that the property should be sold separately, and directed that it should all be sold as real estate. On the 8d day of July, 1886, the sale was made. In making the sale the sheriff sold the land separately to Horn, who bid for it \$2,000; and the heading factory and equipments he also sold to Horn for the sum of \$4,000, that being the amount bid by him. Horn has removed part of the machinery from the State, and the part so removed is of the value of \$9,000. The Teters are insolvent and unless the appellee can make its claim out of the property it will be lost.

The court stated as conclusions of law: "(1) that the law is with the plaintiff; (2) that the plaintiff ought to have judgment against Benjamin F. Horn and Elibu Hawkins for one half the value of the property."

It cannot be successfully denied that the factory and its equipments were treated by all the interested parties as personal property long prior to the time the appellee's mortgage was executed. It was so characterized in the chattel mortgage to Carson, in which the right to remove it from the Town of Cicero to Sheridan was provided for, and so it was treated in the agreements made between the parties prior in equity and in time to the appellee. The agreement between the appellee and the senior lienholders recognizes the validity of the former agreements and mortgages, so that the parties by their own acts had impressed upon the factory and its equipments the character of personal property. *Ford v. Cobb*, 20 N. Y. 848.

It was entirely competent for them to do this, for a factory and its equipments, or a mill and its machinery, may be personal property, although it is affixed to the soil. *Malott v. Price*, 109 Ind. 23, 7 West. Rep. 246; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152, and cases cited.

Whether the property is real or personal is, as the modern decisions unite in declaring, in a great measure a question of intention. *Hubbell v. East Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 42 Am. Rep. 446, and authorities in note to p. 447.

In this instance the intention to fix upon the heading factory and its equipments the character of personalty had been fully and unequivocally manifested and notice lawfully given before the appellee acquired any rights in the property. We are not, therefore, dealing with a case where a purchase is made or a mortgage accepted where there is no notice of the character of the property and appearances indicate that it is part of the realty. We make no inquiry as to what rights a mortgagee acquires where his lien is taken upon the faith that the property is land and there is neither actual nor constructive notice that the parties have by their conduct impressed upon the property a different character.

As the factory and its equipments were originally personal property, that character they retained unless it be true that the decree in the foreclosure suit transformed it into property of another kind. The case is, so far as concerns

this point, controlled by the decree. If the decree does, as appellee's counsel contend, adjudge that the property is real and not personal, the appellants are estopped to treat it as personalty. There is no direct adjudication upon this question, for there is no express decretal order that the mill and its equipments are either real or personal property, nor does it appear that the pleadings directly presented that question for decision. So far as we can judge from the special findings the parties simply sued to foreclose their respective liens, and the only questions which necessarily arise on pleadings demanding a foreclosure are as to the right to a foreclosure, the priority of equities and the distribution of the proceeds. It would no doubt have been within the power of the court to adjudicate upon the question of the character of the property as an incident of the suit, had that question been directly made; but the question was not directly made, and there is no express adjudication. We must therefore ascertain whether there is such an inferential or indirect decision of the question of the character of the property as concludes the parties. The appellee's counsel assert that the material part of the decree is this: "It is therefore considered, ordered and adjudged by the court, that the plaintiff Benjamin F. Horn recover the sum of \$10,889; and that the plaintiff James R. Carson recover the sum of \$2,935.80; and also that there is due said Smith and Rodman \$1,320; and that said Indianapolis National Bank recover the sum of \$5,068.18. It is further adjudged and decreed by the court that said mortgage set out in the complaint in favor of said plaintiffs, and also the mortgage in the cross-complaint in favor of said Bank, should be foreclosed, and that the equity of redemption of said defendants, and each of them, in and to said property, and all other persons claiming through and under them or either of them in and to said property, be, and the same is, hereby barred and forever foreclosed."

"And it is further ordered and adjudged by said court that said property, or so much thereof as may be necessary for that purpose, shall be sold by the sheriff of said County of Hamilton as other property is sold on execution issued upon judgment at law, after duly advertising the same."

This decretal order does not direct that the property shall be sold as land or real property, but it simply directs that it shall be sold as property, so that it cannot be inferred from the description of the thing directed to be sold whether it is that species of property within the class denominated chattels, or within the class denominated lands, for the generic term employed includes both species. The order does, it is true, bar the equities of the parties; but such an order would be appropriate if only personal property were involved. Here, however, both classes of property were involved, for at the time the decree was entered the factory and machinery were undoubtedly personal property. For this reason, it cannot be justly said that the provision barring the equity of redemption is conclusive as to the character of the property ordered to be sold. We cannot hold that there is such an adjudication as concludes the parties from showing the truth, for the general rule is that decrees relied upon

as creating an estoppel are to be construed with strictness; and certainly this general rule should apply here, for the equities are strongly with the senior lienholder, and prior to the decree the factory and its equipments were certainly treated as personal property. It ought in good conscience to apply, because a sworn officer gave a construction to the decree and insisted upon selling the factory and equipments as personal property, and the senior mortgagee could not do otherwise than buy at the sale without suffering delay and probably serious loss. If the appellee was not satisfied with the construction of the decree given by the sheriff it ought to have applied to the court for relief, and not have delayed until the senior lienholder had purchased and taken possession of the property.

It is difficult to perceive how it can be possible for the appellee to affirm the sale by offering to redeem and yet insist upon its invalidity; but this the appellee does by insisting that the property sold as personal property is in fact real estate. If it be true that the factory and equipments were real estate, then the sheriff did wrong in selling them as personal property and the sale might have been avoided; but this is not what the appellee seeks to do, for it asserts that the sale is valid by offering to redeem. In affirming the validity of the sale it made an election, and made one that necessarily affirms the sale, and, thus affirming the validity of the sale, the appellee cannot be heard to aver that Horn did not buy the mill and its equipments as personal property. He could not, indeed, have bought them as anything else, for they were advertised and sold as personal property. If they are personal property there can of course be no redemption. If the sale was invalid, the appellee's remedy was by an attack upon the sale itself and not by a suit to redeem. *Jones v. Kokomo Bldg. Assn.* 77 Ind. 840.

The appellee's equity of redemption was barred by the decree, and the only claim it can with plausibility assert is that it has a right to redeem under the Statute. The only right it has to redeem, if it has any at all, is under the Statute, for its general equity of redemption is cut off by the decree. *Biceman v. Finch*, 79 Ind. 511; *Duke v. Beeson*, Id. 24.

If the appellee has a right to redeem under the Statute now in force, it must be for the reason that it belongs to the class of persons to whom the Statute grants the privilege of redeeming, for the right is purely a statutory one and can only be exercised by the persons upon whom the Statute confers it. The law, as it now stands, is clearly laid down in the well-reasoned case of *Hervey v. Krost*, 116 Ind. 268. The rule there declared is that a judgment creditor cannot redeem from his own sale. It is there shown that the decision in *Green v. Doane*, 57 Ind. 186, was of doubtful soundness under former statutes, and that it is entirely without force under the present ones. We must therefore accept, as the settled law of this State, the rule that a judgment creditor cannot redeem from his own sale.

If the sale from which the appellee seeks to redeem was made to satisfy its judgment, it has no statutory right to redeem, so that the pivotal question is whether the sale was made

on its own judgment. It will aid us in our investigation to ascertain the reason for the rule prohibiting a judgment creditor from redeeming from a sale made to satisfy a judgment in his own favor. The policy of the law is to make the property bring its full value, and to discourage persons from bidding less than the fair value of the property. It is also the intention of the law to do justice to interested parties by securing the fair value of the property at one sale, and thus prevent the annoyance and expense of numerous sales, and numerous sales may follow where there are many successive redemptions. The law was not intended to enable a creditor to offer only part of the fair value of the property and take the chance of a redemption; neither was it intended that the creditor should permit others to bid much less than the value of the property and subsequently redeem from the sale. Nor was it intended that the bidders should be discouraged by the uncertainty of acquiring title and the probability that the owner of the judgment which the property was sold to satisfy might come in and redeem. There are strong reasons supporting the conclusion that a judgment creditor should not be permitted to redeem from a sale made to satisfy his own judgment, and the conclusion is supported by authority.

In *Hervey v. Krost*, *supra*, it was said: "While the courts favor and give a liberal construction to the Redemption Laws in the interests of the debtor, and others who are concerned that the debtor's property shall go towards the payment of his debts to the full extent of its value, and to whom the right of redemption may be their only means of protection, it never could have been intended that redemption should afford a rapacious creditor the means of speculating out of the property and upon the necessities of his debtor."

The conclusion is supported by the long line of cases which hold that where a sale is made to satisfy two judgments there can be no redemption, although both may not be satisfied. *Simpson v. Castle*, 52 Cal. 644; *Black v. Gerichter*, 58 Cal. 56; *People v. Easton*, 3 Wend. 298; *Ex parte Lawrence*, 4 Cow. 417; *Jackson v. Bowen*, 7 Cow. 21; *People v. Fleming*, 2 N. Y. 484; *Russell v. Allen*, 10 Paige, 249, 4 N. Y. Ch. L. ed. 966; *Clayton v. Ellis*, 50 Iowa, 590.

The appellee is clearly within the reason of the rule, and it is within the letter, for the judgment was entered in its favor as well as in favor of the other lienholders. There was one decree, and it was the decree of all the lienholders. The decree authorized one sale, and it was the sale of all the judgment creditors. If the property had sold for enough to satisfy the judgment of the appellee in whole or in part, it could not be doubted that the sale was on its own judgment, and the fact that it did not sell for enough to satisfy its judgment does not change the principle which governs the case. The decree directed the property to be sold to pay all of the liens, and made provision for distribution to the appellee and all other lienholders, so that there could only be one sale.

Analogous cases in our reports prove that there was but one judgment and one sale.

In *Harrison v. Stipp*, 8 Blackf. 455, it was held that where the sheriff had several executions in his hands and the property was not susceptible of division there must be one sale, and this case has often been followed and approved. The decision in the case of *Steamboat Rorer v. Stiles*, 5 Blackf. 483, is that where liens are filed against a steamboat there can be only one judgment and one sale. It is true that the decision referred to is modified in some respects by the case of *Roose v. McDonald*, 28 Ind. 157, but it is not modified upon the point to which it is here cited. In the case of *Shirk v. Wilson*, 18 Ind. 129, it was held that where several claims are filed in attachment proceedings there can be only one sale, although some of the judgments were collectible without relief from appraisal laws and others were subject to those laws.

Davis v. Langsdale, 41 Ind. 899, is not in conflict with the cases to which we have referred, for in that case the peculiar provisions of the decree prevented a sale on the junior mortgagee's claim until after the claim of the senior mortgagee should be satisfied. *Langsdale v. Mills*, 82 Ind. 890.

Decisions of other courts come nearer the precise case before us, and are, indeed, decisive of the principle which rules the case.

In the case of *McCullough v. Rose*, 4 Ill. App. 149, it was held that where there was an interpleader filed in a suit to foreclose a mechanic's lien the decree was the decree of all, and that none of the parties to it in the character of creditors could redeem from the sale.

The case of *Todd v. Davey*, 60 Iowa, 533, declares that a mortgagee cannot redeem from a sale made upon a decree in his favor, and cites the cases of *Clayton v. Ellis*, *supra*; *Blake v. Blake*, 55 Iowa, 252; *Poweshiek County v. Denison*, 86 Iowa, 244; *Echer v. Simmons*, 54 Iowa, 289.

The opinion in the case of *Lauriat v. Stratton*, 6 Sawy. 339, is a strong one, and it is de-

clared that a sale upon a decree foreclosing several mortgages is a sale as to all the lienholders, and that there can be no redemption by any one of them. The court said: "It cannot be denied, and is admitted, that if the sale was made in favor of Crooke as mortgagee, and upon process to enforce his lien as well as that of Swegle, his lien was thereby extinguished." The court cites in support of its conclusion the cases of *Shepard v. O'Neil*, 4 Barb. 125; *Wood v. Colvin*, 5 Hill, 228; *Ex parte Stevens*, 4 Cow. 133.

It is true that in *Lauriat v. Stratton*, reference is made to the Statute of Oregon, and it is said that the Statute requires the court to adjudicate upon the rights of all the parties to a foreclosure, but this does not weaken the force of the decision as applied to cases under our Statute; on the contrary, it strengthens it, for it has long been the rule in this State that all rights and equities must be settled in one decree, and that this is one of the leading purposes of our Statute. *Woodworth v. Zimmerman*, 93 Ind. 849, and cases cited; *Masters v. Templeton*, Id. 447; *Stockwell v. State*, 101 Ind. 1; *Bundy v. Cunningham*, 107 Ind. 880, 5 West. Rep. 540; *Adair v. Mergentheim*, 114 Ind. 803, 18 West. Rep. 852.

As the law contemplates a final decree adjusting all rights and equities, and as such a decree was rendered in the foreclosure suit involved in this case, it necessarily results that a sale upon that decree was a sale on all the judgments embodied in it. This being true, it must also be true that none of the claimants in whose favor a judgment was incorporated in the decree of the court can redeem from the sale made on the decree.

The judgment is reversed, with instructions to restate conclusions of law and render judgment upon the special findings in favor of the appellant Horn, and with the further instruction to sustain the demurrer of appellant Hawkins to the complaint.

WISCONSIN SUPREME COURT.

Joseph ULLMAN, *Appt.*,

v.

J. A. DUNCAN, *Resp.*

(...Wis....)

1. Where a firm consisting of two partners, being the owners of horses, executed a chattel mortgage on them to plaintiff, which was duly filed, and afterwards one of the partners sold his interest in the horses to the other, and received from him a chattel mortgage on them to secure the purchase money, and died before the time for renewing the first mortgage, and, after the time for renewing it, his administrator took the horses under the latter mortgage, the plaintiff, although he neglected to renew his mortgage by filing the affidavit to renew the same, required by § 2315, Wis. Rev. Stat., may recover the horses of defendant after a demand and refusal, although creditors had filed claims with him against the estate of his intestate; such recovery being subject to the right of the surviving partner, or of the defendant, as administrator, to redeem them from plaintiff's

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mortgage, by paying the debt it was given to secure.

2. Under § 2315, Wis. Rev. Stat., which provides for renewing chattel mortgages, the only effect as to creditors of a failure to renew a chattel mortgage is to render it invalid as against such creditors of the mortgagor as obtain liens upon the property after the time expires to renew the mortgage.

(November 25, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Ashland County, in favor of defendant in an action brought to recover possession of some horses alleged to be unlawfully detained by defendant. *Reversed.*

Statement by *Lyon, J.*:

This is an action brought to recover three horses of the value of \$300, alleged to be unlawfully detained by defendant from the plaintiff. The facts were stipulated substantially as follows: On May 18, 1887, the firm of Gorton & Dodge, then being the owners of the

horses in controversy, executed a chattel mortgage on them to the plaintiff. The mortgage was duly filed in the proper office on the 23d of the same month. Subsequently, Dodge sold his interest in the horses to his partner, Gorton, and received from Gorton a chattel mortgage on them to secure the purchase money. Dodge died in 1888, and the defendant was duly appointed administrator of his estate, and qualified as such. The plaintiff neglected to renew the mortgage by filing in the proper office the affidavit to renew the same, required by § 2815, Rev. Stat. On May 25, 1889, the defendant took possession of the horses, claiming the right to do so as administrator of the estate of Dodge. He was still acting as administrator when this action was commenced. At that time, a considerable number of creditors, holding claims against the estate of Dodge, had filed their claims with the administrator, some of which were filed within two years after the filing of plaintiff's mortgage, and others thereafter. Due demand of the property was made by the plaintiff of the defendant before the action was commenced, and delivery thereof refused. On the above facts, the court directed the jury to render a verdict for the defendant, which they accordingly did. A motion for a new trial was denied, and judgment for the defendant entered, pursuant to the verdict. The plaintiff appeals from the judgment.

Mr. J. J. Miles, for appellant:

If the creditors of the defendant had a lien on the property their rights became vested on the death of Dodge.

Jones, Chat. Mort. 2d ed. § 240.

At the time of his death the plaintiff's mortgage was a valid security, and if the defendant's and creditor's rights vested then, the plaintiff's failure to file the affidavit could not defeat his title.

Wis. Rev. Stat. § 2815; *Newman v. Tymeson*, 12 Wis. 448; *Case v. Jewett*, 13 Wis. 498; *Lowe v. Wing*, 56 Wis. 81.

If the plaintiff's title was valid as against Dodge, it was good against the administrator. Jones, Chat. Mort. 2d ed. §§ 239-241, 245.

Messrs. Lamoreaux & Gleason, for respondent:

A chattel mortgagee, who has allowed the two years to run upon his mortgage without renewing the same, is not entitled to the benefit of his security as against creditors of the mortgagor, whose claims have attached to the property covered by the mortgage by reason of their having filed their claims against the estate of the mortgagor, with his administrator.

Wis. Rev. Stat. § 2815; Jones, Chat. Mort. 292; *Thompson v. Van Vechten*, 27 N. Y. 568, 582; *Hill v. Merriman*, 72 Wis. 488; 7 Am. & Eng. Encyclop. Law, 230, 231, 233; *Kilbourne v. Fay*, 29 Ohio St. 264, 284.

Lyon, J., delivered the opinion of the court:

The mortgage executed by Gorton to Dodge covered only the equity of redemption in the horses. The legal title thereto was in plaintiff, by virtue of his mortgage, and continued in him, as against his mortgagor, Gorton, and the defendant, as administrator of the estate of Dodge, although no affidavit for a renewal of

the plaintiff's mortgage was filed. Defendant took possession of the horses, as administrator of Dodge, after the time for renewing the mortgage had expired. We cannot understand how the defendant obtained any better right to the property than Dodge would have obtained had he lived and taken possession thereof at the same time. In either case such possession would have been taken under Gorton's mortgage to Dodge, and would have been subject to plaintiff's legal title, whether he renewed his mortgage or not. If defendant gets a better title to the horses than Dodge would have obtained, under the circumstances supposed, it is because there are existing creditors of the estate of Dodge, whom, it is said, the defendant represents. No creditor of Dodge's estate has any specific lien upon the horses in the hands of defendant, and no such creditor is here asserting any claim to them. The only claimant here is defendant, and his claim must necessarily rest exclusively upon Gorton's mortgage to his intestate, which we have seen is subordinate to plaintiff's legal title under his mortgage. This court had occasion in *Manson v. Phœnix Ins. Co.*, 64 Wis. 26, to construe § 2314, Rev. Stat., which provides for filing chattel mortgages, and to determine the consequences of a failure to file them. It was there held that "the only effect of the failure to duly file the mortgages was to render them invalid, as against purchasers or mortgagees in good faith, or creditors who had obtained liens upon the insured property by attachment or levy upon execution." That was a contest between a chattel mortgagee of insured property and creditors of the party insured, the loss, if any, being payable to such mortgagee as his interest might appear. As a matter of course, the same rule applies to a failure to renew a mortgage under section 2815.* We think this case comes fairly within the rule of *Manson v. Phœnix Ins. Co.* The accuracy of the proposition that the creditors of Dodge's estate have no lien upon the horses becomes more clear when it is considered that Gorton has the undoubted right to redeem them by paying defendant whatever may be due on his mortgage to Dodge. Also the creditors of Gorton may, by appropriate proceedings, assert the same right. This right is entirely inconsistent with the idea that the creditors of Dodge's estate have any lien upon the horses. Moreover, the creditors of Dodge's estate can have no lien upon the property unless it vested at Dodge's death. But he died within two years after the filing of plaintiff's mortgage, at which time it was valid as against them. The creditors are therefore in the position of a creditor who seizes mortgaged property on attachment or execution before the time to renew the mortgage has expired, and the time afterwards expires without renewal. This court has held several times that the mortgage ceases to be valid only as

*Wis. Rev. Stat. § 2315, provides that every chattel mortgage "shall cease to be valid, as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of two years from the filing of the same, or a copy thereof, unless within thirty days next preceding the expiration of the two years, the mortgagee, his agent or attorney shall make and annex to the instrument or copy on file an affidavit setting forth the interest which the mortgagee has," etc.

against creditors of the mortgagor who acquires a lien upon the property after the time expires to renew the mortgage. The cases which so hold are collated and reaffirmed, in the opinion by Mr. Justice Oston in *Lowe v. Wing*, 56 Wis. 31.

Our conclusion is that the plaintiff is entitled to recover the horses, notwithstanding he failed to renew the mortgage under which he claims them, subject only to the right, either of Gorton or of defendant as administrator of Dodge's estate, to redeem them from plaintiff's mortgage by paying the debt it was given to secure.

The judgment of the Circuit Court must be reversed, and the cause will be remanded for a new trial.

James SHEANON, Resp't.,

PACIFIC MUTUAL LIFE INSURANCE CO., App't.

(...Wis....)

Entire destruction of the use of both of a person's feet by paralysis, caused by an accidental pistol wound in the back, is within the provisions of an accident insurance policy, providing indemnity for the loss of "two entire feet,"

NOTE.—"Accidental" defined.

The term "accidental" in a policy is used in its ordinary popular sense as meaning happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected; so, if in the preceding act something unforeseen, unexpected or unusual occurred, which produced the catastrophe which caused the injury, then the injury was accidental. *United States Mut. Acc. Assn. v. Barry*, 181 U. S. 100, 83 L. ed. 60; *North American L. & Acc. Ins. Co. v. Burroughs*, 60 Pa. 42. See *Stedman v. United States Mut. Acc. Assn. ante*, 617.

Conditions in policy: restrictions as to occupation and employment.

An accidental strain resulting in death is an accidental injury within the meaning of the policy. *North American L. & Acc. Ins. Co. v. Burroughs*, 60 Pa. 42.

Under an accident policy providing against bodily injury from accident or violence, plaintiff recovered where his spine was injured through lifting a heavy burden in the course of his business. *Martin v. Travelers Ins. Co.* 1 Post. & F. 505.

A condition in a policy on a person who was by occupation a farmer, rendering the policy void in case death should be incurred while employed in "mining, blasting or wrecking," does not prevent a recovery when the death of the insured was caused by his attempting to save a crew from a wreck in Lake Ontario, on the shore of which he was living. *Tucker v. Mutual Ben. L. Ins. Co.* 50 Hun, 60. See *Brink v. Guarantee Mut. Acc. Assn.* 28 N. Y. S. R. 921; *Shaffer v. Travelers Ins. Co.* (Ill.) Oct. 31, 1899; *Knapp v. Preferred Mut. Acc. Assn.* 53 Hun, 84.

The insurer is not liable for injuries or death to a shop hand, sustained by falling from the platform of a moving car. *Hull v. Equitable Acc. Assn.* 41 Minn. 231.

A description, in an insurance policy, of the occupation or employment of the assured as an ice-

man, adding the words "as proprietor," is broad enough to include a practical and laboring man engaged in the actual delivery of ice in his own name. *Neafie v. Manufacturers Accident Indemnity Co.* 55 Hun, 111.

(October 14, 1890.)

APPEAL by defendant from an order of the Circuit Court for Dane County overruling a demurrer to the complaint in an action brought to recover the amount alleged to be due under an accident insurance policy. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs Ogden & Hunter*, for appellant; In construing the contract, the words used in framing it are to be taken in their ordinary and popular sense.

Robertson v. French, 4 East, 185; *Ripley v. Aetna F. Ins. Co.* 80 N. Y. 186; *Spensley v. Lancashire Ins. Co.* 54 Wis. 439; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 529, 103 N. Y. 347; 2 Parsons, Cont. 500; *Saceland v. Fidelity & C. Co.* 67 Wis. 178; *Ford v. United States Mut. Acc. Relief Co.* 1 L. R. A. 700, 148 Mass. 158.

In construing this contract, effect must be given to every portion thereof, so that no clause, sentence or word shall be superfluous, void or insignificant.

Barb'n v. Fitzgerald, 15 East, 541; *Booth v. Cleveland R. M. Co.* 74 N. Y. 23; *Barhydt v. Ellis*, 45 N. Y. 110. See also *Benedict v. Ocean Ins. Co.* 81 N. Y. 892; *Donahoe v. Kettell*, 1

man, adding the words "as proprietor," is broad enough to include a practical and laboring man engaged in the actual delivery of ice in his own name. *Neafie v. Manufacturers Accident Indemnity Co.* 55 Hun, 111.

An assured who is not able, by reason of his personal injuries, to carry on the business of delivering ice, is totally disabled; yet he may be able to give general directions to persons who took his place as an ice-man during the period of his disability. *Ibid.*

Where the certificate of a mutual accident association permits an employment different from the one named in the application, but reduces the amount of insurance proportionately according to a classification by the association of occupations as more or less hazardous, the beneficiary under a certificate issued to a member who stated his occupation to be a "spare conductor" on a freight train, who was killed while performing the duties of a brakeman, can recover only the amount due on the death of a brakeman, and not that due on the death of a conductor, notwithstanding that on that road a "spare conductor" was required to do any work necessary in running the train, of which fact the association had no notice. *Aldrich v. Mercantile Mut. Acc. Assn.* 140 Mass. 457.

An accident insurance company has power, after the occurrence of an accident, under a policy in which the occupation of the insured was incorrectly described, to substitute a corrected policy therefor, and render itself liable thereunder for such previous accident. *Ford v. United States Mut. Acc. Relief Co.* 1 L. R. A. 700, 148 Mass. 158.

Where one is insured in a twofold occupation (as "leather cutter and merchant") by an accident policy which provides for indemnity in case of an injury which "shall wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation in which he is insured," he must, to be entitled to the indemnity, be wholly disabled from the prosecution of business in both capacities. *Ibid.*

Conditions in policy. See exhaustive note to Paul v. Travelers Ins. Co. (N. Y.) 8 L. R. A. 443.

Cliff, 141; *Harper v. New York City Ins. Co.* 22 N. Y. 441; *Ladd v. Ladd*, 49 U. S. 8 How. 28, 12 L. ed. 974; Bishop, Cont. § 834; *Hyrie-ville Co. v. Eagle R. R. Co. & S. Co.* 44 Vt. 895; 1 Addison, Cont. 181; *McCaul v. Thayer*, 70 Wis. 188; *Nichols v. Halliday*, 27 Wis. 406.

Since the Company has seen fit to specify the loss of the respondent's feet as the condition upon which he might recover in plain and unambiguous language, this court has not the right to disregard the plain terms of the contract, and to extend its meaning to an injury, the consequences of which may be to the respondent as great or even a greater injury than that against which he was insured.

Dwight v. Germania L. Ins. Co. 4 Cent. Rep. 529, 103 N. Y. 347; *Love v. Pares*, 18 East, 80; *Adams v. Warner*, 28 Vt. 411.

Messrs. A. McArthur and A. W. Chynoweth for respondent.

Cole, Ch. J., delivered the opinion of the court:

It is almost superfluous to say that the construction of a policy of life or accident insurance is governed by the same rules as those which are applicable to the construction of other written contracts; that is, they should be construed according to the sense and meaning of the language used in order to carry out the intention of the parties to the contract, when ascertained. And it is doubtless true that, in arriving at the intention of the parties, the language is to be understood in its ordinary and

popular sense, unless it appears that it was used in some special or peculiar sense. There can be no disagreement as to the application of these cardinal and familiar rules in the construction of such contracts as the one before us. Now, in view of these rules, what conclusion must be reached upon the facts stated in the complaint? It appears that the plaintiff was shot in the back, during the life of the policy, while he was attempting to escape from a saloon quarrel, commenced by other parties; and the ball penetrated his spine, and produced an immediate and total paralysis of the lower part of his body, and entirely destroyed the use of both feet. The quarrel in the saloon arose suddenly, and was carried on without any participation therein by the plaintiff, and without his fault. He happened to be in the saloon when it occurred, and seems to have used due caution for his personal safety and protection; but he was shot in the back, probably accidentally, by one of the parties engaged in the quarrel. The question is, Does the policy cover such an injury? The policy covers both death and indemnity, the Company agreeing to pay the principal sum if the insured, from a violent and accidental injury, which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot." This is the language of the policy, and the question is, What does it mean? or What must be understood by it? Is its meaning that the insured is

Death while traveling.

Traveling on foot is not traveling by public or private conveyance, within the meaning of a clause in an accident insurance policy stipulating for payment for death caused while traveling by public or private conveyance. *Ripley v. Passengers Assur. Co.* 58 U. S. 18 Wall. 336, 21 L. ed. 490.

Death while committing a public offense.

Death ensuing in commission of misdemeanor,—as where horse-racing is a misdemeanor,—was caused by a violation of the law, although his opponent disregarded the rules of the course, and intentionally sought to run him off the track. *Travelers Ins. Co. v. Seaver*, 58 U. S. 19 Wall. 531, 23 L. ed. 155.

One injured in an affray is not thereby deprived of relief under an accident policy. *Supreme Council O. C. F. v. Garrigus*, 1 West. Rep. 861, 104 Ind. 183.

Violation of rules of insurance corporation.

"The rule of a corporation," within the meaning of an accident policy exempting the insurance company from liability in case of death from violating a rule of a corporation, must be one which is known to the policy-holder and of full force at the time of its alleged violation. *Marx v. Travelers Ins. Co.* 30 Fed. Rep. 321.

A rule of a railroad company forbidding passengers to ride on the platform of a car, which is not at the time in force and has been generally disregarded by passengers as well as trainmen, is not a rule of a corporation, within the meaning of an accident insurance policy exempting the insurer from liability in case of death from violating such rule. *Ibid.*

Death from injuries intentionally inflicted.

An insurance company is not liable on an accident insurance policy which provides that the company shall not be responsible thereon for death or

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injury caused by "intentional injuries inflicted by the insured or any other person," where the insured, while lawfully engaged in his ordinary business, is intentionally shot and killed by a third person without provocation. *Fischer v. Travelers Ins. Co.* 1 L. R. A. 572, 77 Cal. 244.

Suicide.

A death caused by a person hanging himself while temporarily insane is covered by a policy against "bodily injuries effected through external, accidental and violent means," and is not within an exception of death caused by "bodily infirmities or disease, or by suicide or self-inflicted injuries." *Accident Ins. Co. v. Crandal*, 130 U. S. 587, 30 L. ed. 740.

Intentional self destruction will avoid a policy, whether the act was committed voluntarily or from unrestrainable impulse, unless the person's mind was so far gone as to render him unconscious that he was taking his own life at the time of committing the act. *Mutual Ben. L. Ins. Co. v. Davison*, 87 Ky. 541.

Death must not have resulted from disease.

Where a person was accidentally wounded in the leg by falling from a veranda, and the wound, which at first seemed slight, was within four or five days aggravated by erysipelas, from which death ensued twenty-three days after the accident, the external injury was the "proximate or sole cause" of the death, within the meaning of those words in an accident policy. *Young v. Accident Ins. Co.* Montreal L. Rep. 6 Super. Ct. 2.

Conceding the necessity of showing, as a condition precedent to a right of recovery, that death was not the result of disease, yet where particular facts are averred which show the physical injuries sustained by the assured, which may have resulted in apoplexy, and that death resulted therefrom, the idea is thereby effectually excluded that death

not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury must have destroyed the entire use of his legs and feet so that they will perform no function whatever? The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word "loss," when used in such a connection. Now, if the feet and hands cannot be used for the purpose of mov-

ing about or walking, or for holding and handling things, they are in fact lost, as much as though actually severed from the body. The expression "loss of feet" would generally be understood to mean a loss of the use of these members; and, if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered "a loss of two entire feet," within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language, as here used, to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body. It is not necessary to go into any recondite or elaborate discussion of the language of the policy, but only to give it its ordinary and popular sense. And, understanding it in that sense, we are very clear that the complaint states a cause of action, and that the demurrer was properly overruled.

The order of the Circuit Court is affirmed, and the cause remanded for further proceedings.

could have resulted in consequence of disease. *National Ben. Assn. v. Grauman*, 5 West. Rep. 543, 107 Ind. 233.

Death from pneumonia, which arose from catching cold while confined to the bed as the result of an accident which dislocated the person's shoulder, and from exposure which could only have been slight, and not such as would have caused his death if he had been in a normal state of health, is a death "from the effects of" an "injury caused by accident or violence," within the meaning of an accident insurance policy. *Isitt v. Railway Pass. Assur. Co.* L. R. 22 Q. B. Div. 504.

Voluntary exposure to danger.

A passenger on a railroad train who, being overcome by the heat of the car and affected with nausea, goes out upon the platform of the car while the train is in motion, does not thereby voluntarily expose himself to or unnecessarily incur danger, within the meaning of an accident insurance policy. *Marx v. Travelers Ins. Co.* 39 Fed. Rep. 321.

Where the insured was killed by an accident while in the discharge of the duties of his employment, it is not the result of voluntary exposure but of the accident. *National Ben. Assn. v. Jackson*, 1 West. Rep. 600, 114 Ill. 353.

Where one meets his death while attempting, in broad daylight, to cross the main line of a railway in front of an approaching train, where there is no station or proper crossing and no obstruction to the view, recovery cannot be had on a policy which excepts accidents happening "by exposure . . . to obvious risk of injury." *Cornish v. Accident Ins. Co.* L. R. 23 Q. B. Div. 453.

Death resulting from injuries sustained while attempting to escape through a window in order to avoid arrest is within a clause of an insurance policy providing that it shall be void in case of voluntary exposure to unnecessary danger. *Shaffer v. Travelers Ins. Co.* (Ill.) Oct. 31, 1899.

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Contact with poisonous substances.

Where an accident insurance policy provided that the insurance should not extend to injury "by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment," the words "inhaling of gas" were used to designate only those common uses of gas in dentistry, surgery, etc., and did not include the case of accidental death by breathing, while asleep, of illuminating gas. *Paul v. Travelers Ins. Co.* 45 Hun, 813, affirmed, 3 L. R. A. 443, 113 N. Y. 472; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52.

External visible sign of injury not essential to right of recovery.

The provisions in an accident insurance policy which covers a weekly indemnity for injuries not resulting in death, as well as a payment in case of death,—that the insurance "shall not extend to any bodily injury of which there shall be no external and visible sign upon the body,"—has reference to a claim made for weekly indemnity, and not an injury resulting in death. *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 113 N. Y. 472.

In a certificate of accident insurance a provision that it "shall not extend to injuries of which there is no visible mark, . . . nor extend to . . . accidental . . . death" from certain causes, does not require that there shall be a visible mark of injuries which result in death. *Eggenberger v. Guarantee Mut. Acc. Assn.* 41 Fed. Rep. 173.

In an action on an accident policy, evidence that the insured had upon his person bruises and wounds, evidencing that he had been recently injured by external violence, and that such injuries caused his death, makes out a prima facie case of death resulting from bodily injuries "through external, violent and accidental means." *Cronkhite v. Travelers Ins. Co.* 75 Wis. 113.

MINNESOTA SUPREME COURT.

Casper CARSTEN, *Respt.*,
v.
NORTHERN PACIFIC R. CO., *Appt.*

(....Minn.....)

- *1. A round-trip excursion ticket used by the purchaser in going to the station named therein, and then sold and transferred, no restrictions appearing, is valid in the hands of the holder, and entitles him to a return passage, subject to the prescribed limitations as to time, etc.
2. And where a conductor of a train refuses to recognize such ticket in the hands of the holder, who is thereby entitled to ride thereon, and demands of him the regular fare and attempts to eject him by force for non-payment thereof, the railway company is liable in damages for the assault, and the jury in assessing the damages may consider in connection therewith the annoyance, vexation and indignity suffered by him.
3. In such an action, damages resulting from the loss of a job of work, occasioned by his delay at the station at which he was obliged to leave the train,—*Held*, too remote to be considered.

(November 11, 1900.)

A PPEAL by defendant from an order of the District Court for Crow Wing County overruling its motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for plaintiff's alleged forcible and unlawful ejection from defendant's train. *Reversed*.

The facts are sufficiently stated in the opinion.

Messrs. John C. Bullitt, Jr., and Tilden R. Selmes for appellant.

Messrs. J. B. Douglas and J. N. True, for respondent:

There is no statute in this State prohibiting the purchase and sale of railroad tickets by individuals, and the legal presumption is that the ticket was properly issued, and property there-in passes by delivery, and possession is evidence of the holder's right to travel on the railroad.

Sleeper v. Pennsylvania R. Co. 100 Pa. 261, 262.

The verdict was a low one and is fully sustained under the liability of a master, as announced in —

Casin v. Minneapolis & St. L. R. Co. 39 Minn. 297; *Shepard v. Chicago, R. L. & P. R.*

*Head notes by VANDERBURGH, J.

NOTE.—Expulsion of passenger.

Where the conductor tore off the wrong half of a round-trip ticket and on the return trip the other half was refused and the passenger was ejected, the company was held liable. *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381.

The holder of a ticket bought of a person not authorized to sell tickets is nevertheless entitled to ride thereon, if it be good, and an expulsion will be illegal. *Sleeper v. Pennsylvania R. Co.* 100 Pa. 259. 9 L. R. A.

Co. 77 Iowa, 54; Stewart v. Brooklyn & C. R. Co. 90 N. Y. 588; *Huford v. Grand Rapids & I. R. Co.* 7 West. Rep. 859, 64 Mich. 631.

Vanderburgh, J., delivered the opinion of the court.

The defendant in August, 1888, issued excursion passenger tickets from Detroit, in this State, "to Minneapolis and return," to be used within a time limited, but without restrictions as to transfer. The plaintiff purchased one of these tickets at second-hand of a railway ticket broker, and, in conformity with the usage of the Company, had it stamped by the defendant's agent at the depot in Minneapolis, and thereupon presented it to the baggageman, who punched it and checked his baggage; and within the time limited plaintiff took passage on a regular passenger train from Minneapolis to Detroit. While on the way, and before reaching Brainerd, an intermediate station, his ticket was examined by an agent of the Company, who is styled a "ticket exchanger," and acted as an assistant to the regular conductor, and who notified the plaintiff that his ticket was not good, on the ground stated by him that it was bought at a "scalper's office." He, however, took up and retained the ticket, and refused to return it to the plaintiff. The regular conductor soon after came along and demanded plaintiff's fare, and, when informed what had been done by the exchanger, also stated that the ticket was not good, and notified him that he would have to leave the train unless he paid his fare, and soon after came back accompanied by two brakemen, as the train was approaching a station, for the purpose, as the evidence tends to show, of ejecting plaintiff from that train. They took him by the shoulder and led him to the door in presence of the passengers, when a stranger paid his fare to Brainerd, at which place the plaintiff voluntarily left the train. Plaintiff acted under compulsion when leaving his seat when ordered, but made no resistance, and there was in fact no violence or vindictive or abusive language used.

1. The evidence is sufficient to show that the ticket was genuine and was good for one passage from Minneapolis to Detroit as a return ticket, and that it was wrongfully taken away from plaintiff and appropriated by the agent of the defendant. The ticket was transferable in the absence of any restrictions in the original contract of sale, and was valid in plaintiff's hands. The conductor was fully advised of the facts in the case, which he could verify by reference to his assistant on the same

An excursion ticket good upon its face for a certain day will not entitle the holder to travel upon a different day, and a refusal to pay fare in such case will justify the expulsion of the passenger. *McElroy v. Railroad Co.* 7 Phila. 206.

Round-trip tickets. See note to *Wightman v. Chicago & N. W. R. Co.* (Wis.) 2 L. R. A. 185.

Expulsion of passenger from train. See notes to *South Florida R. Co. v. Rhoads* (Fla.) 3 L. R. A. 788; *McGowen v. Morgan Louisiana & T. R. & S. Co.* (La.) 5 L. R. A. 817.

train. His conduct in requiring the plaintiff to leave the train was therefore wrongful. *Burnham v. Grand Trunk R. Co* 68 Me. 803.

2. It is an action sounding in tort, and we think the plaintiff entitled to claim damages for the wrong and injury done him, in addition to the price of the ticket, though no particular loss or special injury to his person was shown. The evidence tended to prove that the agents of the defendant laid hands on him, and were proceeding to eject him by force, if necessary, from the car, which was full of passengers. The fact that he escaped personal violence by nonresistance does not deprive him of his right of action; and the jury were entitled to consider, in connection with the physical acts of the conductor in wrongfully attempting to eject him, the annoyance, vexation and mortification suffered by him, and the indignity put upon him. *Chicago & A. R. Co. v. Flago*, 43 Ill. 864; 3 Suth. Dam. 712, 715; 2 Beach, Railway Law, § 891.

But the jury must be governed by the evidence, and the damages assessed must be appropriate to the nature of the case, which will be modified by the circumstances, such as the presence or absence of personal malice, actual violence and threatening or insulting language. *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562, 573.

The instruction given by the court to the jury that if the conductor took up the ticket, and failed to give any excuse for his refusal to return the same to plaintiff, and no excuse existed, they might presume that he acted malevolently, and with a tyrannical and oppressive motive, and might award him "any amount of damages that is proper not exceeding the sum of \$1,000," was, we think, in view of the evidence in the case, erroneous, and likely to mislead the jury as to the extent of their discretion on the question of damages.

3. The plaintiff was permitted, against the objection of the defendant, to prove that, by reason of his delay at Brainerd, he lost a job of threshing at Detroit, for which he expected \$2.25 per day. He testified that he was detained there for a week for want of money to go any further, and this alleged loss the jury were allowed to consider. This was error. Such damages are too remote. They cannot be considered the proximate result of the alleged wrongful act of the conductor. There must have been several other independent causes to which the same result might have been referred. *Brown v. Cummings*, 7 Allen, 508.

Order reversed.

NEW HAMPSHIRE SUPREME COURT.

MANCHESTER & LAWRENCE R. CO. v. CONCORD R. CO.

(.....N. H.....)

1. In case of a transaction which is simply ultra vires neither party will be heard to allege its invalidity while retaining its fruits. Limitation of the contractual power of a corporation does not prevent it from making restitution of money or property obtained under an unauthorized contract.
 2. Contracts between rival and competing railroad companies, which prevent unhealthy competition but do not raise rates of transportation above the standard of fair compensation or violate any duty that is owing to the public from non-competing roads, are not void as against public policy.
 3. A railroad company which continues to operate a rival and competing line under a prior contract after the passage of a statute prohibiting such contracts and making the company which operates a rival line subject to penalty, although such continuation was illegal, cannot retain the money acquired by such operation when called upon by the owner of the road for an accounting, but the latter, not being *in part delicto*, is entitled to an equitable share of the earnings.
 4. If an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition which does not involve any positive immorality, and there is no
- 9 L. R. A.

other reason of public policy why the courts should refuse to grant relief, a party who has received anything under it from the other party and has failed to perform on his part must account to the other for what he has received.

5. A claim of exemption from discovery on the ground that it would fix a penal liability upon the party cannot be sustained where a prosecution for the penalty is already barred by the Statute of Limitations.

(March 14, 1890.)

BILL in equity for a discovery, for an accounting by defendant of its dealings with plaintiff's railroad properties under various contracts and leases and for a return of certain of such properties to plaintiff. On pleas and demurrer to bill and demurrers to pleas. *Demurrers to pleas sustained. Demurrer to bill overruled.*

Plaintiff and defendant were in 1850 rival and competing railroad companies. On October 4 of that year they entered into an agreement by which plaintiff's corporate property, with all the privileges and appurtenances thereto belonging, was leased to defendant for a term of years. The consideration for this lease was an agreement to divide the net earnings of the two roads among their stockholders, in a certain manner agreed on. Under this agreement the defendant took possession of plaintiff's property and retained the same under

the original agreement and several supplements thereto until July 1, 1887, when plaintiff ceased to carry out the contracts and demanded and received from defendant the independent possession of its road.

In 1888 this bill was filed for a discovery and accounting of the profits made by defendant while operating plaintiff's road under the agreements, for a return of some of the property which defendant was alleged to have unlawfully retained in its possession and for a determination of the rights of the respective parties in certain other property.

The further facts sufficiently appear in the opinion.

Messrs. Charles H. Burns, W. S. Ladd and Fletcher Ladd, for plaintiff:

The Concord Railroad has been from beginning to end the principal law-breaker, the party taking advantage of its relations with the plaintiff corporation, and the power thereby acquired and maintained by it over that corporation, to promote its own schemes and enterprises, and therefore the two parties are not *in pari delicto*, whatever meaning be given to the word *delictum*.

Smith v. Cuff, 6 Maule & S. 165; *Smith v. Bromley*, 2 Doug. 696, note; *White v. Franklin Bank*, 22 Pick. 181; *Worcester v. Eaton*, 11 Mass. 368; *Schermerhorn v. Talmage*, 14 N. Y. 98; *Tracy v. Talmage*, 14 N. Y. 162; *Jaques v. Golightly*, 2 W. Bl. 1073; *Browning v. Morris*, Cowp. 790; *Williams v. Healey*, 8 East, 378; *White v. Franklin Bank*, 22 Pick. 186; *Ford v. Harrington*, 16 N. Y. 285; *Osborne v. Williams*, 18 Ves. Jr. 379; *Harrington v. Grant*, 54 Vt. 286.

The plea of *ultra vires* should not prevail, whether interposed for or against a corporation, when it would not advance justice, but would perpetrate a wrong.

Chicago & A. R. Co. v. Derkes, 1 West. Rep. 550, 103 Ind. 620; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

The law sustains a defense of this nature only when an imperative rule of public policy requires it.

Wright v. Pipe Line Co. 101 Pa. 204. See also *Steam Nav. Co. v. Weed*, 17 Barb. 878; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 1 N. Y. Ch. L. ed. 871; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Standard Oil Co. v. Scofield*, 16 Abb. N. C. 872.

A private corporation cannot be allowed to interpose such plea where its contract has been performed by the other party and the corporation has had the benefit of the contract and its performance.

Camden & A. R. Co. v. May's Landing & E. H. C. R. Co. 4 Cent. Rep. 801, 48 N. J. L. 580; *Denver P. Ins. Co. v. McClelland*, 9 Colo. 11; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Hall Mfg. Co. v. American R. S. Co.* 43 Mich. 381; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.* 88 Pa. 160; *Bradley v. Ballard*, 55 Ill. 413, 417; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. ed. 698, 695; *Pneumatic Gas Co. v. Berry*, 118 U. S. 322, 327, 28 L. ed. 1003; *Union Water* 9 L. R. A.

Co. v. Murphy's Flat Fluming Co. 22 Cal. 620; *State Board of Agriculture v. Citizens St. R. Co.* 47 Ind. 407; *Newbury Petroleum Co. v. Weare*, 27 Ohio St. 343, 353; *Slater Woolen Co. v. Lamb*, 8 New Eng. Rep. 443, 143 Mass. 420; *Hall v. Paris*, 59 N. H. 74; *Norton v. Derry Nat. Bank*, 61 N. H. 589; *Parish v. Wheeler*, 22 N. Y. 494; *Darat v. Gale*, 83 Ill. 137; *Ward v. Johnson*, 95 Ill. 215; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Steamboat Co. v. McCutcheon*, 13 Pa. 18; *Terry v. Eagle Lock Co.* 47 Conn. 141; *De Groff v. American Linen Thread Co.* 21 N. Y. 124, 127; *Underwood v. Newport Lyceum*, 5 B. Mon. 129; *Southern L. Ins. & T. Co. v. Lanier*, 5 Fla. 110, 165; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 453; *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 668, 678, 23 L. ed. 227, 233; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Prairie Lodge v. Smith*, 58 Miss. 801, 808; *Hitchcock v. Galveston*, 96 U. S. 841, 851, 24 L. ed. 659, 662; *Ossipes H. & W. Mfg. Co. v. Canney*, 54 N. H. 295, 818-327; *Pierce, Railroads*, 519 et seq.; *Waterman*, Spec. Perf. § 226; *Morawetz*, Priv. Corp. §§ 648-653, 669-699.

The contracts under which the Concord Railroad controlled and operated the Manchester & Lawrence Railroad were not necessarily illegal because contrary to public policy.

Hare v. London & N. W. R. Co. 2 Johns. & H. 80; 1 Redf. Railways, § 146, cl. 2.

There is nothing in the Statute of 1867 to preclude plaintiff from having a fair and just settlement with the Concord Road as to the matters and things in which both corporations are pecuniarily interested, arising under and growing out of the control and management by the latter corporation of the former, after its passage.

See *Foulke v. San Diego & G. S. P. R. Co.* 51 Cal. 365; *Philadelphia Loan Co. v. Twener*, 13 Conn. 258; *Pangborn v. Westlake*, 36 Iowa, 546; *Pratt v. Short*, 79 N. Y. 445; *Pratt v. Eaton*, 79 N. Y. 449; *Farmers L. & T. Co. v. St. Joseph & D. C. R. Co.* 1 McCrary, 247; *Harris v. Runnels*, 53 U. S. 12 How. 79, 13 L. ed. 901; *Bowditch v. New England Mut. L. Ins. Co.* 2 New Eng. Rep. 238, 141 Mass. 292; *Holden v. Upton*, 184 Mass. 178; *Prince v. Eighth St. Baptist Church*, 2 West. Rep. 621, 20 Mo. App. 832; *Curtis v. Leavitt*, 15 N. Y. 14; *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 733; *Sharp v. Taylor*, 2 Phill. Ch. 801; *Planter's Bank v. Union Bank*, 83 U. S. 16 Wall. 433, 21 L. ed. 473; *Cook v. Sherman*, 20 Fed. Rep. 167; *Western U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 558; *Wells v. McGeech*, 71 Wis. 196; *Gilliam v. Brown*, 43 Miss. 641, 664; *Lewis v. Alexander*, 51 Tex. 578, 589; *Whitney v. Peay*, 24 Ark. 23; *Philadelphia Loan Co. v. Twener*, 13 Conn. 249; *Berkshire v. Evans*, 4 Leigh, 223; *DeLeon v. Trevino*, 49 Tex. 88; *Pfeuffer v. Malby*, 54 Tex. 454; *Cook v. Sherman*, 20 Fed. Rep. 167; *American U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 188; *Atlantic & P. Teleg. Co. v. Union Pac. R. Co.* Id. 541; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 8 McCrary, 180; *Tenant v. Elliott*, 1 Bos. & P. 8.

Messrs. James F. Briggs and Oliver E. Branch, also for plaintiff.

Messrs. Chase & Streeter and J. H. Benton, Jr., for defendant:

A contract beyond their corporate power to make, by which railroad companies deprive the public of the benefits of competition between them, is illegal as creating an unauthorized monopoly.

Bissell v. Michigan Southern & N. I. R. Co. 22 N. Y. 258; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 68 Ill. 489; *State v. Hartford & N. H. R. Co.* 29 Conn. 588; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 899.

The purpose of the Act of 1867 was to prevent the increase of the charges of rival and competing roads beyond what might be expected under the influence of a free competition.

Currier v. Concord R. Corp. 48 N. H. 331.

The penalties imposed by it imply a prohibition.

Boutelle v. Melendy, 19 N. H. 196; *Favor v. Philbrick*, 7 N. H. 340; *Benj. Sales*, §§ 530, 531; *White v. Hunter*, 23 N. H. 128; *Pray v. Burbank*, 10 N. H. 377; *Lewis v. Welch*, 14 N. H. 294; *Williams v. Tappan*, 23 N. H. 885, 390, 391; *Bracket v. Hoyt*, 29 N. H. 264, 267; *Punk v. Gallivan*, 49 Conn. 124; *Allen v. Hawks*, 13 Pick. 79; *Miller v. Post*, 1 Allen, 434; *Mandelbaum v. Gregorich*, 17 Nev. 87, 45 Am. Rep. 433; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, and note; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; 2 Add. Cont. 1147, and note; *Roby v. West*, 4 N. H. 285; *Udall v. Metcalf*, 5 N. H. 396; *Bliss v. Brainard*, 41 N. H. 256; *Smith v. Godfrey*, 28 N. H. 879.

To say that either party, notwithstanding the contracts were prohibited under such penalties, can invoke the aid of the court to adjust controversies arising out of such prohibited and illegal action, is to say that the court will punish such illegal action with one hand, while with the other it apportions the result of it between the guilty parties. Both the parties have knowingly acted in violation of the law, and the purpose of the Act to protect the public from the destruction of competition by such contracts as the parties made would be wholly thwarted unless the contracts are held void.

Miller v. Post, 1 Allen, 434; *Forster v. Taylor*, 5 Barn. & Ad. 887; *Smith v. Arnold*, 106 Mass. 269.

In reference to all acts or contracts which are unlawful because they are hostile to the public policy, the parties thereunto are regarded as being *in pari delicto*. And in all such cases the rule of law is, *potior est conditio defendentis*.

Souhegan Nat. Bank v. Wallace, 61 N. H. 24, 26; *Para. Cont.* 673, 746; *Ward, Pol. Cont.* 232, 332; *Bish. Cont.* §§ 155, 156, 458, 497; *Met. Cont.* 258; *Benj. Sales*, § 530, and numerous authorities in note; *Bish. Stat. Crimes*, § 254; 7 *Wait, Act. and Def.* 64; *Wheeler v. Russell*, 17 Mass. 257; *Robeson v. French*, 12 Met. 24; *Patties v. Greeley*, 18 Met. 284; *White v. Buss*, 8 Cush. 448; *Williams v. Cheney*, 8 Gray, 215; *Larned v. Andrews*, 106 Mass. 435, 437; *Concord v. Delaney*, 58 Me. 809, 815; *Punk v. Gallivan*, 49 Conn. 124; *Lycorning F. Ins. Co. v. Wright*, 55 Vt. 526, 533; *Dillon v. Allen*, *supra*; *Allen v. Deming*, 14 N. H. 188, 189; *Smith v. Bean*, 15 N. H. 577; *Varney v. French*, 19 N. H. 233, 239; *Leach v. Tilton*, 40 N. H. 478; *Welsh v. Cutler*, 44 N. H. 561; *Moses v. Julian*, 45 N. H. 60; *Richards v. Columbia*, 55 N. H. 96, 98; *Gil-*

man v. Berry, 50 N. H. 62, 64; *Williams v. Hastings*, Id. 373; *Chenette v. Teehan*, 63 N. H. 114.

Where the purpose is to prohibit an act, there is no power in the court to allow the act to be the foundation of a right to recover, for this would be *jus dure*, and not *jus dicere*.

Lewis v. Welch, 14 N. H. 294, 298; *Bish. Cont.* § 497. See also *Woodworth v. Bennett*, 43 N. Y. 273.

Separate brief of *Mr. J. H. Benton, Jr.*, for defendant:

A corporation, by making and performing a contract wholly beyond its power to make or to ratify, is not estopped to deny its capacity to make or ratify the contract.

Pennsylvania, D. & M. S. Nav. Co. v. Danbridge, 8 Gill & J. 819.

Legal capacity cannot be given or enlarged by estoppel.

Lovell v. Daniels, 2 Gray, 168; *Farmington Nat. Bank v. Buzzell*, 60 N. H. 189; *Penacook Sav. Bank v. Sundborn*, Id. 558; *Merriam v. Boston, C. & P. R. Co.* 117 Mass. 244; *Citizens Sav. & L. Asso. v. Topeka*, 87 U. S. 20 Wall. 655, 667, 22 L. ed. 455, 462.

When an act is utterly beyond the power of a corporation to do or ratify it is void *in toto*, and the corporation may set up that fact against a suit upon it.

Miners Ditch Co. v. Zellerbach, 37 Cal. 548, 579; *Hood v. New York & N. H. R. Co.* 23 Conn. 1, 23 Conn. 609; *Smith v. Alabama L. Ins. & T. Co.* 4 Ala. 558; *Montgomery City Council v. Montgomery & W. Pl. R. Co.* 31 Ala. 76; *Littlewort v. Davis*, 50 Miss. 408; *Natches v. Mallory*, 54 Miss. 499; *Orr v. Lacey*, 2 Doug. (Mich.) 230; *Wilson v. Onen*, 80 Mich. 474; *Germantown Mut. F. Ins. Co. v. Dhein*, 43 Wis. 420; *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *McPherson v. Foster*, 48 Iowa, 48.

No recovery can be had upon such a title as the plaintiff here sets up.

Downing v. Mt. Washington Road Co. 40 N. H. 230; *Pearce v. Madison & I. R. Co.* 63 U. S. 21 How. 441, 16 L. ed. 184; *Ashbury R. Co. & I. Co. v. Riche*, L. R. 7 H. L. 658; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *York & M. L. R. Co. v. Winans*, 50 U. S. 17 How. 80, 15 L. ed. 27; *Davis v. Old Colony R. Co.* 131 Mass. 258.

These contracts which the plaintiff counts upon and seeks the aid of the court to enforce, are contracts which it is conceded were made for the purpose of preventing competition, and thereby creating a monopoly, and are thus not only prohibited by the common law and the charters of the contracting corporations in the sense of being *extra vires*, and contrary to the intention of the Legislature, but are also contrary to public policy and illegal in themselves.

Ashbury R. Co. & I. Co. v. Riche, L. R. 7 H. L. 658; *Oscanyan v. Winchester Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Cardozo v. Swift*, 113 Mass. 250; *Dunham v. Freely*, 120 Mass. 289; *Evans v. Richardson*, 8 Meriv. 469.

The plaintiff states the illegal contracts as its title to recover, and it can make out its case only through the medium and by the aid of the illegal contracts and transactions thereunder, to all of which it was itself a party with the defendant. The plaintiff and defendant are therefore *in pari delicto*.

Simpson v. Bloss, 7 Taunt. 248.

No court shall aid men who found their cause of action upon illegal acts.

Roby v. West, 4 N. H. 285, 290; *Weeks v. Hill*, 38 N. H. 199; *Babcock v. Thompson*, 3 Pick. 446; *Worcester v. Eaton*, 11 Mass. 368; *Seidenbender v. Charles*, 4 Serg. & R. 173; *Ohio L. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 11.

A contract against public policy is void as much as one against a positive statutory prohibition.

Allen v. Deming, 14 N. H. 183, 140; *Smith v. Bromley*, 2 Doug. 696, note; *Fuller v. Dams*, 18 Pick. 472, 483; *Cook v. Sherman*, 30 Fed. 1, op. 167; *Case v. Gerriah*, 15 Pick. 49; *Trumbull v. Tilton*, 21 N. H. 138; *Blasdel v. Fowle*, 120 Mass. 447; *Tyrrill v. Freeman*, 189 Mass. 297; *Favor v. Philbrick*, 7 N. H. 826, 840; *Newburgh v. Galatian*, 4 Cow. 840; *Sayles v. Sayles*, 21 N. H. 812; *Smith v. Townsend*, 109 Mass. 500; *Farnsworth v. Hemmer*, 1 Allen, 494; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 188 Mass. 814; *Holcomb v. Weaver*, 186 Mass. 285; *Atlee v. Fink*, 75 Mo. 100; *Byrd v. Hughes*, 84 Ill. 174; *Phispen v. Stickney*, 3 Met. 384; *Gibbs v. Smith*, 115 Mass. 592; *Belious v. Russell*, 20 N. H. 427; *Huntington v. Bardwell*, 46 N. H. 492; *Walker v. Osgood*, 98 Mass. 848; *Rice v. Wood*, 113 Mass. 183; *New York Cent. R. Co. v. Lookwood*, 84 U. S. 17 Wall. 357, 31 L. ed. 627; *Alger v. Thacher*, 19 Pick. 51; *Taylor v. Blanchard*, 18 Allen, 370; *Eastern Exp. Co. v. Meseros*, 60 N. H. 198; *Frost v. Belmont*, 6 Allen, 152; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 886, 14 L. ed. 962; *Hunt v. Frost*, 4 Cush. 54; *White v. Hunter*, 28 N. H. 135.

A contract between two railroad corporations to operate their roads together for the purpose of destroying the natural and fair competition between them, and thus increasing the rates thereon to the public, is void.

Redf. Railways, § 15, p. 48; *Low v. Connecticut & P. R. R. Co.* 45 N. H. 870, 376; *Sampson v. Shaw*, 101 Mass. 145; *Bishop v. Palmer*, 6 New Eng. Rep. 129, 146 Mass. 474; *White Mountains R. Co. v. Eastman*, 84 N. H. 124; *Nickerson v. English*, 2 New Eng. Rep. 662, 142 Mass. 272; *Crawford v. Wick*, 18 Ohio St. 190.

Any contract in restraint, wholly or partially, of competition in the business of railroading or telegraphing is injurious to the public and illegal.

Western U. Teleg. Co. v. American U. Teleg. Co. 65 Ga. 160; *Western U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 246; *West Virginia Transp. Co. v. Ohio P. L. Co.* 22 W. Va. 600-627; *Sayre v. Louisville U. Assn.* 1 Duv. 143; 3 Chitty, Crim. Law, 1189; *Com. v. Carlisle*, Bright. (Pa.) 86; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *Hooker v. Vandewater*, 4 Denio, 849; *People v. Fisher*, 14 Wend. 9; *Rez v. Journeymen Tailors of Cambridge*, 8 Mod. 11. See also *Raymond v. Leavitt*, 46 Mich. 451; *Rez v. DeBerenger*, 8 Maule & S. 68; *Rez v. Norris*, 2 Kenyon, 800; 1 Hawk. P. C. chap. 80; *Rez v. Waddington*, 1 East, 143-167; *Bish. Crim. Law* (6th ed.) §§ 527, 528.

The origin of the well-settled common-law rule against monopolies is found in the celebrated *Case of the Monopolies*, 11 Coke, 86 b, where it was held that any grant of the crown producing or tending to produce the raising of prices of staple commodities was void as an in-

jury to the public. After this restriction upon the power of the crown was established by the courts, individuals attempted to accomplish by combinations among themselves what had previously been accomplished by grants from the crown. When the contracts by which these combinations were formed, however, were brought before the courts, they took the same ground with reference to them that they had previously taken with regard to monopolies under royal grants, that is, that they were injurious to the public, and therefore against public policy and illegal and void.

Egerton v. Brownlow, 4 H. L. Cas. 1; *Low v. Peers*, Wilmot's Notes, 377.

The rule was thus established that the common law would not permit any person to oblige himself by contract either to do or not to do anything in any degree clearly injurious to the public, but would punish such a contract as an offense.

Horne v. Graves, 7 Bing. 748; *Skeels v. Phillips*, 54 Ill. 309; *Neustadt v. Hall*, 68 Ill. 172; *Edgar v. Fowler*, 3 East, 222; *Atcheson v. Mallon*, 48 N. Y. 147; *Gulick v. Bailey*, 5 Halst. 87; *Mills v. Mills*, 40 N. Y. 545; *Hannah v. Fife*, 27 Mich. 172; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Horn v. Star Foundry Co.* 28 W. Va. 522; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Raymond v. Leavitt*, 46 Mich. 447; *Perkins v. Savage*, 15 Wend. 412; *Dixon v. Olmstead*, 9 Vt. 810; *Griswold v. Waddington*, 16 Johns. 486; *Morck v. Abel*, 3 Bos. & P. 85; *Harrington v. The Victoria Graving Dock Co.* L. R. 3 Q. B. Div. 549; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650; *Pooria & R. I. R. Co. v. Coal Valley Min. Co.* 68 Ill. 489; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *State v. Hartford & N. H. R. Co.* 229 Conn. 538; *Hoffman v. Brooks*, 28 Am. L. Reg. N. S. 648; *Central R. Co. v. Collins*, 40 Ga. 582; *Stanton v. Allen*, 5 Denio, 484; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 686; *Craft v. McConoughy*, 79 Ill. 346; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 4 DeG. M. & G. 115; *Charlton v. Newcastle & O. R. Co.* 5 Jur. N. S. 1097; *Hare v. London & N. W. R. Co.* 2 Johns. & H. 80; *Midland R. Co. v. London & N. W. R. Co.* L. R. 2 Eq. 524; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, Id. 289; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170.

Plaintiff cannot recover in this case though the illegal contracts counted upon have been partially performed.

Jackson v. McLean, 37 Fed. Rep. 218; *Gould v. Kendall*, 15 Neb. 549; *Kitchen v. Greenbaum*, 61 Mo. 110; *Watson v. Fletcher*, 7 Gratt. 1; *Read v. Smith*, 60 Tex. 379; *Northrup v. Phillips*, 99 Ill. 449; *Riley v. Jordan*, 123 Mass. 281; *Craft v. McConoughy*, 79 Ill. 346; *Barile v. Coleman*, 29 U. S. 4 Pet. 184, 7 L. ed. 825; *Watson v. Murray*, 28 N. J. Eq. 257; *Gregory v. Wilson*, 86 N. J. L. 815; *Todd v. Rafferty*, 30 N. J. Eq. 254; *King v. Winants*, 71 N. C. 469; *Woodworth v. Bennett*, 48 N. Y. 278.

Mr. J. W. Fellows, also for defendant.

Blodgett, J., delivered the opinion of the court:

This proceeding is a bill in equity for a dis-

covery and an accounting of the defendant's dealings with the plaintiff's railroad properties from December 1, 1856, to July 1, 1887, under various contracts and leases; for the delivery of certain books, records and papers alleged to belong to the plaintiff; for the return to it of rolling stock and equipments of the appraised value of \$147,593, which went into the defendant's possession at the time it took the plaintiff's road, and which it still retains; and for the determination and adjustment of the respective rights of the parties in and to certain lands, depots and tracks, situate in Manchester. In bar of the plaintiff's right to a recovery the defendant files three special pleas, and, as to the matters in the bill not covered by the pleas, it demurs. The plaintiff demurs to the pleas.

The first plea avers that the contracts between the parties, under which the defendant went into and retained the possession and management of the plaintiff's road for more than thirty years, were wholly beyond the corporate power of either party to make or to ratify, and that therefore the defendant should be hence dismissed with its costs and charges. In other words, not denying that it has received the full benefit of the performance of the contract by the plaintiff, the defendant says that it should in equity be permitted to retain the benefit and property so acquired, and be dismissed with costs, because it was not empowered by its charter to perform what it promised the plaintiff in return. The demurrer to this plea is sustained. The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to the transaction *ultra vires* simply will be heard to allege its invalidity while retaining its fruits. However the contractual power of the defendant may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract, nor as a corporation is it exempt from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.

The second plea avers, and the demurrer of course admits, that at the time of the making of the contracts between the parties, and of the dealings thereunder, their respective roads "were rival and competing railroads, by the competition of which the prices of transportation thereon were, and, but for said supposed contracts, dealings, transactions, operations and business would have continued to be, materially reduced, and said alleged contracts, dealings, transactions and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it." It will be noticed that there is no averment in the plea that the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and the naked question presented then is, whether all contracts between rival railway corporations which prevent competition are

necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the illegality depends upon circumstances. While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefited by unrestricted competition between railroads has been so emphatically disproved by the results which have generally followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious. Upon authority, also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy. *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80, is directly in point. In that case a bill in chancery had been filed by a stockholder in the defendant company to annul an agreement between two railway companies to divide the profits of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill *Vice-Chancellor Wood* said (p. 108): "With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. . . . It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So, also, in 1 Redf., Railways, § 146, par. 2, it is said: "There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition." And Mr. Morawetz says, in his admirable treatise on Corporations: "Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among companies are designed to effect this result, their purpose is not injurious to the public, or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is therefore impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business ar-

rangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts." Morawetz, Priv. Corp. (2d ed.) § 1181. In the same section, in speaking of contracts in restraint of trade (to which many of the authorities and much of the argument for the defendant relate), he says: "Even if there were such a rule, as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed also that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and if the operation of the road were stopped the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges." The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiff could not reasonably hope to successfully compete with its more powerful rival. The alternatives presented, it may safely be assumed, were combination or ruinous competition. It accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiff to an accounting with the defendant. Numerous cases have been cited in behalf of the defendant in support of its proposition that the combination between the parties

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must be regarded as void at common law because against public policy. For want of time it is quite impossible to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiff; but it is sufficient to say in general terms, as is there said, that they are cases of contract in restraint of mercantile business; or cases of contracts which attempt to derogate from the right of eminent domain inherent in the State; or cases where contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build or to cease to operate a road which it was chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were *ultra vires*,—in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea is sustained.

The averment in the third plea is, "that during all the time from said December 1, 1856, until July 1, 1887, the roads of the plaintiff and defendant each constituted a part of the different lines of route for public travel and transportation between cities and towns within and without this State, forming rival and competing lines of route between such points." This plea is understood to be based upon the Statute of July 5, 1867, entitled "An Act to Prevent Railroad Monopolies," and providing, among other things, "that two or more railroad corporations chartered by the Legislature of this State, constituting the whole or parts of different lines of route for public travel and transportation between any two cities or towns, or between any city and town, either within or without this State, forming rival and competing lines of route between such points, shall not be allowed to consolidate such roads or lines; and neither of said lines, or any road or roads composing the same, shall be run or operated by any such rival and competing line, or any road or roads, portion thereof, under any business contract, lease or other arrangement, but each and every railroad corporation so situated shall be run, managed and operated separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition, unless such lease, contract or arrangement be first authorized by the Legislature, and approved by the governor and council." When this Act was passed, the contract in force between the parties, and under which the roads were then being operated, was that of December 27, 1860; and the claim of the defendant is that whatever may be said with reference to the prior contracts and to the operation of the roads under them up to the time of the passage of the Act of 1867, that Act rendered the further execution of the contract of December 27th illegal and prohibited it. This point is well taken. Whatever may

now be the sentiment of New Hampshire in respect to the operation of railroads since the results attendant upon consolidation have been sufficiently demonstrated to remove any intelligent fear of extortion in rates or deterioration of service, there can be no doubt that in 1867 its sentiment was in favor of independent and competing lines, and that the purpose of the Legislature was to make the Act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them, by means of which competition is removed. *Currier v. Concord R. Corp.* 48 N. H. 825; *Fisher v. Concord R. Co.* 50 N. H. 208.

The Act, of course, had no *ex post facto* application, and was therefore of no effect as to anything which had already been done by the parties under the contract of December 27th, but it did prohibit them from further operating the roads under that contract (unreported opinion of Bellows, J., in *Currier v. Concord R. Corp.*, December Law Term, 1871), and so far rendered it void as to deprive either party of the right of recovering expressly for its subsequent breach. Nevertheless, we do not think the defendant is entitled to retain the money or other property so acquired, and for which it has rendered no corresponding equivalent to the plaintiff in return, but, on the contrary, we are of opinion that it is its duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding. It is true that, in general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity will not interpose to grant relief; but this is so only when the parties stand upon equal footing, for the doctrine everywhere running through the books is that relief will be granted when both parties are *in delicto*, provided they do not stand *in pari delicto*. See Story, Eq. Jur. (12th ed.) §§ 298, 300.

These parties do not so stand, for, however guilty the plaintiff may have been in permitting or in concurring in the illegal operation of its road by the defendant after the Act of July 5th, its guilt must fairly be regarded as far less in degree than that of its associate in the offense. And that the Legislature regarded the defendant as the greater offender is made entirely plain by the fact that the only penalty prescribed by the Act of July 5th for the violation of its provisions is imposed upon the road which operates another road, and not upon the road which is operated; for the reading of the second section is that "in all cases where any road, its directors, officers or agents, shall hereafter enforce or attempt to enforce or exercise any authority over any other road, situated as provided in said first section, or do any act in conflict with said first section, such officers or agents shall severally be subject to a fine or liability not exceeding five hundred dollars for each offense, to be recovered by action of debt, or by information or indictment, for the use of the county within which such suit shall be instituted." These considerations, as well as others of a kindred character, which need not be adverted to, bring the case fully within the exception to the general rule, that equity will not grant relief to parties concerned in illegal transactions; and if this be so, it is the end of 9 L. R. A.

the case as regards the questions raised by the pleas, because, if the transactions between the parties were of the character which the defendant now ascribes to them, the plaintiff, not being *in pari delicto*, is entitled to participate in the property accumulated or its proceeds, which, as between the parties, will be divided according to equity, and it has not been argued to the contrary in the defendant's behalf. There is, however, another ground of relief, which should be briefly mentioned. The contracts have been executed on the part of the plaintiff; they were not immoral; and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly *in pari delicto*, the case still falls within the general rule, "that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief in the case." *Morawetz, Priv. Corp.* § 721.

He adds: "These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received,"—citing *White v. Franklin Bank*, 22 Pick. 181; *Dill v. Wareham*, 7 Met. 438; *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. 873; *Whitney v. Peay*, 24 Ark. 22; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Foulke v. San Diego & G. S. P. R. Co.* 51 Cal. 365; *Farmers L. & T. Co. v. St. Joseph & D. C. R. Co.* 1 McCrary, 247, 2 Fed. Rep. 117; *Madison Ave. Baptist Church v. Olive St. Baptist Church*, 73 N. Y. 82; *Tracy v. Talmage*, 14 N. Y. 162, 175, 195; *Sackett Harbor Bank v. Codd*, 18 N. Y. 240; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, 496; *Vanatta v. State Bank*, 9 Ohio St. 27; *United States Exp. Co. v. Lucas*, 36 Ind. 861. See also *Pratt v. Short*, 79 N. Y. 437, 445; *Owen v. Davis*, 1 Bail. L. 315; *Gilman v. Brown*, 48 Miss. 641, 644; *Western U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 558, 562, 3 Fed. Rep. 423; *Lewis v. Alexander*, 51 Tex. 578; *Brooks v. Martin*, 69 U. S. 2 Wall. 70 [17 L. ed. 782], and cases cited; *Planters Bank v. Union Bank*, 83 U. S. 16 Wall. 438 [21 L. ed. 478], and cases cited; *Central Trust Co. v. Ohio Cent. R. Co.* 23 Fed. Rep. 806.

The leading case of *Brooks v. Martin* was a bill in equity for an account of profits between the parties under an executed partnership contract for the purchase and location of soldiers' land warrants, "confessedly against public policy," as well as in violation of the express provisions of an Act of Congress; but the court held that the partner in whose hands the profits were could not refuse to account for or divide them on the ground of the illegal character of the original contract, saying (Miller, J., p. 80 [785]): "It is to have an account of these funds,

who has, by fraudulent means, obtained possession and control of these funds to refuse to do equity to his other partner, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the Statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner, or what rule of public morals will be weakened by compelling him to do so. . . . The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case." We are aware that the doctrine of this case has been criticised, and perhaps denied, by some of the state courts; but it was reaffirmed in *Planters Bank v. Union Bank*, *supra*, and it is not found to have been changed or modified in any subsequent decision. It requires no words to apply the doctrine of *Brooks v. Martin* to the present case; it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendant should not keep any part of the plaintiff's equitable share of the property it obtained from operating the plaintiff's road, whether legally or illegally. Whatever the Legislature may have intended to accomplish by the Anti-Monopoly Act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And, however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and common honesty, and which in conscience the benefited party cannot retain. The demurrer to the third plea is also sustained.

Various causes of demurrer to the bill are assigned by the defendant, but at the argument only the one relating to discovery was insisted

accurate and true discovery and disclosure of all and singular the matters and things herein set forth." This is the usual prayer for a discovery, and no objection to its sufficiency is perceived. It is immaterial that the prayer concludes with a request that the "defendant be required, but not under oath, to discover and state, fully and with particularity," certain things specified; for, if the word "answer," which it is said was intended to be used, is substituted for "discover," the first objection of the defendant, that a prayer for a discovery not under oath cannot be granted, is readily obviated.

The second objection, that the policy of the law exempts the defendant and its officials from discovery, is based wholly upon the unfounded assumption that the plaintiff's action is against public policy, and has already been sufficiently considered.

The third and last objection is that the fundamental law does not require the defendant to discover. The argument in its support is that the defendant is charged with the doing of that which was positively prohibited by the Act of July 5, 1867; that, if the charge is sustained, each of the defendants is liable to the penalty prescribed by the Act; and that they are asked to make discovery of facts, which, in any event, would tend to fix their penal liability under that Act, contrary to the constitutional provision that "no subject shall . . . be compelled to . . . furnish evidence against himself." This objection is unavailing. See *Currier v. Concord R. Corp.* 48 N. H. 322.

Of course the defendants are not obliged to discover any matters that may expose them to the penalty of the Act of 1867; but they cannot do so, however willing they may be, because prosecution under that Act is barred by the Statute of Limitations. The transactions between the parties as to which discovery is sought ended July 1, 1867, and section 10, chap. 266, Gen. Laws, provides that "all prosecutions founded upon any penal statute, which are wholly or in part for the use of the prosecutor, shall be brought within one year, and all other suits and prosecutions thereon within two years, after the commission of the offense, unless otherwise specially provided."

The demurrer is overruled.

Case discharged.

Smith, J., did not sit. The others concurred.

NEW JERSEY COURT OF CHANCERY.

HEROLD

HEROLD.

(.....N. J. Eq.)

*1 When a husband, not entirely blame-

*Head notes by GREEN, V. C.

less for the act, makes no effort to prevent his desertion by his wife, and acquiesces in and appears satisfied with its continuance, he is not entitled to a divorce on the ground of desertion.

2. A wife claiming that her abandonment of her home was caused by the

NOTE.—Divorce on ground of desertion. Desertion is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation. 9 L. R. A.

without justification either in the consent or the wrongful conduct of the other. *Alkire v. Alkire*, 33 W. Va. 517.

The essence of the wrong of desertion by a wife

See also 14 L. R. A. 220; 25 L. R. A. 697; 31 L. R. A. 608; 47 L. R. A.

conduct of her husband, must in the face of his denial, if she seeks a divorce on the ground of desertion, sustain her claim by the corroborative evidence of circumstances, or of other witnesses.

(September 10, 1890.)

BILL in equity for a divorce on the ground of desertion. On bill, answer, cross-bill and proofs taken. *Bill and cross bill dismissed.*

The facts fully appear in the opinion.

Mr. William Brinkerhoff for complainant.

Mr. Warren Dixon for defendant.

Green, V. C., delivered the following opinion:

The complainant brings this suit for divorce from his wife, on the ground of willful, obstinate and continued desertion for three years. On the nonappearance of the defendant, and on the report of the master to whom the cause was referred, a decree of divorce was entered in favor of the complainant. On application by the defendant this decree was opened, and she was allowed to come in and defend. She has filed an answer denying the desertion, and, by way of cross-bill, alleges desertion on the part of the complainant for three years, and asks for a decree in her favor. The parties were married in the City of New York on the 10th day of December, 1876. Complainant was a widower forty-five years of age, with five children, and lived with his family in Ninth Street, in that city, his place of business being

on the ground floor of his place of residence. The defendant was a widow, from appearances not the junior of the complainant. She had three children and the control of some money as the guardian of those children. After the marriage the parties lived at the residence of the complainant in Ninth Street, in New York City. There is no evidence whatever to support the allegations of the bill that defendant was addicted to the free use of liquor, and was frequently in a state of intoxication. The complainant and his son and daughter testify that the defendant was quarrelsome, jealous and abusive; that almost from the time of her marriage she was unkind to her husband. This seems exaggerated and is inconsistent with the other testimony of the daughter, that defendant was kind and indulgent to the children, and that they all got along very well except the boy, who seems to have exercised his ingenuity to make her life miserable. It appears that she bought, with her own money, furniture, clothes and a piano for the girls, and paid for their education; and that she loaned the complainant \$3,500 of the money belonging to her children, on a mortgage, besides furnishing him with other sums in his business. She, on her part, says that occasionally, if not frequently, her husband returned late at night intoxicated, and, when in that state, would boast of his amours with other women and speak disparagingly of her age and appearance. His denial of this is quite as positive as her statement. There can be no doubt, however, that, long before the separation, the relations

consists in her refusing to live with her husband when he desires her to live with him. *Newing v. Newing, 45 N. J. Eq. 498.*

Where a wife, without any apparent cause other than her dislike for him, voluntarily leaves the home of her husband, and refuses to return or cohabit with him for a period of more than three years, although she is in good faith requested by her husband to do so, the husband will be entitled to a divorce. *Alkire v. Alkire, supra.*

Where parties continue to live together as husband and wife and other marital duties are observed, a refusal to occupy the same bed does not by itself constitute desertion. *Segelbaum v. Segelbaum, 39 Minn. 258.*

Provocation which is disproportionate to the wrongs and injuries suffered is insufficient to sustain a plea of justification in a divorce suit. *Ibid.*

A refusal of marital intercourse, while all other marital obligations are performed, is not "utter desertion," within the meaning of the law authorizing the court to grant a divorce for three years' utter desertion. *Peters, Ch. J., and Haskell, J., concur in the result, but declare that continued refusal may become "cruel and abusive treatment."* Since impotency is cause for divorce, continued refusal of intercourse amounts to the same in result. *Stewart v. Stewart, 3 New Eng. Rep. 387, 73 Me. 548.*

The abandonment of one of the married persons by the other, to be made the ground for separation from bed and board, in Louisiana, must originate in that State, while that is their matrimonial domicile. *Heath v. Heath, 42 La. Ann. —.*

Where a matrimonial domicile was in Massachusetts, and an abandonment occurred there, and the husband moved into Louisiana, where he acquired a residence, and the wife refused to come to that State, he cannot sue in the courts of Louisiana for a separation from bed and board. *Ibid.*

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Desertion must be for the statutory period.

Desertion to be a ground of divorce must be for the full statutory period. *Newing v. Newing, 45 N. J. Eq. 498.*

There is no desertion by a wife of her husband unless she has absented herself for three years of her own accord, without his consent and against his will. *Ibid.*

A wife's voluntary desertion of her husband and staying away from him for ten years, for no other reason than a desire to live in her own fashion, is ground for a divorce for desertion. *Rathbun v. Rathbun, 76 Mich. 482.*

If, at the time a wife files a bill for divorce and alimony against her husband, three years have not elapsed since she separated from her husband, and during the pendency of the suit that period does elapse, counting from the date of the desertion, the husband may file a cross-bill alleging that the desertion was willful and has continued for three years, and may have a decree of divorce against the plaintiff if his allegations are sustained by proof. *Martin v. Martin, 33 W. Va. 606.*

Action on ground of desertion and failure to support.

Inability of the husband to furnish means of support will not furnish grounds for divorce, although caused by his imprisonment for burglary. *Hammond v. Hammond, 1 New Eng. Rep. 301, 15 R. I. 40.*

A complaint in divorce alleging abandonment and alienation of the defendant's affections by association with religious fanatics is bad under the Texas Constitution, securing to all persons the right to worship according to the dictates of their own consciences. *Haymond v. Haymond, 74 Tex. 414.*

A wife's extreme cruelty to her husband, who is reasonably kind, is a sufficient defense to her bill alleging that he had deserted her, and asking for

between the two, but those which should exist between man and wife. She admits her jealousy, and gives as her reason for it the stories he related when in his cups. She testifies to her unhappiness from his treatment and that of his son. She says that when she could not give him any more money he treated her in this manner, and intimates this was the reason for his change towards her. It appears that this condition of affairs culminated in a quarrel. She ceased to attend to any of the household duties, and at last, on January 2 or 8, 1877, after they had been married a year and a few days, told him plainly that she could not and would not live with him any longer. He sent for a neighbor, and, in her presence, told him his wife wanted to leave him; that this was her home and where she belonged, and if she went away he would not be responsible for anything. Great stress is laid upon this interview to show that her going was against his wish. It appears strange that a husband should call in his neighbor to hear his wife announce her determination to leave, but in this case, as that neighbor had been in the habit of giving money to the wife, which complainant had paid, the suspicion is created that the neighbor was called to hear the declaration that if she went he would not be responsible for her debts, rather than the protest to her going. Beyond the declaration in the neighbor's presence, complainant took no steps to induce his wife to remain. This interview was in the morning. She did not leave until the evening, and he does not pretend that he reasoned with her, that he tried to reconcile her,

or that he ever saw her again after the morning interview in the shop. In the afternoon she took all her property, employed a cartman and moved her things away. The evidence fails to justify defendant in her departure from her home and relieve her from the charge of willful desertion; yet complainant cannot claim to have been free from blame in not correcting the causes of her dissatisfaction, and in permitting her departure without an attempt at reconciliation. It appears that the parties met at a Mr. Stein's some six months after the separation. What the object of the meeting was does not clearly appear. Whether it was with reference to a suit she had commenced against him in New York, or with reference to the mortgage he had given to secure her for the \$3,500 of her children's money she had loaned to him, or both, is uncertain. He says that he then asked her to return. She denies this, and says she was willing to return if he had asked her and would insure that she would be properly treated. No reconciliation, however, was effected, and it appears that such representations were then made to her as to the value of the security he had given her that she parted with her \$3,500 mortgage for \$1,000 or \$1,200. Complainant has, ever since defendant left him, maintained his connection with the business in Ninth Street, and continued to reside there until he removed to New Jersey, in September, 1885. After the separation, defendant went to live at 218 Eighth Street, New York City, and for some years kept a little store at that place and supported herself by its business and by collecting rents for a friend. While

alimony. *Harvey v. Harvey*, (N. J.) 6 Cent. Rep. 102.

On a bill by a wife who has lived apart from her husband more than three years, for support and maintenance, on the ground of his constructive abandonment and refusal and neglect to provide for her, he may not only deny the abandonment, but, by cross-bill, ask for a divorce because of her desertion of him. *Harrison v. Harrison*, 46 N. J. Eq. 75.

Several years' residence abroad is sufficient, under Tex. Rev. Stat., art. 2382, to deprive a plaintiff of the right to maintain a suit for divorce in the Texas courts, although such residence is not sufficient to cause a loss of citizenship or domicile for other purposes. *Haymond v. Haymond*, *supra*.

The taking and retention, by a husband, of their engagement ring from his wife, is, in connection with other facts,—as, the making of foul charges against her,—strong proof of a determination to desert her. *McKean v. McKean* (N. J.) 4 Cent. Rep. 134.

In an action for divorce predicated on a previous judgment of separation rendered one year before, it is incumbent on the plaintiff to prove that no reconciliation had taken place. *Von Hoven v. Weller*, 38 La. Ann. 303.

A wife who leaves her husband without legal cause is not entitled to alimony on a divorce being granted to her husband. *Martin v. Martin*, 53 W. Va. 695.

Where a wife suing for divorce is in possession of the homestead, and has more valuable property than the husband, who supports more of the children than she does, no temporary alimony should be awarded to her. *Turner v. Turner*, 80 Cal. 141.

Nebraska courts of equity have jurisdiction, in a suit by the wife for alimony and support, to compel

the husband to support the wife and children, whether the action is one for divorce or not. *Earle v. Earle* (Neb.) Sept. 17, 1889.

In an independent action for her support by a wife justified by her husband's misconduct in living separate from him, if the wife is destitute the court has power to include in its judgment an allowance of attorneys' fees as necessities for her. *Bueter v. Bueter* (S. D.) 8 L. R. A. 562.

A decree of divorce in favor of a wife, awarding the homestead to her "to be held by her in trust for her common support and for that of her children," creates no trust, but passes an absolute title to the wife, under Cal. Civ. Code, § 144, subd. 2. *Simpson v. Simpson*, 30 Cal. 237.

Plea of justification of desertion.

The reasonable cause which will justify a desertion must be such as will authorize a dissolution of the marriage bond. *Van Dyke v. Van Dyke*, 135 Pa. 459.

A cause which will justify a wife in leaving her husband, and constitute a defense to an action for divorce on the ground of desertion, must be such as would authorize an action on her part for divorce. *Taylor v. Taylor* (Iowa) May 12, 1890; *Naff v. Neff*, 2 West. Rep. 567, 20 Mo. App. 182.

It must be such as would be made the foundation for a divorce *a mensa et thoro*. *Alkire v. Alkire*, 33 W. Va. 517; *Martin v. Martin*, 1d. 695.

A wife is not obliged to stay under her husband's roof with his prostitute. If she leaves him for that reason, and he refuses to support her, she is entitled to a decree against him, under § 20 of the Statute concerning divorce. *Weigand v. Weigand*, 3 Cent. Rep. 362, 41 N. J. Eq. 203.

In South Dakota a wife justified by her husband's misconduct in living separate from him may maintain an independent action against him for

engaged in the latter occupation, and at other times, she says she frequently met him, but that they never recognized or spoke to each other. He denies that he saw her on these occasions, but it is clear he would not have spoken to her if he had seen her. Her residence was known to his daughter and mutual friends, yet he made no inquiry with reference thereto or any effort to secure an interview. With the exception of his remarks to her in the shop, and his testimony of what he claims to have said at Stein's (which she denies), there is nothing to show that her original departure and her subsequent separation were not in consonance with his wishes and entirely agreeable to him. He admits he never made any attempt to ascertain her whereabouts, never communicated in any way with her, or made any effort whatever towards a reconciliation.

It is abundantly established that a husband who, not being blameless for the act, makes no effort to prevent his desertion by his wife, and appears to acquiesce in and be satisfied with its continuance, cannot appeal successfully to the court for a divorce on the ground of deser-

tion. *Cornish v. Cornish*, 28 N. J. Eq. 208; *Belden v. Belden*, 83 N. J. Eq. 94; *Grant v. Grant*, 86 N. J. Eq. 502; *Boulby v. Boulby*, 28 N. J. Eq. 406; *Taylor v. Taylor*, 28 N. J. Eq. 207; *Rittenhouse v. Rittenhouse*, 29 N. J. Eq. 274.

The defendant, by her answer, by way of cross-bill, seeks a divorce on the ground of willful, continued and obstinate desertion for three years. As she was the one who actually left the other, she invokes the rule that, where a wife is obliged, by the cruelty or violence of her husband, to leave him for safety or to avoid personal injury, this compulsory flight on her part amounts to a desertion, under our Statute, by him. In these cases the wife has the burden of proof upon her to show that her abandonment was not voluntary, but that she was compelled to go by his treatment or command. *Starkey v. Starkey*, 21 N. J. Eq. 186.

As before suggested, I do not think she has sustained her claim. While she testifies to much that might reasonably engender jealousy and create unhappiness, she admits it only happened when her husband was the worse for

her support, without regard to the question of divorce. *Bueter v. Bueter* (S. D.) 8 L. R. A. 562.

A husband who brings an action against his wife for a divorce on the ground of abandonment will not be entitled to a decree of divorce if it is made to appear on the trial that she was compelled to leave the home of the plaintiff by reason of his cruel treatment of her. *Kikel v. Kikel*, 26 Neb. 256.

Where she shows that her abandonment was caused by such acts of personal violence and use of insulting language by the plaintiff towards her as entitle her to a separation and a reasonable support at his hands, it is proper to refuse the plaintiff the relief sought by him and to render an affirmative judgment in favor of the defendant. *Waltermire v. Waltermire*, 110 N. Y. 138.

A man cannot, by a coarse manner bordering on cruelty, yet keeping inside the line of statutory causes of divorce, compel his wife to flee from his home, and then get rid of her entirely by alleging her desertion. *Neff v. Neff*, 3 West. Rep. 567, 20 Mo. App. 182.

The conduct of a husband towards his wife may be such as would warrant her in leaving him, although it would not entitle her to a divorce. *Ibid.*

In an action by a husband for divorce on account of desertion, proof that the husband was subject to epileptic fits, which fact he had concealed and denied before marriage, is sufficient answer on the part of the wife. *Ibid.*

Want of affection between the parties is not a sufficient ground for a wife's desertion of her husband. *Taylor v. Taylor*, *supra*.

Incompatibility of temper is not a legal justification of desertion. *Van Dyke v. Van Dyke*, *supra*.

The refusal of a husband to pay for his board the same as other persons boarding with his wife will not entitle her to a divorce, or justify her abandonment of him. *Ibid.*

Condonation as a defense.

Condonation is a defense to divorce for cruelty. Voluntary cohabitation after cruelty on the husband's part is not always condonation. *Wilson v. Wilson*, 5 New Eng. Rep. 632, 16 R. L. —.

A wife will not be held to have condoned an offense not known to her. *Ibid.*

Patience and forbearance of the wife during long periods of cruel treatment from her husband, while
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entertaining hope of his reformation, will not constitute a condonation or reconciliation, but serve rather to strengthen than to weaken her cause of action. *Mack v. Handy*, 39 La. Ann. 491.

Consent or acquiescence defeats action.

Divorce for desertion will not be granted to a husband when he consented thereto, and furnished the wife with money to effect the separation. *Zimmerman v. Zimmerman* (N. J.) 2 Cent. Rep. 738.

If one party consents to a separation on the ground of the other's adultery, the departure of the other will not be a desertion, although the consent is justified. *Ford v. Ford*, 3 New Eng. Rep. 785, 148 Mass. 577.

A consent which will take away the character of desertion from the original departure will take it away equally from the subsequent remaining absent, if given at a later time. *Ibid.*

If a wife leaves her husband without cause and with intent to throw off her marital duty, and afterwards, realizing that she has done wrong, would return, only that her husband, for the purpose of making her absence the ground of a suit for divorce, refrains from doing anything to induce her to return, her desertion is neither obstinate nor against her husband's will, and cannot, therefore, be made the basis for a decree of divorce. *Newing v. Newing*, 45 N. J. Eq. 498.

A man who left his wife in the possession of their homestead, the title to which was in his name, and in the possession or control of all his other property, and who was absent for more than a year, during which time he once sent her money, and directed their son to send her money, and wrote to her suggesting that he would return home, to which she replied by requesting him not to do so,—cannot be held to have abandoned her so as to justify a divorce. *Taylor v. Taylor*, 41 Kan. 535.

A man is not entitled to a divorce on the ground of desertion because his wife went to another State in anxiety to see her only daughter and has not returned, where there never was any trouble between them, and he has never written her since she left, or attempted any reconciliation, or invited her to return. *Wright v. Wright* (Mich.) May 9, 1890.

A writing made several months after a wife abandoned her husband, by which certain arrangements are made in reference to their children and property rights, is not a bar to a divorce for abandonment. *Nichols v. Nichols*, 10 Ky. L. Rep. 930.

drink. He contradicts her testimony as to his intoxication, his lewdness or his having boasted of profligacy. There is no evidence whatever of his association with women of even suspicious or questionable character; and the testimony of other witnesses clears him of the imputation of habitual inebriety.

To establish such conduct on the part of the husband as will not only justify the wife in leaving her home, but convert such abandonment into the husband's desertion in the eye of the law, more than the uncorroborated testimony of the wife should, in the face of his denial, be required. *Fischer v. Fischer*, 18 N. J. Eq. 800; *Frane v. Franz*, 32 N. J. Eq. 488; *Sandford v. Sandford*, Id. 420; *Pullen v. Pullen*, 29 N. J. Eq. 541; *Tate v. Tate*, 26 N. J. Eq. 55; *Belton v. Belton*, Id. 449; *Reid v. Reid*, 21 N. J. Eq. 381; *Woodworth v. Woodworth*, Id. 251; *Cummins v. Cummins*, 15 N. J. Eq. 138; *McShane v. McShane*, 45 N. J. Eq. 841.

If the willingness to return to her marital duties, which she testifies she entertained, had materialized into any manifestation prior to three years before the commencement of this

suit, she might have put complainant in the wrong if he had rejected such advances. But she admits she was restrained by her pride, which might avail her as an excuse against his suit, but cannot shift the responsibility of her actual abandonment when she appeals to the court for affirmative relief. She testifies that she wrote to him, but this was within the statutory period prior to the filing of her answer; and, if it was in fact such an advance as to make him responsible for the subsequent separation, it is insufficient to authorize a decree in her favor. The whole evidence, however, impresses me with the opinion that the separation of these parties was distasteful to neither in its inception, and was satisfactory to both in its continuance; that, however willful it was as to each, and while it continued for many years without interruption, it cannot be said to have been obstinate in the sense which obtains with reference to desertion under our Statute.

The bill and cross-bill must be dismissed, with costs of the original bill to the defendant.

This result renders an examination of other points unnecessary.

NEBRASKA SUPREME COURT.

Abraham J. FRIEDLANDER

v.

Mary E. HEWITT *et al.*, *Appts.*

(.....Neb.....)

*1. A tenant in possession, under a lease which does not provide that he may remove his fixtures and improvements, cannot, after he has surrendered possession to his landlord, re-enter and remove his fixtures.

2. A creditor, by the levy of an execution upon a tenant's fixtures, acquires no greater rights therein, or to remove the same, than the tenant had.

3. When a tenant is in the actual possession

*Head notes by NORVAL, J.

NOTE.—Tenant; right to remove fixtures.

A tenant may put in an engine, and remove it at the end of the term. *Andrews v. Day Button Co.* 55 Hun, 494.

Where a lessee of a factory, engine, etc., requests the lessor to put in a new engine or contribute to its expense, which the latter refuses to do, and the lessee puts it in on his own responsibility, it does not become a fixture, where it can be removed without injury to the building. *Ibid.*

A boiler and tank placed on a foundation of brickwork, the edges of which had been cemented before they were placed thereon, to keep them in place, and easily removable, remain the personal property of the tenant at will, as against the owner, on a demand for rent. *Cooper v. Johnson*, 8 New Eng. Rep. 183, 143 Mass. 108.

A distinct understanding on the part of the owners of land, that icehouses built by a lessee or a part owner should remain personal property, is sufficient to make them such. *Handforth v. Jackson*, 150 Mass. 149.

A house built principally for a dwelling-house, independent of carrying on a trade, would be a fixture. *Van Ness v. Pacard*, 27 U. S. 2 Pet. 127, 7 L. ed. 374.

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sion of real estate, at the time it is sold by the landlord, the purchaser is chargeable with notice of the rights of the tenant.

4. Unless there is a stipulation in the lease to the contrary, a tenant can only remove such improvements erected by him the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession. *Lamphear v. Lowe*, 3 Neb. 131.

(November 18, 1890.)

APPEAL by defendants from a judgment of the District Court for Douglas County in favor of plaintiff in an action brought to enjoin the removal of a portion of a building from plaintiff's land. *Affirmed.*

At common law, fixtures which were erected for carrying on trade were allowed to be removed by the tenant during the term, and were deemed personalty for this purpose. *Ibid.*

Where a large house was built by a tenant, who used it partly for carrying on a trade, and for the residence of his family, for the purpose of more beneficially exercising the trade, he was entitled to remove it. *Ibid.*

The form, size or material of a building is immaterial; the sole question is whether it is designed for trade or not. *Ibid.*

Fixtures; general discussion. See notes to *Brinkley v. Forkner* (Ind.) 3 L. R. A. 84; *Hill v. Munday* (Ky.) 4 L. R. A. 674; *Collamore v. Gillis* (Mass.) 5 L. R. A. 150; *McGorrick v. Dwyer* (Iowa) 5 L. R. A. 594; *Hopewell Mills v. Taunton Sav. Bank* (Mass.) 6 L. R. A. 249.

Tenant cannot remove fixtures after expiration of his term.

Fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised his right to remove them. *Walsh v. Sichter*, 2 West. Rep. 587, 20 Mo. App. 374.

If the tenant neglects until the term expires to

See also 12 L. R. A. 87.

The facts are fully stated in the opinion.

Mr. John P. Breen for appellants.

Mr. A. C. Troup, for appellee:

The record of the justice of the peace shows that the defense to the forcible detention suit was represented by counsel, and that Mrs. Hewitt was present and testified at the trial in behalf of the defense. Even if she was entitled to notice of that proceeding, the notice she had of the matter was all-sufficient.

See *Godfrey v. Walker*, 42 Ga. 562; *Farnham v. Hohman*, 90 Ill. 312.

Delivery of notice to the husband is a sufficient service upon his wife.

Cook v. Creswell, 44 Md. 581.

The tenants and their creditors lost their right to remove after the date of service of notice to the tenant to quit the premises.

Taylor, Land. and T. § 551, and *note*, also § 553; Wood, Land. and T. § 532, and authorities cited in *note* to p. 892; *Erickson v. Jones*, 37 Minn. 459.

Fixtures are not goods and chattels for all purposes. They are not unless made so by the tenant's severance, or for the benefit of his execution creditors. While they remain attached they are a part of the freehold.

Darraa v. Baird, 101 Pa. 265.

Norval, J., delivered the opinion of the court:

On July 8, 1885, one Malina Sanchezerey entered into an article of agreement for the purchase, from the South Omaha Land Company, of lot 4 in block 81, South Omaha. Subsequently, she erected on the north half of the lot a two-story frame building, and on the 1st day of October, 1886, she leased the said north half to one George Boyle for the term of one year, with the privilege of three years more, at his option, the stipulated rent being \$50 per month. Boyle went into possession under the lease, and while in possession he erected a frame addition to the building, which had been constructed by Mrs. Sanchezerey. The defendants claim that the lease contained a provision giving the tenant the right to remove all buildings he should construct upon the premises. The plain-

tiff denies that the lease contained such stipulation. Mrs. Sanchezerey assigned her contract of purchase to one Moses Horrowich, on December 7, 1886, who completed the payments to the South Omaha Land Company, and received a deed for the lot. On the 30th day of April, 1887, Moses Horrowich and wife sold and conveyed by warranty deed the lot to Abraham J. Friedlander, the plaintiff, who is still the owner thereof. This deed was filed for record in the county clerk's office of Douglas County, on April 23, 1887. Boyle, on the 4th day of February, 1887, assigned the lease to one Thomas Higgins, and on the same day executed a bill of sale to Higgins for the frame addition erected by Boyle. Higgins went into possession of the premises under the lease, and remained in the occupancy thereof until the latter part of December, 1887. On the 12th day of January, 1888, Higgins, it is claimed, assigned the lease to Mary E. Hewett, one of the defendants, and at the same time sold her his interest in the frame addition. The Hewetts took possession and paid the rents for a time. Having quit paying rent, and being in default thereof, the lease was declared forfeited for that reason, and, on March 19, 1888, the plaintiff, A. J. Friedlander, brought an action of forcible detainer against Harvey Hewett, the husband, before J. S. Morrison, a justice of the peace in and for Douglas County, to recover the possession of the premises. The justice found the complaint of the plaintiff to be true, and rendered a judgment of restitution on the 4th day of April, 1888. On the same day a writ of restitution was issued, and two days later the Hewetts were dispossessed by an officer, under the writ. It also appears that some time in April, 1888, and after the judgment of restitution was entered, the defendants Ryder & Glick recovered a small judgment before a justice of the peace of Douglas County, against Harvey W. Hewett and Mary E. Hewett, and that an execution was issued thereon, which was levied upon the frame addition, above referred to, as the property of the Hewetts. The officer holding the execution, having advertised the addition for sale, and the Hew-

remove buildings erected by him, he is deemed to have abandoned them. *Hedderick v. Smith*, 1 West. Rep. 144, 108 Ind. 208.

If a tenant, having placed erections or machinery upon leased premises during his term, which would be deemed a part of the realty as between grantor and grantee, at the end of his term surrenders the actual possession of the leased premises to his landlord without first removing such erections or machinery, they become the property of the landlord. *Beloit Second Nat. Bank v. O. R. Merrill Co.* 66 Miss. 501.

When the evidence clearly shows that there was no intention on the part of the tenant to relinquish his unquestioned right to the fixtures, and there is also evidence showing that the landlord understood such intention, and acquiesced by promising that he might remove them after the surrender, his right to so remove them is not lost. *Ibid.*

The surrender of leased premises by operation of law vests the landlord with the title to any structures thereon. *Bedlow v. New York F. D. D. Co.* 2 L. R. A. 622, 112 N. Y. 233.

A tenant for years, with a covenant in the lease for perpetual renewal, cannot remove the building on the leased premises, so as greatly to impair and

endanger the security for the rent reserved. In such case a bill in equity may be brought by the reversioner to enjoin such act as an equitable waste to the inheritance. *Crowe v. Wilson*, 3 Cent. Rep. 881, 65 Md. 479.

A tenant at will whose tenancy can only be terminated after reasonable notice, and who has ample notice and opportunity to remove the building before he is dispossessed, cannot thereafter remove it. *Erickson v. Jones*, 37 Minn. 459.

The mere fact of a landlord deeding leased premises to a third party will not support trover by the tenant, for fixtures attached by him to the realty, and left by him on abandoning the premises. *Walsh v. Siebler*, 2 West. Rep. 565, 20 Mo. App. 374.

Effect of acceptance of new lease.

A tenant's right of removal of fixtures is lost by acceptance of a new lease without their reservation. *Carlin v. Ritter*, 12 Cent. Rep. 98, 68 Md. 473.

If a tenant takes a new lease on different terms, and not a mere extension of the old lease, a new tenancy is created; and whatever constituted a part of the freehold at the time of the new lease must be surrendered up at its termination. *Hedderick v. Smith*, 1 West. Rep. 144, 108 Ind. 208.

ment, the plaintiff and the defendant both came to court to join the sale and removal. A trial was had to the court, with findings and judgment for the plaintiff. The defendants appeal.

It is claimed by the appellees that the lease from Mrs. Sanchezerey to Boyle contained a stipulation that the tenant could remove all buildings he should erect thereon during the continuation of the lease. The original lease was not produced on the trial, and without showing that it was not in existence, the defendants introduced a purported copy thereof, which contained such a clause. Whether such a provision was in the original lease when executed is not so clear. The lease, soon after its execution, was recorded in the county clerk's office of Douglas County. The record thereof was produced at the trial, and it contained no stipulation authorizing the tenant to erect and remove buildings, nor did it prohibit the erection and removal of improvements. The parties to the lease were not called to prove its terms. Theodore Elliott and H. H. Ish, being called as witnesses by the defendants, testified to having made the copy of the original lease introduced in evidence, after it had been assigned to Mrs. Hewett. While it may be true that they made a correct copy of the paper then before them, they could not know that it contained the disputed clause at the time of its execution, as they never saw the instrument until many months after it was made. This testimony was not sufficient to overcome the record of the original made by the county clerk. The finding of the trial court that the original lease contained no such a provision was certainly justified by the evidence. Under the lease, as established by the evidence, the tenant had a right, before the surrender of possession, to remove any improvements owned by him, which are embraced under the head of "Tenants' Fixtures," but the tenant had no authority to remove such improvements after the termination of the tenancy. In other words, the tenant could not re-enter to remove his fixtures, after the surrender of possession to the landlord. In the case at bar, the addition constructed by the tenant was not removed before the tenant was ousted under the writ of restitution. It is true, before the writ of restitution was served, the execution in favor of Ryder & Glick was levied upon the addition; but we fail to see how that could affect the rights of the plaintiff. These creditors, by the levy of their execution, obtained no greater rights in the premises than had their debtors, the Hewetts. If the Hewetts had no right to re-enter and remove the property after they had been dispossessed under the writ of restitution, then it would seem clear that their creditors had no such right. It is claimed that the lease was transferred to Mrs. Hewett, and not to her husband, and, as she was not a party to the forcible detainer suit, she is not bound by the proceedings therein. It does appear from the copy of the lease introduced in evidence by the appellants that it was assigned to her, yet it is equally certain that Friedlander, the plaintiff, was not aware that Mrs. Hewett claimed any interest in the premises until long after this suit was instituted. The testimony shows that her husband stated to the plaintiff's

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transferred to Mrs. Hewett. It was he who paid the rent. The transcript of the detainer suit shows that Mrs. Hewett was a witness for her husband on the trial of that case. There is ample testimony in the record to warrant the conclusion that the husband was the plaintiff's tenant, but, if it be conceded that Mrs. Hewett owned the improvements claimed as fixtures, she has forfeited all right thereto. She failed to pay the rent, and the lease was forfeited for that reason. She made no effort to remove the improvements prior to the taking possession by the plaintiff of the leased premises. The plaintiff contends that he is an innocent purchaser, and had no notice when he purchased from Horrowich that the tenant in possession claimed to own the addition in question. The testimony shows that one Hammond represented the plaintiff in making the purchase. The testimony introduced for the purpose of showing that Hammond had actual notice that the addition belonged to the tenant is conflicting and unsatisfactory. Horrowich and his wife each testified at the trial that they informed Hammond at the time the deed was executed that the addition did not belong to them but was the property of the tenant. This is contradicted by the testimony of Hammond.

As a reviewing court, we can only examine the evidence to see whether it sustains the finding of the trial court. The testimony of Hammond, if true, was sufficient to base a finding that the plaintiff was not chargeable with actual notice of the rights of the tenant. In our view, it is quite immaterial whether Friedlander had actual notice of the claims of the tenant or not. The latter was in the open, notorious possession at the time the plaintiff became the owner of the lot. This was sufficient notice of the rights of the tenant. *Wing v. Gray*, 36 Vt. 261; *Dubois v. Kelly*, 10 Barb. 508; 2 Devlin, Deeds, § 770.

This brings us to the consideration of the question, Was the addition erected by the tenant of such a character as the law would permit him to remove it? The evidence shows that, at the time the premises were leased by Boyle, there stood upon the lot and attached to it a frame two-story building. To the front of this building Boyle, while in possession erected a frame addition 24x20 feet in dimensions, two stories in height. It was placed upon wooden posts set in the ground. This addition, as well as the old portion of the building, was sided with shiplap. In the construction of the addition, all the windows in the front of the old building were taken out, and the openings made thereby were sealed up with boards. An opening was cut in the front of the upper story of the old part, and as a means of communication between the old and new parts, a door was hung therein. The eaves of the main building where the addition joined were cut off, and the roofs of the two parts were so connected as to use one drainage. The addition next to the old part was not sided, but a row of studding was placed there which, as well as the sill of that side of the addition, were nailed to the main building. There is also evidence tending to show that the siding was removed from the front of the old house

when the new was joined. This is denied by some of the appellants' witnesses. It further appears in testimony that the tenant at one time presented to the landlord a bill for repairs made by the tenant on the new part, the amount of which was allowed by the landlord and deducted from the rents. It is obvious that the new part could not be removed without material injury to the old portion, and, if separated and removed, neither part would be a complete structure. We do not deny the right to remove this addition on the ground that it was attached to the freehold, but because the improvement was of such a character, and was so annexed to the main building, that its removal would greatly injure the demised premises. The modern decisions are to

the effect that a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises or put them in a worse condition than they were when he took possession. *Lamphere v. Lowe*, 3 Neb. 181; 1 Washb. Real Prop. chap. 1, § 27; *Taylor, Land. and T.* § 550; *Whiting v. Bradstow*, 4 Pick. 811.

We are convinced from a careful reading of the testimony that the improvement placed upon the leased premises was practically an enlargement of the old building, and that it cannot be removed without considerable injury to the premises.

The judgment of the District Court is affirmed.

The other Judges concur

TEXAS SUPREME COURT.

INTERNATIONAL & GREAT NORTHERN R. CO., *Appt.*,
v.
KEENAN.

(....Tex....)

1. A railroad company is liable for injuries received by one of its brakemen in consequence of the negligence of its car inspector in permitting a foreign car to come upon its road in a defective and unsafe condition.
2. It is not error to refuse a request to give a special instruction to the jury, where the court has already embodied the proposition contained therein, in its general charge.

(October 28, 1890.)

A PPEAL by defendant from a judgment of the District Court for Smith County in fa-

vor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the commissioner's opinion.

Messrs. Gould, Camp & Robertson for appellant.

Messrs. John M. Duncan and I. J. Rice for appellee.

Collard, J., delivered the following opinion: Appellee, employed as a brakeman, while in the performance of his duty, uncoupling cars in appellant's railroad yard in San Antonio, had two fingers on his right hand mashed off. The cause of the injury was a defect in the car and the coupling apparatus. Appellant, by several assignments of error, arising from the refusal of the court to give special instructions asked by defendant, insists that the injury re-

NOTE.—Instructions, when may be refused.

Instructions need not be repeated in a special charge, where they have been fully covered in the general charge. *State v. Spooner*, 41 La. Ann. 780; *Tucker v. Cannon* (Neb.) Dec. 17, 1889; *Roth v. Northern P. L. Co.* 18 Or. 206; *People v. Hicks* (Mich.) Feb. 20, 1890.

Where the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not. *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 29 L. ed. 712; *Kelly v. Jackson*, 81 U. S. 6 Pet. 622, 8 L. ed. 623; *Winans v. New York & E. R. Co.* 62 U. S. 21 How. 88, 16 L. ed. 68; *Law v. Cross*, 66 U. S. 1 Black. 533, 17 L. ed. 185; *Beaver v. Taylor*, 68 U. S. 1 Wall. 637, 17 L. ed. 601; *Laber v. Cooper*, 74 U. S. 7 Wall. 655, 19 L. ed. 151; *Mills v. Smith*, 75 U. S. 8 Wall. 27, 19 L. ed. 346; *St. Louis Pub. Schools v. Risley*, 77 U. S. 10 Wall. 91, 19 L. ed. 850; *Chicago & N. R. Co. v. Whitton*, 80 U. S. 18 Wall. 270, 20 L. ed. 571; *Armstrong v. Morrill*, 81 U. S. 14 Wall. 120, 20 L. ed. 765; *United States v. Tweed* ("Tweed's Case") 83 U. S. 16 Wall. 504, 21 L. ed. 339; *Klein v. Russell*, 86 U. S. 19 Wall. 493, 22 L. ed. 116; *Burton v. Driggs*, 87 U. S. 20 Wall. 135, 22 L. ed. 290; *Woodruff v. Hough*, 91 U. S. 593, 23 L. ed. 333; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 253, 24 L. ed. 608; *Ruch v. Rock Island*, 97 U. S. 633, 24 L. ed. 1101; *Smith v. Field*, 105 U. S. 52, 26 L. ed. 9 L. R. A.

1007; *Ayers v. Watson*, 113 U. S. 594, 28 L. ed. 1038.

Where the jury were fully and fairly instructed, there is no reasonable ground of complaint for refusal to give instructions requested. *Albrosky v. Iowa City*, 76 Iowa, 301.

A refusal to give instructions which have already been given in substance is proper. *Coleman v. State* (Fla.) March 4, 1890; *People v. Giancoli*, 74 Cal. 642; *Tynberg v. Cohen*, 76 Tex. 409.

Instructions, the principles of which have already been fully presented to the jury, are properly refused. *Lincoln v. Smith* (Neb.) Feb. 13, 1890.

The refusal of an instruction which is simply a repetition, in slightly different phraseology, of principles already presented, is not error. *Rock Island v. Cuthnely*, 126 Ill. 408.

A refusal to instruct upon a point already substantially covered is not error. *Seekel v. Norman*, 71 Iowa, 264; *State v. Winter*, 72 Iowa, 627; *People v. McCoy*, 71 Cal. 386; *People v. Bush*, Id. 602; *Craig v. Thompson*, 10 Colo. 517; *Addy v. Janesville*, 70 Wis. 401; *State v. Peterson*, 38 Kan. 204; *Carr v. State*, 24 Tex. App. 662; *Chicago, M. & St. P. R. Co. v. Krueger*, 14 West. Rep. 364, 124 Ill. 457; *Jackson v. State*, 8 Cent. Rep. 581, 49 N. J. L. 252; *Johnson v. Baltimore & P. R. Co.* 11 Cent. Rep. 720, 6 Mackey, 232; *Dunn v. Cass Ave. & F. G. R. Co.* 96 Mo. 652; *Benson v. State*, 119 Ind. 488; *Castagnino v. Balletta*, 82 Cal. 250; *Bonner v. Runala*, 76 Mich. 126; *People v. Swalm*, 80 Cal. 46; *State v. Canty*, 41 La. Ann. 597; *Jacobs v. Totty*, 76 Tex. 343.

sulted from the negligence of its car inspector in failing to report the car in bad order for repairs, and, the inspector being a fellow servant of plaintiff, the Company would not be liable. The rule is that a railway company is bound to furnish safe machinery and appliances for use by its employes in operating its road, and if ordinary and reasonable care is not exercised by the company to do this it would be responsible for injuries to its servants caused by such neglect. The company cannot relieve itself of this duty by charging its servants with its performance. The neglect of the servant, to whom the company intrusted such duties, is the neglect of the master. *Galveston, H. & S. A. R. Co. v. Farmer*, 78 Tex. 85, and authorities cited; *Houston & T. O. R. Co. v. O'Hare*, 64 Tex. 601; *International & G. N. R. Co. v. Bell*, 75 Tex. 53.

The fact that the defective car belonged to another road was immaterial. It was the duty of the Company to use the same care in protecting its employes that it would have used if the car had been its own, and, if the danger of the service was thereby increased, to warn the brakeman. *Missouri P. R. & I. & G. N. R. Co. v. White*, 76 Tex. 103.

Appellant requested the court to charge the jury that if the injury was caused by the carelessness of the engineer in backing the train, the negligence would be that of a fellow servant, and defendant would not be liable. The court gave, in the general charge, a similar instruction, embodying the same principle, and it was not necessary to repeat it by giving the requested charge. The law of contributory negligence as applicable to the case was given to the jury in its general charge, which dispensed with the necessity of giving the special charge asked by appellant on the same subject. Besides this, the charge asked could not be given, because it contained the oft-repeated illegal proposition insisted on by defendant that, if the injury resulted from the negligence of the car inspector, the defendant would not be liable. On this account alone the instruction could not have been given. We find no error in the trial of the case or in the judgment of the court below, and conclude it ought to be affirmed.

Stayton, Ch. J.:

Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

William EMMELUTH, *Recept.*,

v.

HOME BENEFIT ASSOCIATION, *Appt.*

(...N. Y....)

1. Where an insurance company issues to each of ten persons as members of a club, for a separate consideration furnished by each, a certificate of insurance which provides that upon the death of either member the company will pay a certain sum to his representatives and to the surviving members of the club, share and share alike, upon the death of a member either of the persons interested in the sum which thereupon becomes payable may maintain a separate action to recover his share without making the other persons interested parties to the action.
2. A complaint which alleges that for a certain valuable consideration an insurance company issued its policy of insurance to a certain person as one of a club of ten, whereby it agreed to pay to his representatives and to the surviving members of said club,

share and share alike, a certain sum ninety days after receipt of proofs of his death; and that the company issued to plaintiff its certificate as one of the members of said club; and then alleges the death of such person, the giving of proofs of loss, etc., and that plaintiff is one of the surviving members of said club entitled to his share of the benefits of the policy; that his certificate remains in full force and that deceased complied with the conditions of insurance,—states a cause of action.

(October 7, 1890.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Westchester Special Term overruling a demurrer to the complaint in an action brought to recover the amount alleged to be due on a policy of life insurance. *Affirmed.*

Statement by Vann, J.:

Action upon a certificate issued by a co-operative insurance corporation organized under

NOTE.—Covenant entered into with several; when one may sue alone.

If a covenant be made with ten persons to pay a distinct sum of money to each, a separate duty arises to each; and in contemplation of law it is the same as if a separate and distinct contract had been entered into with each separately. *Trustees of Perryville v. Letcher*, 1 T. B. Mon. 11; *Carthrae v. Brown*, 3 Leigh, 98; *Ludlow v. McCrea*, 1 Wend. 223; *James v. Emery*, 5 Price, 329; *Coleman v. Sherwin*, 1 Salk. 187; *Hall v. Leigh*, 12 U. S. 8 Cranch, 50, 3 L. ed. 484; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *New England Marine Ins. Co. v. DeWolf*, 6 Pick. 61; *Townsend v. Hubbard*, 4 Hill, 351; *Van Alstyne v. Van Slyck*, 10 Barb. 387; *How v. How*, 1 N. H. 49.

Where a contract contains distinct grants, or promises of distinct sums to distinct payees, their

interests are several, and they may bring separate actions. *Ford v. Bronaugh*, 11 B. Mon. 14; *Servante v. James*, 10 Barn. & C. 410; 1 Addison, Cont. 79.

Where the consideration moves from many persons, but from each severally, the contract is several and each may sue separately for his proportion. *Bell v. Chaplain*, Hardr. 321; *Thomas v. —*, Style, 461; *Brand v. Boulcott*, 3 Bos. & P. 235.

There may arise from the same contract a joint duty to all and also several duties to each of the parties. *Peokham v. North Parish in Haverhill*, 16 Pick. 274; *Story v. Richardson*, 6 Bing. N. C. 123.

Where the covenant was several one party might sue alone for the nonpayment of his share without joining with him the other parties beneficially interested. *Pool v. Hill*, 6 Mees & W. 335; 1 Parsons, Cont. 11.

chapter 175 of the Laws of 1888. The plaintiff by his amended complaint alleges the corporate character of the defendant, and that, December 8, 1884, in consideration of the annual premium of \$10 to it paid by Daniel Sandford, it issued its policy of insurance, whereby it "agreed to pay to the sister of said Sandford, and to this plaintiff, and the surviving members of the Five Thousand Club I, within ninety days after receipt" of proof of the death of said Sandford, the sum of \$5,000 "to the surviving members of said club, limited to ten members, share and share alike." The certificate, which is made a part of the complaint, states that in consideration of certain representations and agreements, and of the membership fee paid, "D. Sandford, is an accepted member of the Home Association . . . for the benefit of D. Sandford, self, and the surviving members of Five Thousand Club I, limited to ten members, whose certificates remain in force, share and share alike, unless said member . . . substitute some other beneficiary," or if he should survive such beneficiary, then for the benefit of the legal heirs of said member. The contract further provides that the member is required to pay a gross sum annually, together with assessments when made, and that upon his death, while said certificate is in force, there shall be payable to said beneficiary or beneficiaries the sum of \$5,000. The certificate is made subject to various conditions relating to assessments, conduct, excluded risks, etc. The complaint further alleges that on December 8, 1884, the defendant, in consideration of the annual payment of \$10, issued its policy of insurance to the plaintiff as a member of said club, "limited to ten members," for the benefit of his wife, "in case of his death, and the surviving members of said" club, and that he "is one of the surviving members of said club, and entitled to his share in the benefits thereof, and his policy remains in full force and effect." The complaint contains the usual formal allegations as to death, proofs of loss and the collection of an assessment from the members of the association to the amount of \$5,000, which is still held by the company, and that since the death of said Sandford, "Stafford Gay and S. Gay, two of the members of said Club I, have withdrawn, leaving eight members of said Five Thousand Club I entitled to receive their share of said \$5,000." The remaining allegations relate to formal compliance by Sandford and the plaintiff with the conditions of insurance. The defendant demurred, upon the ground that no cause of action was set forth, and because there is a defect of parties plaintiff, "in that if plaintiff has any interest in either of the contracts referred to in said amended complaint, . . . such interest is a joint interest with one or more other persons, and no reason is assigned for the non-joinder of said persons as parties plaintiff."

Mr. Francis Lawton, for appellant.—There is a defect of parties plaintiff.

All persons having joint interests must be joined as parties.

Code, §§ 448, 452.

It is "the interest of the parties as it appears on the face of the contract" which governs the construction.

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Pearce v. Hitchcock, 2 N. Y. 390; 1 Addison, Cont. p. 79.

Contracts like the one in this case are joint in form.

Addison, Cont. p. 81, § 43; 1 Parsons, Cont. p. 13; *Lane v. Drinkwater*, 1 Crompt. M. & R. 589; *Byrne v. Fitzhugh*, 1 Crompt. M. & R. 618 note; *English v. Blundell*, 8 Car. & P. 832.

To create a separation of interests which arise under such a contract the covenant must be to pay a distinct sum of money to each of the persons interested.

Withers v. Bircham, 8 Barn. & C. 254; *Shaw v. Sherwood*, Cro. Eliz. 729.

To sustain a suit on a separate contract to pay a portion of a gross sum of money to an individual plaintiff, it must appear on the face of the contract: (1) that the plaintiff is the person named to take; (2) what proportion is payable to him; (3) what the whole sum distributable is.

Dean v. Chamberlin, 6 Duer, 691; *Cochran v. Carrington*, 25 Wend. 409; *Hallett v. Hallett*, 2 Paige, 19, 2 N. Y. Ch. L. ed. 795.

Where the slightest doubt exists as to the persons to take, or as to the amount of the shares, or as to the gross amount divisible, all parties must be heard or represented in the suit.

Moak, Van Santv. Pl. p. 126.

The shares of one party cannot be determined here until the rights of all the others are settled or ascertained.

Hallett v. Hallett, *supra*; *Oromer v. Pinckney*, 8 Barb. Ch. 474, and cases cited; *Wells v. Knox*, 17 Civ. Proc. Rep. 61; *Oromer v. Pinckney*, *supra*; *Burgess v. Abbott*, 1 Hill, 476; *Hill v. Gibbs*, 5 Hill, 56; *Sherman v. Ballou*, 8 Cow. 804, 811; *Leavy v. Leavy*, 23 Hun, 499.

Mr. Norman A. Lawlor for respondent.

Vann, J., delivered the opinion of the court:

It appears from the complaint that ten persons designated as members of Five Thousand Club I, limited to ten, each procured a certificate of insurance from the defendant. While this is not expressly alleged, it necessarily follows from the allegations that the club was limited to ten members, each with a certificate in force, and the withdrawal of two thereof "leaving eight members of said Five Thousand Club I entitled to receive their share of said \$5,000." One of the certificates is specifically set forth, and another generally, and from the former, issued to Daniel Sandford, it appears that an annual premium, and such assessments as should be made, were payable by him to the defendant, and that upon his death there was payable from the defendant to him or his representative, and to the other members of the club, the sum of \$5,000 "share and share alike." According to the contract Mr. Sandford was empowered to designate a beneficiary to receive the one tenth, or such other fractional part as otherwise would be payable to him. Whether he did this or not is unimportant in this action, which relates simply to the share of the plaintiff; but some confusion is produced by the allegation in the complaint that the defendant, by its contract with Sandford, promised to pay the amount of the policy, when due, to the sister of said Sandford, and to the plaintiff and the other mem-

which is set forth *in nunc verba*, does not mention the sister, and the complaint can conform to the contract in this regard only upon the theory that he had designated her as his beneficiary. Whether he had or not does not affect the plaintiff, as in either event his fractional part would be the same. The certificate issued to the plaintiff, so far as it is set forth, is like that issued to Mr. Sandford, and presumptively the certificates of the other members of the club were the same, as it distinctly appears that membership depended upon a certificate in force. The form of those certificates, however, is not here important, because it appears from the certificates of the plaintiff and Mr. Sandford that the interest of each of those persons was several, as it was founded on a separate consideration and an independent contract, and the promise, as alleged, was to pay to the members or their designated beneficiaries, share and share alike. The action follows the nature of the interest, and when that is several separate actions may be maintained, even if the language of the promise is joint. *Ilees v. Nellis*, 1 Thomp. & C. 118; *Van Wart v. Price*, 14 Abb. Pr. 4, note; *Warner v. Ross*, 9 Abb. N. C. 385; *Shaw v. Sherwood*, Cro. Eliz. 729; *Eccleston v. Cliphsham*, 1 Saund. 153; *Withers v. Bircham*, 3 Barn. & C. 254; 1 Addison, Cont. 79; 1 Parsons, Cont. 11.

The words "share and share alike" are words of severance, and create a several right, especially when considered in the light of the fact that the consideration was several. As the language of the promise is not expressly joint, but, to say the least, may be construed to be joint or several, it should, according to the authorities cited, be held several, because the interest of the promisees is several. The action to recover the share of the plaintiff was therefore properly brought in his name alone. Some confusion is also created by the allegation that the certificate of the plaintiff is for the benefit of his wife, but that is only in case of his death, and this action is not founded upon the certificate issued to the plaintiff, but upon that issued to Mr. Sandford. The only importance of setting forth the former at all is to show that the plaintiff is a member of the club. There is clearly a cause of action alleged.

The judgment should be affirmed, with costs.
All concur, except **Brown, J.**, absent.

BOWERY NATIONAL BANK of New York, *Respt.*,

v.
John W. WILSON et al., *Appts.*

(.....N. Y.....)

An assignment by a sheriff of such fees

NOTE.—*Unearned salary of officer not assignable.*

The remuneration which the law provides for the officer is supposed to be essential to support the dignity of the office, to maintain him without resorting to other employments and to supply an inducement for a sedulous performance of his official duties. *Mulhall v. Quinn*, 1 Gray, 105; *Brackett v. Blake*, 7 Met. 335; *Webb v. McCauley*, 4 Bush, 10; *Field v. Chipley*, 79 Ky. 260; *Bliss v. Lawrence*, 58 9 L. R. A.

from the State or County, for public services thereafter to be rendered, is contrary to public policy and void.

(December 2, 1890.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term in favor of plaintiff for the recovery of moneys. *Reversed.*

Statement by Pollett, Ch. J.:

In 1885 Alexander V. Davidson was the sheriff of the City and County of New York, his term expiring December 31 of that year. September 10, 1885, the plaintiff discounted for Davidson his promissory note for \$4,500, which was indorsed by three accommodation indorsers. To secure the payment of this loan, Davidson executed and delivered to the plaintiff a written assignment of a portion of such sums of money as might be due him for services to be rendered as sheriff during the month of December of that year, which assignment was filed September 12 with the comptroller of the city. In December the sheriff rendered services for which, in January, 1886, he was audited and allowed the sum of \$4,485.75. Prior to the commencement of this action John Tully was appointed receiver of Davidson in proceedings supplementary to execution upon several judgments, and entered on the discharge of his duties as such. The plaintiff and the receiver claiming the money, the comptroller refused to pay it to either, and March 30, 1886, this action was begun against the mayor, alderman and commonalty of the city to recover the amount audited. In December of that year the city was permitted, by an order, to pay the amount of the claim into court, and thereupon Tully and two other persons (the nature of whose claim does not appear) were brought in as defendants. The case was tried at special term, which directed a judgment in favor of the plaintiff, and, among other things upon which its decision was based, it found that January 23, 1886, Davidson orally assigned his said claim to the plaintiff for the payment of the money secured by the note. Upon appeal to the general term this judgment was affirmed.

Mr. Henry D. Hotchkiss, for appellants:

The written assignment by Davidson, in September, of his fees to be earned in the following December, was against public policy and void.

Bliss v. Lawrence, 58 N. Y. 442; *Billings v. O'Brien*, 14 Abb. Pr. N. S. 238; *Wayne Twp. v. Cahill*, 5 Cent. Rep. 335, 49 N. J. L. 144; *Thurston v. Fairman*, 9 Hun, 584; *Green*

N. Y. 442, 48 How. Pr. 21; *Liverpool v. Wright*, 23 L. J. Ch. 868; *Arbuckle v. Cowan*, 3 Bos. & P. 321; *Barnwick v. Reade*, 1 H. Bl. 627; but see, *contra*, *State v. Hastings*, 15 Wis. 75.

No action will lie against the inhabitants of a township to recover moneys for work done upon the public roads in advance of an appropriation. *Callahan v. Morris Twp.* 30 N. J. L. 100. See *State v. Hudson County*, 37 N. J. L. 254; *Greenhood*, Pub. Pol. Rule 297.

See also 21 L. R. A. 827; 23 L. R. A. 97; 36 L. R. A. 174; 48 L. R. A. 441.

hood, Pub. Pol. 351; *Conner v. New York*, 5 N. Y. 285; *Devlin v. New York*, 63 N. Y. 8.

The September assignment cannot be enforced in equity.

Williams v. Ingersoll, 89 N. Y. 519; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 539, 7 L. ed. 512; *Russell v. De Grand*, 15 Mass. 39; *Coe v. Tough*, 116 N. Y. 273.

The void paper assignment filed with the comptroller in September cannot be used in aid of the alleged parol assignment.

Gray v. Hook, 4 N. Y. 459, 460; *Woodworth v. Bennett*, 43 N. Y. 277, 279.

The pretended parol assignment was void under the Statute of Frauds.

Atlantic Bank v. Franklin, 55 N. Y. 235; *Cary v. White*, 52 N. Y. 138; *Artcher v. Zeh*, 5 Hill, 200; *Hunter v. Wetzel*, 57 N. Y. 375; *O'Neil v. New York Cent. & H. R. R. Co.* 60 N. Y. 138; *Hoyt v. Hoyt*, 8 Bosw. 522; *Dung v. Parker*, 52 N. Y. 434; *Morris v. Garrison*, 13 Abb. N. C. 261; *Cooke v. Millard*, 65 N. Y. 352-367; *Shindler v. Houston*, 1 N. Y. 261; *Heath v. Hall*, 4 Taunt. 327; *Risley v. Phentz Bank*, 83 N. Y. 818; *Armstrong v. Cushman*, 43 Barb. 340; *Lovry v. Tew*, 3 Johns. Ch. 407, 5 N. Y. Ch. L. ed. 952; Pom. Eq. Jur. § 1270, *Mr. James R. Marvin* for respondent.

Follett, Ch. J., delivered the opinion of the court:

The finding that an oral assignment of the claim was made by Davidson to the Bank on the 22d of January, 1886, is challenged by the appellants, on the ground that there is no evidence tending to sustain it. The defendants requested the court to find the converse of this proposition, excepted to the finding made and present a case which contains all of the evidence, and so are in a situation to require a review of the finding. After an examination of all of the evidence, we are convinced that no assignment, except the written assignment, was ever made of this claim, and that the most that occurred in January was the recognition of the existence of the previous assignment. No words are found in the evidence which indicate an intent on the part of Davidson to make a present assignment of his claim to the plaintiff, and, had there not been a previous written assignment, we think no one would assert that any words used in January amounted to a transfer of the claim. This brings us to the consideration of the question whether an assignment by a sheriff of such fees as he may become entitled to receive from the State or county, for public services thereafter to be rendered, is valid. It is settled in this State that an assignment by a public officer of his unearned salary is contrary to public policy and void. *Bliss v. Lawrence*, 58 N. Y. 443; *Billings v. O'Brien*, 4 Daly, 556, 45 How. Pr. 392, 14 Abb. Pr. N. S. 233.

The same rule is established in England, and in some of the United States. *Hill v. Paul*, 8 Clark & F. 395; *Cooper v. Reilly*, 2 Sim. 560; *Wells v. Foster*, 8 Mees. & W. 149; *Beal v. M'Vicker*, 8 Mo. App. 202; *Bangs v. Dunn*, 66 Cal. 72; Pom. Eq. Jur. § 1276; Story, Eq. Jur. 13th ed. § 1040d; Greenhood, Pub. Pol. Rule 297.

In *Bliss v. Lawrence*, *supra*, it was said: "Salaries are, by law, payable after work is 9 L. R. A.

performed, and not before; and while this remains the law it must be presumed to be a wise regulation, and necessary, in the view of the lawmakers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. . . . If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties, as a barren charge, to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service."

The reasons here given for holding the unearned salaries of public officers to be unassignable apply with greater force to fees payable upon the due performance of public duties which cannot be discharged by any other officer. If a sheriff can legally assign the fees which may become due him for services to be performed for the public in any given month, he may make a valid assignment of all of the fees that shall become due him for services during the whole of his term. If he could assign to one he could assign to many, and every purchaser would be entitled to the rights of assignees of claims against individuals, and, in the case of conflicting interests or of disputes between the officer and his alleged transferee, the government would have to decide at its peril between them or be subjected, as in the case at bar, to litigation. By a division of the unaudited claims of a public officer among many persons, a powerful influence in their support may be brought to bear upon the auditing officers, which would not exist if the demands were held by the officer who rendered the service. The statutes provide for the payment of public servants after the rendition of their services, and make no distinction in this respect between officers compensated by a salary or by fees. An officer having assigned his interest in a compensation to become due him for future public services, would have less interest in the punctual and efficient performance of his duties, and, in the case of improvident assignments, might be without the ability to discharge them.

So great were the evils arising from assignments of claims against the United States, that a statute was passed in 1853, and re-enacted in section 3477 of the Revised Statutes of the United States, prohibiting the assignment of any claim, or any interest in any claim, against the government until after it had been allowed and a warrant for its payment issued. In this State the right of a public officer to assign unearned fees does not seem to have been considered in any reported case, except in *People v. Dayton*, 50 How. Pr. 143, in which it was held at special term that the earned and unearned fees of a justice of the peace might be assigned; but we think this judgment is not supported by the principle declared in the authorities cited. In England, and in some of the States, the assignability of unearned fees has been considered, and, so far as our attention has been called to the adjudications, no distinction has

earned salaries.

In *Palmer v. Bate*, 2 Brod. & Bing. 673, a clerk of the peace attempted to assign his unearned fees, but the transaction was held contrary to public policy and void.

In *Hill v. Paul*, 8 Clark & F. 295, the question arose whether an assignment by a keeper of the Register of Sasines—instruments proving the transfer of feudal property in Scotland—was broad enough to cover future fees, and, if it was, were they assignable. The case was finally decided on the first ground, but the assignability of unearned fees was considered and said to be contrary to the public policy of England and Scotland.

In *Field v. Chipley*, 79 Ky. 260, it was held that an assignment by the clerk of the court of chancery of the future fees of his office was void, as against public policy. Upon principle and authority, we think that an assignment by a sheriff of fees for services to be rendered to the public is contrary to public policy and is void.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, **Bradley, J.**, in result; **Haight, J.**, absent.

Elbert S. JEMISON *et al.*, Appts.,

v.

CITIZENS SAVINGS BANK of Jefferson,
Texas.

(...N. Y....)

1. **Persons dealing with the cashier of an incorporated savings bank** as such are chargeable with knowledge of the corporate powers of the bank and of the extent to which the cashier can bind it; and it is immaterial that the institution is a foreign one.
2. **Speculative contracts entered into by a savings bank**, which is incorporated with the usual powers of receiving on deposit and loaning money and discounting notes, for the sale or purchase of cotton futures, subject to the hazard and contingency of gain or loss, are *ultra vires*.
3. **Speculative dealing in cotton futures is not authorized** by a clause in the charter of a savings bank giving it power to buy and sell exchange, bullion, bank notes, government stocks and other securities.
4. **Where brokers purchase and hold cotton futures in their own names** in compliance with the orders of a savings bank, there never being any delivery of cotton or other property, or transfer of any title thereto to the bank, it is not estopped to set up the defense of *ultra vires* when sued for commissions and the amount expended by the brokers in purchasing the futures.
5. **The defense of *ultra vires* is as available to a corporation** when the attempt is made to hold it liable as principal upon a con-

NOTE.—Contract; option deals. See note to *Sprague v. Warren* (Neb.) 3 L. R. A. 679.

Wagers and wagering contracts. See note to *Harvey v. Merrill* (Mass.) 5 L. R. A. 200.

Gambling consideration. See note to *Snoddy v. American Nat. Bank* (Tenn.) 7 L. R. A. 705.

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sued upon a contract which it made as principal.
6. **A person suing a corporation upon a contract cannot proceed** upon the theory that it made the contract as agent for the purpose of avoiding the defense of *ultra vires*, and then upon the theory that it was the principal for the purpose of establishing a right to recover.

(October 7, 1890.)

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit dismissing the complaint in an action brought to recover commissions and the amount expended by plaintiffs at defendant's request in the purchase of cotton futures. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Barlow & Wetmore, for appellants:

Where a corporation has received the money or property of the plaintiffs, or the benefit thereof, it is no defense to say that the transactions are *ultra vires* of the corporation.

Whitney Arms Co. v. Barlow, 63 N. Y. 62; *Parish v. Wheeler*, 22 N. Y. 494; *Rider Life Raft Co. v. Roach*, 97 N. Y. 881; *Starin v. Edson*, 112 N. Y. 215; *New York v. Sonneborn*, 113 N. Y. 426; *New York v. Huntington*, 114 N. Y. 633, 634.

The acts in question were not *malum in se*.

Where an act is *malum in se*, it is just as immoral when done by an individual as when done by a corporation, and no one can pretend that it is immoral for an individual to speculate in cotton.

Bissell v. Michigan, S. & N. Ind. R. Co. 23 N. Y. 259.

The acts were merely *ultra vires*.

See *People v. Mechanics & T. Sav. Inst.* 93 N. Y. 9; *Parish v. Wheeler*, 22 N. Y. 507.

The rule applied in *Whitney Arms Co. v. Barlow*, *supra*, applies as much to a savings bank as to any other corporation.

Before an act can be condemned as "against public policy," it must be "evil in itself," or "illegal or void by statute," and not where it involves "a simple want of capacity or power."

New York v. Sonneborn, 113 N. Y. 426.

The defendant has received the plaintiffs' property.

If A were to buy cotton to be shipped to B at the request of the latter, and before the shipment B should direct A to sell it to pay a debt of B, it would be just this case, and it could not be claimed that A had not paid out his money for the benefit of B.

See *Parish v. Wheeler*, 22 N. Y. 494.

Messrs. Seward, DaCosta & Guthrie and William H. Bristow, for respondent:

A speculation in cotton futures would involve an unauthorized exercise of corporate powers by the defendant as a savings bank.

Leslie v. Lorillard, 1 L. R. A. 456, 110 N. Y. 519, 532; *Huntington v. National Sav. Bank of D. C.* 86 U. S. 388, 393, 24 L. ed. 777, 778; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 82, 83, 86, 25 L. ed. 950, 952, 953; *Sistars v. Best*, 88 N. Y. 527, 538; *People v. Mechanics & T.*

Sav. Inst. 92 N. Y. 7, 9; *Nassau Bank v. Jones*, 95 N. Y. 115, 120, 122.

Money paid under or in the performance of an illegal contract cannot be recovered.

Smith v. Bromley, Doug. 896, *note*; *Riggs v. Palmer*, 5 L. R. A. 840, 115 N. Y. 506, 511; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518, 528; *Dent v. Ferguson*, 182 U. S. 50, 65, 83 L. ed. 242, 247.

The defendant Savings Bank cannot be held liable because it was acting as agent for an undisclosed principal.

Argersinger v. MacNaughton, 114 N. Y. 585, 540; *Oglesby v. Yglesias*, El. Bl. & El. 980; *Hough v. Manzanos*, L. R. 4 Exch. Div. 104; *Ogden v. Hall*, 40 L. T. N. S. 751.

Haight, J., delivered the opinion of the court:

The plaintiffs were commission merchants, and members of the Cotton Exchange of the City of New York. The defendant was a savings bank and trust corporation, organized under the laws of Texas. This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures. The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that, in the transaction alleged in the complaint, it acted as the agent of one Albert P. Clopton, of Jefferson, Tex., and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to. While the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good, responsible customers," the general term was of the opinion that this defense could not be sustained, for the reason that the defendant did not disclose the name of his principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal, and not the defendant, his agent, would have been liable. Without stopping to consider the evidence, we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as a principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered giving the amount, and this was followed by an order by telegraph from Parsons, as cashier, under date of February 10, to buy 100 bales, June delivery; and on the same day he wrote the plaintiffs that the order was made for one of their customers, who had deposited \$250 as per their favor of the 27th ult. Other orders followed, the final result of which was a loss, to recover which this action was brought. At the time, Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution and by-laws, having the general charge of the business of the Bank and the supervision of the

concern; and, inasmuch as the answer alleges that the transactions referred to in the complaint were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. This brings us to the question whether or not the defendant had the power to make the orders in question. The defendant was incorporated and chartered in 1871, by an Act of the Legislature of the State of Texas entitled "An Act to Incorporate the Citizens' Savings Bank of Jefferson, Texas." The Act, among other things, provides that the general business and object of this corporation shall be to receive on deposit or in trust such sum or sums of money as may from time to time be offered therefor by tradesmen, merchants, clerks, laborers, servants and others, to be repaid to such depositors when demanded, at such times, with such interest and under such regulations, as the board of directors may from time to time prescribe, and also "this corporation may loan money according to the Constitution and laws of the State, or may discount in accordance with bank usages, taking such security therefor, either real or personal, as the directors may deem sufficient. Said corporation shall have power to borrow money, buy and sell exchange, bullion, bank-notes, government stocks and other securities." The Act further provides that the business of the corporation shall be managed by twelve directors. Corporations are artificial creations, existing by virtue of some statute and organized for the purposes defined in their charters. A person dealing with a corporation is chargeable with notice of its powers, and the purposes for which it was formed; and when dealing with its agents or officers, is bound to know the extent of their power and authority. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It follows that the plaintiffs must have known, or are chargeable with knowledge, of the corporate powers of the defendant, and of the extent to which its cashier could bind the corporation. *Alexander v. Cauldwell*, 83 N. Y. 480; *Hoyt v. Thompson*, 19 N. Y. 207-222; *Relfe v. Rundie*, 103 U. S. 222-228 [26 L. ed. 837-839]; *Davis v. Old Colony R. Co.* 181 Mass. 258-260; *Leonard v. American Ins. Co.* 97 Ind. 299.

Savings banks are designed to encourage economy and frugality among persons of small means, and are organized with restrictions and provisions intended to secure depositors against loss. Speculative contracts entered into for the sale or purchase of stock by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, are *ultra vires*, and a perversion of the powers conferred by its charter. *People v. Mechanics & T. Sav. Inst.* 92 N. Y. 7-9; *Sistare v. Best*, 88 N. Y. 527-531.

Contracts of corporations are *ultra vires* when they involve adventures or undertakings outside and not within the scope or power given by their charters. The Acts under which they are organized were framed in view of the rights of the public, and the interest of the stockholders. As artificial creations, they possess only the powers with which they were endowed. An act may be *malum in se* or *malum prohibi-*

ration, unauthorized and prejudicial to the stockholders. In either case the plea of *ultra vires* should prevail, unless it would defeat justice, or accomplish a legal wrong. *Huntington v. National Sav. Bank of D. C.* 96 U. S. 388 [24 L. ed. 777]; *Thomas v. West Jersey R. Co.* 101 U. S. 71 [25 L. ed. 950]; *Nassau Bank v. Jones*, 95 N. Y. 115; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456.

As we have seen, the defendant was chartered for the purpose of receiving on deposit or in trust such sums of money as may from time to time be offered by tradesmen, merchants, clerks, laborers, servants and others. It was authorized to loan these moneys according to the Constitution and laws of the State, and to discount in accordance with bank usages, taking such security therefor, either real or personal, as the directors may deem sufficient. In addition thereto, the defendant was given power to borrow money, buy and sell exchange, bullion, bank-notes, government stock and other securities. The authority here given to buy and sell exchange, bullion, bank-notes, government stocks and other securities does not embrace or include speculative contracts in cotton futures any more than it does hay, oats, provisions or dry goods. The exchange, bullion, bank-notes, securities, etc., authorized, are those of fixed value, current in the market, and not subject to the control of speculators. While the buying and selling of cotton to be delivered in the future may not ordinarily be immoral, or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders, and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter, and the Constitution and laws of the State; and, in so far as this right was violated by the transaction in question, it was a misappropriation of the funds and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs, and that the defendant is estopped from setting up the defense.

In the case of *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, the plaintiff was a corporation, organized for the purpose of manufacturing every variety of fire-arms, and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal-Lock Company to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed, and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in *Parish v. Wheeler*, 22 N. Y. 494, in which it was held that a railroad company, having purchased and received a steamboat, could be compelled to pay for it, although the power to purchase such

tion of an action, or to contracts that are prohibited as against public policy or immoral. *Nassau Bank v. Jones*, *supra*; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371-389 [88 L. ed. 157-163].

In the case at bar, the transaction, as we have seen, was not only immoral, and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto, and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the City of New York, in which the members doing business therein with other members act as principals, and are liable as such. The most that can be claimed is that they held the cotton, or the contracts therefor, subject to the call or order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property, to the defendant. If the steamboat had never been delivered to the railroad company, so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal-Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that, under the circumstances of this case, the defense of *ultra vires* is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is therefore liable as such. If the defendant had no power to engage in the business as principal, we do not understand what right it had to do so as an agent; but, conceding that it was an agent, and that the orders were made for and on behalf of Clopton, then this action should have been brought against Clopton, instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders, and for that reason it is liable; but, if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal, and liable as such, and, if a principal, then the question of *ultra vires* arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of *ultra vires*, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent, and still bind himself as a principal, but, if he is proceeded against as a principal, he is entitled to all of the rights and privileges that the law gives to a person occupying the position of principal. We consequently are of the opinion that *the judgment should be affirmed, with costs.*

All concur.

Motion for re-argument denied December 9, 1890.

Margaret BOHAN, *Recept.*

v.

PORT JERVIS GAS LIGHT CO., *Appt.*

(.....N. Y.....)

1. If one carries on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages therefor.
2. To render a business, the conducting of which pollutes the air with noxious smells and vapors, such a nuisance as will entitle adjoining property owners to recover damages for the maintenance thereof, it is not necessary that such owners should be driven from their dwellings; it is enough that the enjoyment of life and property is rendered uncomfortable.
3. Devoting real estate to uses which produce destructive vapors and noxious smells, and which result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood, is not reasonable under the maxim, *sic utere tuo ut alienum non laedas*.
4. The existence of negligence is not essential to the maintenance of an action against the proprietor of a business which is in and of itself a nuisance, to recover for injuries resulting to third persons from the conducting of it.
5. A statute authorizing in general terms the creation of corporations for manufacturing and supplying illuminating gas will not exempt a corporation organized under its provisions from liability for consequential injuries to adjoining property

holders, flowing from the careful prosecution of the business for which it was created. To have such a result the statutory exemption must be express or must be a clear and unquestionable implication from powers expressly conferred; and it must appear that the Legislature contemplated the doing of the very act which caused the injuries.

(Pollett, Ch. J., and Haight, J., dissent.)

(October 7, 1890.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Orange Circuit in favor of plaintiff, and from an order denying defendant's motion for a new trial in an action brought to recover damages for the alleged maintenance of a nuisance. *Affirmed.*

Statement by Brown, J.:

The amended complaint, after setting out the incorporation of the defendant, and that it was, and for several years prior to the commencement of the action had been, engaged in the manufacture of gas, and that the plaintiff and defendant were owners of adjoining property, alleged "that about the year 1880 the defendant erected a new tank for the purpose of its gas-works on its said premises, the southern side of which stands within a few feet of plaintiff's premises; that about the year 1880 the defendant began to, and ever since has and still does, manufacture its gas at said works from naphtha, and that said tank was and still is used

NOTE.—Nuisances, what are.

To constitute a nuisance it is not necessary that a noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces what is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Metropolitan Board of Health v. Heister*, 37 N. Y. 683, 6 Trans. App. 191; *Brady v. Weeks*, 8 Barb. 159; *Barnes v. Hathorn*, 54 Me. 124, 7 Am. L. Reg. N. S. 86; *Ross v. Butler*, 19 N. J. Eq. 800; *McKeon v. See*, 4 Robt. 466; *Hutchins v. Smith*, 63 Barb. 256; *Campbell v. Seaman*, 2 Thomp. & C. 237, 63 N. Y. 668; *Walker v. Shepardson*, 2 Wis. 384; *Hackney v. State*, 8 Ind. 494; *Fish v. Dodge*, 4 Denio, 311; *State v. Haines*, 30 Me. 65; *State v. Purns*, 4 McCord, L. 472; *Rox v. Neil*, 2 Car. & P. 485; *Westcott v. Middleton*, 10 Cent. Rep. 202, 43 N. J. Eq. 478; *Fisher v. Clark*, 41 Barb. 382.

Where the using of defendant's property impairs the health of plaintiff's family and the value of his property, it constitutes a nuisance. *Hurlbut v. McKone*, 4 New Eng. Rep. 51, 55 Conn. 31.

A mere tendency to injury is not sufficient to constitute such a nuisance as is dangerous to the public health, within the New Jersey Act of 1887, but there must be something actually appreciable which arrests the attention and strikes the common sense of the ordinary citizen. *State v. Bergen County Chosen Freeholders*, 46 N. J. Eq. 173.

The damage, to constitute a nuisance, must be real, not fanciful; a mere annoyance to fastidious tastes is not sufficient. *Beckly v. Skroh*, 1 West. Rep. 319, 19 Mo. App. 76.

An undertaker's establishment in a populous place is not a nuisance *per se*. *Westcott v. Middleton*, *supra*.

Physical discomfort from a morbid taste or excited imagination will not justify interference by a court. *Ibid*.

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Interference of the court is not called for where but a single person is disturbed by such an establishment. *Ibid*.

The law will not interfere where the defendant's business is lawful and the use of his own property is reasonable. *Hurlbut v. McKone*, *supra*.

What constitutes nuisance in one locality may not in another. *Ibid*.

A cooking-stove may be so located and used as to make it a nuisance to the adjacent proprietor. *Ibid*.

Limitation of right to use of one's own property.

The right of everyone to use his own property as he pleases, for all the purposes to which such property is usually applied, is unlimited and unqualified, up to the point where the particular use becomes a nuisance. *Fisher v. Clark*, 41 Barb. 382.

The owner of property is entitled to the fullest dominion over it consistent with public weal and the lawful rights of others; and acts of others denying this right are actionable injury. *Beckly v. Skroh*, 1 West. Rep. 319, 19 Mo. App. 75.

A man is bound to so use his own property as not to injure his neighbor. Hence, courts have interfered to restrain or punish the proprietor of the business creating the nuisance, as, for example, when the injury was caused by disagreeable vapors and odors. *Mulligan v. Elias*, 12 Abb. Pr. N. S. 264; *Campbell v. Seaman*, 63 N. Y. 551, 30 Am. Rep. 575; *Taylor v. People*, 6 Park. Cr. Cas. 263; *Davis v. Lamberton*, 56 Barb. 480; *Hutchins v. Smith*, 63 Barb. 251; *Whitney v. Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 63 Ill. 24; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Sampson v. Smith*, 8 Sim. 272; *Tipping v. St. Helen's Smelting Co.* 4 Best & S. 608, 616; *Pointer v. Gill*, 3 Rolle, Abr. 140.

The rule that "a man shall so use his own as not to interfere with others," extends to every act as

that naphtha, a offensive, fire, and unhealthy and sickening mineral substance, destructive to the health and comfort of those required to be and remain in close proximity to it; that said tank was erected and is maintained in a negligent and unskillful manner, and by reason of the negligence and want of care upon the part of the defendant in the construction, use of and maintenance of said tank, . . . and also by reason of the erection and use of said tank and said works, and the negligent and unskillful manufacture of gas from naphtha, the defendant has since August, 1880, and still does, maintain a nuisance, injurious to the comfort and enjoyment of the plaintiff, and injurious to the rental value of said premises."

The defendant, in its answer, admitted the erection of the tank, and that it was engaged in manufacturing gas from naphtha, and alleged that it used naphtha because it was more economical than coal, and denied negligence in the erection of its works or in the conduct of its business. It alleged that its business was carried on with all practicable care and skill, and by the use of the most approved machinery, and the employment of skillful and competent persons; that it was engaged in a lawful business, authorized by the statutes of the State, and that its gas was used in lighting the streets and public places of the Village of Port Jervis, and that the consequences to the plaintiff therefrom were such as necessarily arose from the prosecution of its business.

It appeared on the trial that defendant had been engaged in manufacturing gas on the

1880, it manufactured gas from coal, but since August of that year all its gas was manufactured from naphtha. The plaintiff gave no evidence of negligence on the part of the defendant, either in the construction or maintenance of its works, or the conduct of its business. For the failure to give such proof, the defendant moved to dismiss the complaint, which was denied and an exception was taken. Further facts appear in the opinion.

Mr. Lewis E. Carr, for appellant:

When the Legislature has authorized the doing of an act, either directly or through the medium of a corporate organization clothed with power to act, the legislative grant carries with it protection from liability for consequential injury flowing from the doing of the act or the prosecution of the business where want of care forms no element of the cause of injury.

Radcliff v. Brooklyn, 4 N. Y. 195; *Bellinger v. New York Cent. R. Co.* 23 N. Y. 42; *Moyer v. New York Cent. & H. R. R. Co.* 88 N. Y. 851, 856; *Wilson v. New York*, 1 Denio, 595; *Seiden v. Delaware & H. C. Co.* 29 N. Y. 634, 641, 642; *Ward v. Atlantic & P. Teleg. Co.* 71 N. Y. 81, 84.

What the law authorizes, done with due care, cannot be a nuisance.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 642, 25 L. ed. 836, 838; *Uline v. New York Cent. & H. R. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98, 107; *Radcliff v. Brooklyn and Bellinger v. New York Cent. R. Co. supra*; *Davis v. New York*, 14 N. Y. 506, 524; *Kellinger v. Porty-*

well as to every use, and the mere lawfulness of a trade or calling will not excuse or justify the destruction or interference with the comfortable enjoyment of his property by another. *Jaques v. National Exhibit Co.* 15 Abb. N. C. 253; *Harrow v. Richard*, 8 Paige, 351, 4 N. Y. Ch. L. ed. 457.

A private nuisance may arise from the improper exercise of a right. *Western U. Teleg. Co. v. Hewett*, 2 Cent. Rep. 605, 4 Mackey (D. C.) 424.

Conduct of business, when a nuisance.

Any lawful business conducted in such a manner as to render uncomfortable the enjoyment by the neighbors of life and property may be deemed a nuisance. *Yocum v. Hotel St. George Co.* 18 Abb. N. C. 841; *Davidson v. Isham*, 9 N. J. Eq. 186; *Crump v. Lambert*, L. R. 3 Eq. Cas. 406; *Davis v. Sawyer*, 138 Mass. 239; *Wesson v. Washburn Iron Co.* 13 Allen, 96; *Cleveland v. Citizens Gas Light Co.* 20 N. J. Eq. 201; *Cogswell v. New York, N. H. & H. R. Co.* 4 Cent. Rep. 225, 103 N. Y. 10; *Valley R. Co. v. Franz*, 3 West. Rep. 362, 43 Ohio St. 623.

A class of the reported cases relates to the prosecution of a legitimate business, which of itself produced inconvenience and injury to others, such as cases of slaughter-houses, fat and offal boiling establishments, hog-styes or tallow manufactories, in or near a city, which are offensive to the senses and render the enjoyment of life and property uncomfortable. *Heeg v. Licht*, 80 N. Y. 582; *Dubois v. Budlong*, 15 Abb. Pr. 445; *Farrand v. Marshall*, 21 Barb. 421.

Slaughter-houses are held to be prima facie nuisances, although originally in a remote place, where the building of houses near by renders them noxious. *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 424; *Brady v. Weeks*, 3 Barb. 159; *Pruner v. Pendleton*, 75 Va. 516, 40 Am. Rep. 738; "Slaughter-House Cases," 83 U. S. 16 Wall. 35, 21 L. ed. 394, 9 L. R. A.

The manufacture of fish into scrap as a fertilizer is a nuisance *per se*. Whatever deprives the citizens of pure, uncontaminated, inoffensive air is a nuisance. *State v. Luce* (Del.) 6 Cent. Rep. 862.

A blacksmith shop near plaintiff's dwelling is a nuisance (see *Faucher v. Grass*, 60 Iowa, 505); or a livery stable (see *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138); or a hog lot. See *Richards v. Holt*, 61 Iowa, 529.

In respect, however, of a business or trade which produces merely annoyance, thereby producing physical discomfort, but which is not hurtful in character or injurious to health or life, the rule is not of the same strictness. *Seacord v. People*, 10 West. Rep. 919, 121 Ill. 623; *Hay v. Cohoes Co.* 2 N. Y. 159; *Peok v. Elder*, 3 Sandf. 126; *Cahill v. Eastman*, 18 Minn. 324; *Bamford v. Turnley*, 81 L. J. Q. B. 266; *Tipping v. St. Helens Smelting Co.* L. R. 1 Ch. App. 68; *Bex v. Dixon*, 10 Mod. 336; *Fletcher v. Rylands*, L. R. 1 Exch. 205, L. R. 3 H. L. 330; *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 167.

Emission of smoke, soot, cinders and coal dust.

A person carrying on in a populous city business requiring the consumption of a large quantity of fuel may be restrained from allowing the soot to become an annoyance or source of injury to his neighbors. *Sullivan v. Royer*, 72 Cal. 248.

Defendant erected upon a lot adjoining a dwelling-house owned by plaintiff an engine-house and coal bins for its road, and used the same in operating it. The smoke, soot, cinders and coal dust caused by such use filled plaintiff's house, rendering the air offensive and unwholesome and the house untenable. It was held that the engine-house as used was a nuisance. *Cogswell v. New York, N. H. & H. R. Co.* 4 Cent. Rep. 225, 103 N. Y. 11.

Dust and smoke and noise from a coal chute on

Second St. & G. St. F. R. Co. 50 N. Y. 206, 210.

The use of property for the purposes of a gas company is a public one.

Bloomfield & R. Nat. Gas Light Co. v. Richardson, 68 Barb. 487, 447-449.

If the act or business is calculated wholly or in part to subserve public convenience and supply the general wants of a locality, and the public have the right to command the enjoyment of the benefit on complying with terms that apply to all alike, the use is public, although a private corporation may be clothed with authority to do the work or carry on the business, and although the scope of its transactions do not extend beyond the community where it may be located.

Bloomfield & R. Nat. Gas Light Co. v. Richardson, supra; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 8 N. Y. Ch. L. ed. 50, 22 Am. Dec. 679, note, 686, and following, where the authorities are collected and reviewed; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 9, 31 Am. Dec. 818; *Todd v. Austin*, 34 Conn. 78; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 28 Am. Dec. 756, 771, 772; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Talbot v. Hudson*, 16 Gray, 417; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 286; *New Orleans Gas Light Co. v. Louisiana L. & H. Co.* 115 U. S. 650, 660, 669, 29 L. ed. 516, 520, 523.

The business of the defendant falls directly within the rule stated.

People v. Manhattan Gas Light Co. 45 Barb. 136, 137; *Shepard v. Milwaukee Gas Light Co.* 6 Wis. 539, 70 Am. Dec. 479, 481-483, 486,

487, note; *Williams v. Mutual Gas Co. supra*; *Commercial Gas Co. v. Scott*, L. R. 10 Q. B. 400.

What will be such an expression of the legislative will as to afford protection for such injuries appears in—

Bellinger v. New York Cent. R. Co. 28 N. Y. 42; *Cogswell v. New York, N. H. & H. R. Co.* 4 Cent. Rep. 225, 103 N. Y. 10; *London, E. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 45, 88 Eng. Rep. Cook's notes, 252, 25 Am. & Eng. R. R. Cas. 116; *Ree v. Pease*, 4 Barn. & Ad. 80; *Vaughan v. Taff Vale R. Co.* 5 Hurlst. & N. 679; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. Cas. 171. See also *Sawyer v. Davis*, 186 Mass. 239, 49 Am. Rep. 27, 29, 30.

The grant of power here is express and precise. Ample and express power is given to manufacture and sell such quantities of gas as may be required for lighting streets, etc. Not only may such companies carry on this business, but having organized, built their works and laid their mains, they must do so, and furnish gas to applicants.

People v. Manhattan Gas Light Co. and Williams v. Mutual Gas Co. supra.

Where the business itself cannot be carried on without producing the effects complained of it must be held the Legislature did contemplate it when it granted power to carry on the business and bound the companies to carry the business on.

Cogswell v. New York, N. H. & H. R. Co. 4 Cent. Rep. 225, 103 N. Y. 22; *Conklin v. New York, O. & W. R. Co.* 8 Cent. Rep. 194, 103 N. Y. 107, 112; *Uline v. New York Cent. & H. R. Co.* 3 Cent. Rep. 116, 101 N. Y. 98, 107.

a railroad, where it is not plain that the chute is carelessly or improperly constructed or operated, do not constitute an actionable nuisance to one whose land does not abut upon the railroad, and between whose house and the right of way there is another dwelling. *Dunsmore v. Central Iowa R. Co.* 73 Iowa, 132.

A railroad company will not be enjoined in the use of its main tracks in making up its outgoing trains and unmaking its incoming trains, in doing which loud noises are made by cars, engines and men, and smoke and steam cast off, and complainant's dwelling caused to tremble or vibrate, and the smoke and steam carried into it when doors or windows are open, so that the inmates are aroused from sleep, and complainant's wife afflicted with nervousness, unless it is shown that there is some abuse or negligent use of the franchise. *Beldeman v. Atlantic City R. Co.* (N. J.) April 18, 1890.

But when offensive smells compel citizens to retire from their porches and close their doors and windows, both by night and day, and thereby be deprived of a constant supply of fresh, wholesome air, and also cause nausea and sickness of the stomach, and produce retching and vomiting, and oblige them to forego their meals, there is such a hazard to the public health as to constitute a nuisance within the cognizance of the board of health, under N. J. Pub. Laws 1887, p. 50. *State v. Neidt* (N. J.) Jan. 7, 1890.

Justification under legislative authority.

The acts that a Legislature may authorize, which would otherwise constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and control. *Cogswell v. New York, N. H. & H. R. Co.* 4 Cent. Rep. 229, 103 N. Y. 10, 9 L. R. A.

The legislative authority exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. *Pennsylvania R. Co. v. Angel*, 5 Cent. Rep. 91, 51 N. J. Eq. 816.

That which the law authorizes cannot be a public nuisance. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 15 L. ed. 436; *Miller v. New York City*, 109 U. S. 335, 27 L. ed. 971.

The statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the Legislature contemplated the doing of the very act which occasioned the injury. *Cogswell v. New York, N. H. & H. R. Co. supra.*

A person or corporation authorized by the Legislature to do an act will be protected from all responsibility, if such act is done carefully and skillfully, although, without legislative authority, the act would have been a nuisance. *Taylor v. Baltimore & O. R. Co.* 38 W. Va. 39.

Although the Legislature of a State may give an exclusive right, for the time being, to particular persons or to a corporation, to provide a stock landing and to establish a slaughter-house in a city, it has no power to continue such right so that no future Legislature, nor even the same body, can repeal or modify it, or grant similar privileges to others. *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 745, 28 L. ed. 585.

To justify a nuisance by legislative authority it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power; and

The plaintiff is entitled to the enjoyment of life and property that she property unmolested by odors created by the manufacture of gas by the defendant, and for the creation and maintenance of such odors the defendant is liable for damages to the plaintiff.

Cogswell v. New York, N. H. & H. R. Co. 4 Cent. Rep. 225, 108 N. Y. 10, and cases cited; *Dunsbach v. Hollister*, 49 Hun, 352; *Filson v. Crawford*, 28 N. Y. S. R. 335; *Robinson v. Smith*, 53 Hun, 688; *Francis v. Schoellkopf*, 53 N. Y. 152; *Chapman v. Rochester*, 1 L. R. A. 296, 110 N. Y. 273; *First Baptist Church v. Schenectady & T. R. Co.* 5 Barb. 79; *Fish v. Dodge*, 4 Denio, 311; *McKoon v. See*, 51 N. Y. 300; *Dubois v. Budlong*, 15 Abb. Pr. 446; *Catlin v. Valentine*, 9 Paige, 575, 4 N. Y. Ch. L. ed. 321; *Brady v. Weeks*, 3 Barb. 157; *Beir v. Cooke*, 37 Hun, 40; *Carhart v. Auburn Gas Light Co.* 22 Barb. 297; *Campbell v. Seaman*, 63 N. Y. 568; *Mulligan v. Elias*, 12 Abb. Pr. N. S. 259.

In *Manhattan Gas Light Co. v. Barker*, 36 How. Pr. 233, it is held that "if a public nuisance work a private injury to a person, that person may have a remedy by a private action for damages, and, in a proper case, may have an injunction. A noisome odor issuing from a public nuisance, such as issues from the plaintiff's gas works, will have this effect, if it pervades the surrounding atmosphere, enters the adjacent dwelling, and either endangers the health or disturbs the comfort of those dwelling therein."

It is not necessary that the plaintiff should

be rendered uncomfortable.

See *Fish v. Dodge*, *Catlin v. Valentine*, *Carhart v. Auburn Gas Light Co.* and *Mulligan v. Elias*, *supra*; *Dorr v. Dansville Gas Light Co.* 18 Hun, 274.

Relief will not be denied the plaintiff on the ground that the nuisance existed before plaintiff acquired the property or built her house, unless continued long enough to establish a prescriptive right.

Mulligan v. Elias, *supra*; *Howard v. Lee*, 3 Sandf. 284, and cases cited; *Leonard v. Spencer*, 11 Cent. Rep. 98, 108 N. Y. 347.

Brown, J., delivered the opinion of the court:

The plaintiff made no complaint of the existence of a nuisance upon defendant's property prior to 1890, when defendant first introduced the use of naphtha in the manufacture of its gas; and it was a disputed question on the trial, upon which there was a strong conflict of testimony, whether the smells from the defendant's works after it began to use naphtha were more offensive than when it used coal. This question, it must be assumed, the jury determined in favor of the plaintiff's contention. The court charged the jury that, to constitute a nuisance, it was essential that the smells and odors from the defendant's works should be sufficient "to contaminate and pollute the air, and substantially interfere with the plaintiff's enjoyment of her property," and that the question for them to determine was,

if the authorized act does not necessarily or naturally create a nuisance, but such result flows from a particular manner of doing the act, the legislative license is no defense. *Pine City v. Munch*, 6 L. R. A. 763, and *note*, 42 Minn. 342.

But the Legislature cannot confer upon individuals or private corporations acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. *Pennsylvania R. Co. v. Angel*, 6 Cent. Rep. 83, 51 N. J. Eq. 316.

The Legislature may pronounce certain things or acts nuisances in themselves. Such laws are not unconstitutional because they do not provide compensation. *Train v. Boston Disinfecting Co.* 4 New Eng. Rep. 437, 144 Mass. 523.

Where anything is declared a nuisance by legislation, it is not competent for a party to show that it is not in fact so. *Ibid.*

Municipal authority.

The city council of New Orleans, to a certain extent, is vested with legislative authority; and it is vested with that discretion, within its authority, common to all legislative bodies. Within the exercise of this legislative discretion, it has authority to determine what is a nuisance, and to pass the necessary ordinances to suppress it. *State v. Heidenhain*, 42 La. Ann. —.

To determine what a nuisance is, is a question of fact. *Ibid.*

There is much discretion left to a municipal corporation for determining what is a nuisance, and the exercise of this discretion will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded

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private rights and transcended the authority granted to it. *Ibid.*

An order of the city council as the board of health, declaring a structure a nuisance and dangerous to public health, is not conclusive as between the owner of the building and one claiming to have sustained private damages by its maintenance. *Kallien v. Wilson* (Iowa) May 22, 1890.

The city council of the City of St. Paul has no power under the charter to declare what acts or omissions shall constitute a public nuisance. *St. Paul v. Gillilan*, 38 Minn. 223.

An ordinance passed by the city council of St. Paul, declaring the emission of dense smoke from smokestacks and chimneys a public nuisance, is unauthorized and void. *Ibid.*

A license given by a county board of health "to manufacture fertilizers and materials" will not authorize the licensee to create noisome odors and thereby corrupt the air, to the inconvenience of the public, or avail as a defense to an indictment for maintaining a public nuisance. *Garrett v. State*, 5 Cent. Rep. 337, 49 N. J. L. 94.

Municipal authority to abate.

Persons living in a city are entitled to protection against the carrying on of a trade or business in a manner which materially affects their health, injures their property, or renders the enjoyment of it physically uncomfortable. *Beir v. Cooke*, 37 Hun, 40; *Doellner v. Tynan*, 38 How. Pr. 130; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409.

Where a business is so carried on in the city that it is a public nuisance *per se*, the metropolitan board of health have the power, and it is their duty, to act, and to act promptly, to suppress the business and abate the nuisance, where notice to show cause why these acts should not be done has been duly served upon the parties interested, and by them

by the defendant to this part of the charge. The rule stated by the learned trial judge was in accordance with all the authorities. If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable. *Rea v. White*, 1 Burr. 833; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Fish v. Dodge*, 4 Denio, 811; *Cottin v. Valentine*, 9 Paige, 575, 4 N. Y. Ch. L. ed. 821; *Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. New York, N. H. & H. R. Co.* 108 N. Y. 10, 4 Cent. Rep. 225; *Wood, Nuisance*, § 497, and cases cited.

It was claimed by the defendant, and the court refused a request to charge, "that unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at these works were unskillful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus, and with the utmost skill and care, and do not result from any defects in the works, or from want of care in their management, the defendant is not liable." An exception to this ruling raises the principal question discussed in the case. While every

one is bound to have respect and regard for his neighbor's rights. The maxim, "*sic utere tuo ut alienum non laedas*," limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood. The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion.

In *Campbell v. Seaman*, *supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery.

In *Hegg v. Licht*, 80 N. Y. 579, an action for injuries arising from the explosion of fireworks, the trial court charged the jury that they must find for the defendant, "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises." And he refused to charge upon the plaintiff's request "that the powder-magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and

disregarded. *Well v. Schultz*, 38 How. Pr. 9; *Crosey v. Murphy*, 1 Hilt. 128; *Dubois v. Gudlong*, 15 Abb. Pr. 445; *Van Wormer v. Albany*, 15 Wend. 262; *Hyatt v. Bates*, 35 Barb. 308; *People v. New York Board of Health*, 38 Barb. 345.

A municipality may prohibit continuance of the nuisance of gas escaping from defective pipes; and an injunction restraining abatement of the nuisance by the municipality should be dissolved. *Butler's App. (Pa.)* 1 Cent. Rep. 594.

An order or notice by the board of health to the owner or occupant of premises on which a nuisance exists, to remove it, may be served by a constable who is one of the board of health. *Com. v. Alden*, 3 New Eng. Rep. 211, 148 Mass. 118.

The direction in the order and notice, "to abate the said nuisance on your estate within forty-eight hours from the service hereof," is sufficient; and a further direction as to the manner of abating it does not render the order void. *Ibid.*

An agent appointed to make sanitary inspections may institute a complaint for a nuisance. *Ibid.*

Where the record of the board of health does not show that the complaint was made by the proper person, it may be amended. *Ibid.*

Nuisances should be removed, as a city extends, to vacant grounds beyond the immediate neighborhood of the residences of the citizens. *Lafin & R. Powder Co. v. Tearney*, 7 L. R. A. 282, 151 Ill. 822.

Abatement of nuisance by action.

Under Iowa Code, § 256, 482, authorizing the abatement of nuisances by ordinance and criminal prosecution, a civil action in equity is not maintainable in the name of a city for the abatement of a nuisance. *Ottumwa v. China*, 75 Iowa, 405.

An action for the abatement of a nuisance cannot be brought by a city, under Iowa Code, § 3331, au-

thorizing the abatement of a nuisance by anyone injured thereby, on the ground that the nuisance is of general harm to the public. *Ibid.*

A provision of Iowa Code, § 3331, giving the right to "any person injured thereby" to maintain an action to abate a nuisance, does not change the ordinary rule that a private person will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself. *Innis v. Cedar Rapids, I. F. & N. W. R. Co.* 76 Iowa, 265; *Isen v. Manley*, 76 Ga. 804.

Parties who wish to abate a nuisance, either public or private, must resort to the remedy provided by Ga. Code, §§ 4004-4008, unless special facts are alleged showing that that remedy is insufficient or inadequate. *Broomhead v. Grant*, 33 Ga. 451.

Where a school district brings an action to abate a public nuisance, it must show that it has sustained damages peculiar to itself; it is not enough that such damages are greater than those sustained by the public at large, differing from them only in degree,—they must be different in kind. *School District No. 1 v. Nell*, 36 Kan. 617.

Relators in a bill filed under N. J. Act March 31, 1887 (Pub. Laws, p. 93), § 23, 29, to abate a nuisance as dangerous to the public health, must show that the situation or practice complained of amounts, of itself, to a public, as distinguished from a private, nuisance. *State v. Bergen County Chosen Freeholders*, 46 N. J. Eq. 173.

A city charter providing for a report of nuisances, and for their abatement at the expense of persons creating them, requires the city to prosecute the owner of property, and to compel the removal of a dangerous wall. *Kiley v. Kansas City*, 9 West. Rep. 201, 87 Mo. 108.

But a failure to do so is not a neglect to execute a private power, where neither the charter nor any

this court reversed the judgment, holding that the charge was erroneous.

In *Cogswell v. New York, N. H. & H. R. Co.*, *supra*, the special term found as facts that, in the construction of the engine-house and coal-bins, and in the use of its premises, the defendant exercised due care, so far as the same was practicable, and it refused to find, upon plaintiff's request, "that, in the construction of the engine-house, chimney, smoke-pipe and coal-bins, it had not exercised, and does not now exercise, such reasonable and proper care as was necessary not to injure the plaintiff's property." A judgment for the defendant was reversed, this court holding that the engine-house as used was a nuisance, and that it was not an answer to the action that the defendant exercised all practicable care in its management. In *Pottstown Gas Co. v. Murphy*, 39 Pa. 257, the charge of the court and the refusals to charge were very similar to the charge in this case. The Supreme Court of Pennsylvania overruled the exceptions, holding that negligence was not essential to a right of recovery. To the same effect see *Cleveland v. Citizens Gas Light Co.* 20 N. J. Eq. 201; *Ottawa Gas Light Co. v. Thompson*, 89 Ill. 598; Wood, Nuisance, 2d ed. § 683.

The principle that one cannot recover for injuries sustained from lawful acts done on one's own property, without negligence and without malice, is well founded in the law. Everyone has the right to the reasonable enjoyment of his own property, and, so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him.

statute makes it an imperative duty to enforce its charter powers. *Ibid*.

The public remedy for the abatement of a nuisance by judicial prosecution *in rem* or *in personam* is not exclusive when the statute, in a particular case, gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished. *Lawton v. Steele*, 7 L. R. A. 184, 119 N. Y. 226.

Where a public nuisance consists in the location or use of tangible personal property so as to interfere with or obstruct a public right or regulation, the Legislature may authorize its summary abatement by executive agencies, without resort to judicial proceedings; and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner. *Ibid*.

Expenses incurred by a board of health in abating a public nuisance are to be charged upon the occupant of the premises. *Prendergast v. Schaghticoke*, 42 Hun, 317.

In a suit, not only to recover damages for the maintenance of a nuisance, but to abate the nuisance, recovery may be had for all damages sustained down to the trial. *Comminge v. Stevenson*, 76 Tex. 642.

Public nuisances, abatement of. See note to *Charlotte v. Pembroke Iron Works (Me.)* 8 L. R. A. 890.

Adequacy of police power of State. See note to *Pine City v. Munch (Minn.)* 6 L. R. A. 763; and see the two cases following this case.

Remedy by injunction.

The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate 9 L. R. A.

The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business; and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. Such losses the law regards as *damnum abeque injuria*; and under this principle, if the steam-boiler on the defendant's property, or the gas-retort, or the naphtha tanks, had exploded, and injured the plaintiff's property, it would have been necessary for her to prove negligence on the defendant's part to entitle her to recover. *Loose v. Buchanan*, 51 N. Y. 476.

But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies. *Hay v. Cohoes Co.* 2 N. Y. 159; *McKeon v. See*, 51 N. Y. 800.

The exception to the refusal to charge the first proposition above quoted was not therefore well taken.

It is contended, however, by the defendant that the Acts of the Legislature relating to gas companies are a protection from liability for consequential injuries flowing from the manufacture of gas, or the prosecution of the business, when want of care forms no element of the cause of injury; and it is sought to apply to this case the broad principle that that which the law authorizes cannot be a nuisance, although it may occasion damages to individual

the nuisance. *Carleton v. Rugg*, 5 L. R. A. 193, 149 Mass. 550.

Courts constantly enjoin nuisances where no damages can be estimated in money and where the nuisance produces mere annoyance and discomfort to the complaining party, as a manufacture producing discomfort to individuals. *Littleton v. Fritz*, 65 Iowa, 483, 54 Am. Rep. 22; *Gilbert v. Showerman*, 23 Mich. 453.

A mere denial of plaintiff's title will not prevent an injunction; but if plaintiff's title is really disputed or is in any real doubt, it must first be established by the verdict of a jury before equity will interfere with its preventive relief. *Gilbert v. Mickie*, 4 Sandf. Ch. 357, 7 N. Y. Ch. L. ed. 1182; *Hart v. Albany*, 3 Paige, 213, 3 N. Y. Ch. L. ed. 197; 8 Pom. Eq. Jur. 382.

Where the occupation of the building for the business and purpose charged is *prima facie* a common nuisance, any person injuriously affected by it may apply to have it abated. *Dubols v. Budlong*, 15 Abb. Pr. 446.

Plaintiffs, although separate owners of the premises charged to be injured and threatened with injury, might join in an action to abate the nuisance, and for an injunction to prevent its enhancement and continuance. *Gillespie v. Forrest*, 18 Hun, 112; *Belknap v. Trimble*, 3 Paige, 577, 3 N. Y. Ch. L. ed. 281.

The plaintiff in an action to restrain a nuisance on adjoining premises rendering plaintiff's premises uncomfortable does not, by alleging ownership, bind himself to prove his title, since bare possession is sufficient to maintain the action. *Quinn v. Winter*, 23 N. Y. S. R. 173.

A public nuisance must be established by clear evidence before the preventive remedy will be granted. 3 Pom. Eq. Jur. 380; *Atty-Gen. v. Cohoes Co.* 6 Paige, 133, 3 N. Y. Ch. L. ed. 223.

rights and property. The cases cited to sustain this proposition are ones where municipal corporations were engaged in grading and improving public streets and highways (*Radcliff v. Brooklyn*, 4 N. Y. 195; *Northern Transp. Co. v. Chicago*, 99 U. S. 685 [25 L. ed. 886]), or where the act causing the injury was done by corporations in the construction of works upon property acquired under the power of eminent domain. *Bellinger v. New York Cent. R. Co.* 28 N. Y. 42.

In these cases, in doing the acts complained of, the defendants acted in the performance of a public duty imposed upon them by the Legislature, or in the exercise of a right conferred by law; and it is well settled that persons appointed or authorized by law to perform a public duty, or to do acts of a public character, are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill. *Northern Transp. Co. v. Chicago*, 99 U. S. 641 [25 L. ed. 888], and cases cited; *Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 2 Cent. Rep. 116; *Conklin v. New York, O. & W. R. Co.* 103 N. Y. 107, 3 Cent. Rep. 194; *Cooley*, Const. Lim. 5th ed. 671, et seq. and cases cited in notes.

This principle cannot, however, be applied to cases like the one under consideration. The defendant is incorporated under chapter 37, Laws 1848, which authorizes, in general terms, the creation of corporations for manufacturing and supplying illuminating gas. It acquired by that Act its corporate life and character, and the power to purchase and hold such real and personal property as might be necessary to enable it to carry on its business. By section

18 of the Act named it is given the power to lay its conductors through the streets of the city, village or town in which it is located, with the consent of the municipal authorities of such city, etc.; and by chapter 311, Laws 1859, it is required to furnish gas to any applicant within 100 feet of its mains. It may be conceded that the business of manufacturing and distributing gas through the public streets for public and private use is a business of a public character, and the individual possessing such right has a franchise granted by the State for a public object, and that it meets a public necessity, for which the State may make provision. But the State has not seen fit to confer upon the corporations formed under the Act cited the power of eminent domain, and they cannot therefore locate their works where they will. In their ability to acquire real estate upon which to establish their manufactory, they have no greater power than any citizen of the State; and, having acquired property, they rest under the same obligation as other citizens to make a reasonable use of it, and to respect and regard the rights of their neighbors. The proposition contended for by the learned counsel for the defendant has in recent years received full consideration in the courts of England and of this country, and the rule is now established that the statutory authority which will justify an injury to private property, and afford immunity for acts which would otherwise be a nuisance, must be express or must be a clear and unquestionable implication from powers expressly conferred; and it must appear that the Legislature contemplated the doing of the very act which occasioned

Remedy by action for damages.

A rare and trifling injury from a lawful business will not sustain an action for damages. *Price v. Grants*, 10 Cent. Rep. 618, 118 Pa. 402.

Where it appears that no other person in the neighborhood of lead works was affected by its fumes except the plaintiff's wife, it is not such injury as will of itself condemn such works as a nuisance. *Ibid.*

One who is injured by a public nuisance, either in his person or his property, cannot have his remedy by action, unless he can show a damage which is special to himself, and different in kind and degree from, and beyond, that sustained by the general public. *Gold v. Philadelphia*, 6 Cent. Rep. 567, 115 Pa. 184.

The exercise of reasonable care in the creation or maintenance of a nuisance can never be an absolute defense to an action for an injury occasioned thereby. *Wilkinson v. Detroit Steel & Spring Works*, 78 Mich. 406.

The doctrine of contributory negligence does not apply to a case where plaintiff in an action to recover for a nuisance is shown to have maintained another nuisance. *Randolf v. Bloomfield*, 77 Iowa, 50.

That land used by a city as dump ground had been purchased and designated by it for such purpose before a resident established his residence adjacent thereto will not relieve the city from damages resulting from the negligent and improper manner in which the city thereafter managed and maintained the place. *Sherman v. Langham (Tex.)* May 16, 1890.

Right of action for special and peculiar injury. See notes to *Charlotte v. Pembroke Iron Works (Me.)* 8 L. R. A. 836; *South Carolina S. R. Co. v. South Carolina R. Co. (S. C.)* 4 L. R. A. 209

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Liability for nuisance.

The receipt of rent does not impose responsibility on the landlord for a nuisance for which he is not otherwise responsible. *Ahern v. Steele*, 5 L. R. A. 449, 115 N. Y. 208.

Persons who become full owners of an estate on the death of a life tenant subject to a valid outstanding lease cannot be rendered responsible for a nuisance committed before the estate descended to them, and of which they had no notice, and which it was the lessee's duty to remove. *Ibid.*

A person is liable for a public nuisance permitted by him to be established upon property under his control, although incidental to a work otherwise lawful. *Davie v. Levy*, 39 La. Ann. 551.

The owner or person having control of a tenement, who lets it for illegal use, or permits it to be so used, is guilty of aiding in maintaining a nuisance, under Rev. Stat., chap. 17, § 4. *State v. Frazier*, 3 New Eng. Rep. 629, 79 Me. 95.

Remedy for public nuisance by indictment.

The remedy for public nuisance is indictment. *Hellams v. Switzer*, 24 S. C. 39.

The offense of maintaining a public nuisance injurious to health is punishable, under Penal Code, § 377, by imprisonment not exceeding one year, or by fine not exceeding \$1,000, and consequently is not within the jurisdiction of a justice's court. *Re Kurtz*, 68 Cal. 412.

Where a defendant who has been sentenced to abate a nuisance is shown to have no control over the premises on which the nuisance exists, the sheriff cannot be required to remove the nuisance, under such sentence. *Com. v. McLaughlin*, 128 Pa. 518.

the injury. *Ogden v. New York, N. H. & H. R. Co.* 108 N. Y. 10, 4 Cent. Rep. 225; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817 [27 L. ed. 739]; *Hill v. Metropolitan Asylum Dist.* L. R. 4 Q. B. 433, on appeal, *Metropolitan Asylum Dist. v. Hill*, L. R. 6 App. Cas. 193; *Pottstown Gas Co. v. Murphy*, 89 Pa. 257; *Eames v. New England Worsted Co.* 11 Met. 370; *Com. v. Kidder*, 107 Mass. 188.

In *Pottstown Gas Co. v. Murphy* the Supreme Court of Pennsylvania said: "The principle invoked applies only when an incorporation clothed with a portion of the State's right of eminent domain takes private property for public use, on making proper compensation, and when such damages are not a part of the compensation required."

In *Eames v. New England Worsted Co.*, Chief Justice Shaw said: "The Mill Act affords no warrant or justification for erecting or maintaining a nuisance."

In *Com. v. Kidder*, in considering the effect of a statute authorizing the storing and manufacturing of naphtha and petroleum, the Supreme Court of Massachusetts said: "The reasonable, if not necessary, inference is that it was not the intention of the Legislature to establish a new rule in this regard, but to leave the question whether the manufacturing is carried on at such places and in such manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law."

In *Baltimore & P. R. Co. v. Fifth Baptist Church* it was said: "The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them where it may think proper, without reference to the property and rights of others. Grants of privileges or power to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion." And in *Metropolitan Asylum Dist. v. Hill* Lord Watson said: "Where the terms of the Statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected." There is nothing in *London, B. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 45, conflicting with this rule. The House of Lords in that case recognized fully the rule applied in *Hill v. Metropolitan Asylum Dist.* and held that, the purpose for which the land was acquired by the defendants being expressly authorized by Act of Parliament, and being incidental and necessary to the authorized use of the railway for cattle traffic, the company were authorized to do what they did. The Legislature may authorize acts which would otherwise be a nuisance when they affect or relate to matters in which the public have an interest, or over which the public have control, such as highways or public streams. In such case the legislative authorization exempts from liability to suits civil or criminal at the instance

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of the State, but it does not affect the claim of private citizens for damages for any special inconvenience and discomfort not experienced by the public at large. *Orittenden v. Wilson*, 5 Cow. 165; *Brown v. Cayuga & S. R. Co.* 12 N. Y. 486; *Sinnickson v. Johnson*, 17 N. J. L. 151; *Baltimore & P. R. Co. v. Fifth Baptist Church*, *supra*. These views lead to the conclusion that the defendant obtained no immunity from liability for consequential injuries sustained by property surrounding its works by reason of its incorporation, or the privileges conferred upon the business by the Acts of the Legislature, and that the facts of the case do not take it out of the operation of the rules of law applicable to ordinary common-law nuisances.

The Legislature has given to the corporations created to manufacture gas the right to lay down their conductors in the public streets, subject to the control and regulation of the municipal authorities; and, for acts done in the execution of that privilege, they are exempt from prosecution at the suit of the people. The choice, however, of the place to locate their works, and the selection of materials from which to manufacture gas, has been left to the corporations, and those things must be performed with reference to the rights of others. The fact appears in this case that for twenty years the defendant conducted its business without annoyance to anyone. For the sake of economy, so it alleges, it adopted, in 1880, a new process and new materials from which to make its gas. The result, under the finding of the jury, has been to impair the value of the plaintiff's property, and substantially interfere with its comfortable enjoyment. If the defendant's contention should prevail, there would be no restraint upon the location of the business, and no limit to the offensive character of the materials it might use. It would thus have an immunity which the law denies to every other citizen. We think the proof permitted the conclusion that the defendant had created a nuisance, and that there was no error in the charge of the court or the refusals to charge.

The judgment must be affirmed.

All concur, except Follett, Ch. J., and Haight, J., who dissent.

Haight, J., dissenting:

This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of offensive odors proceeding from the gas-works of the defendant, and to obtain an injunction restraining the defendant from permitting further emissions of such odors. The complaint alleges negligent and unskillful construction of the works, and also negligence in the use and maintenance thereof. The trial resulted in a verdict for damages, upon which the court awarded a judgment for an injunction. Upon the trial it appeared that the defendant was incorporated, under chapter 37 of the Laws of 1848, for the purpose of manufacturing and supplying the streets, public places and inhabitants of the Village of Port Jervis with illuminating gas; that its works were constructed in the year 1860, upon lands purchased for that purpose, since which time it has continued the manufacture of gas; that prior to 1880 coal was used in such manufac-

ture, but since that time naphtha has been used instead; that, in making the change from coal to naphtha, two storage tanks were constructed, one of which was constructed near to the plaintiff's premises. It further appeared that the plaintiff lived upon the premises adjoining those of the defendant, and that she had been the owner thereof since the year 1878. It further appeared that in all works with the most approved apparatus, and managed with the utmost skill and care, there was some odor which was inseparable from the manufacture of gas. It was claimed upon her part that prior to 1880 there was a smell of gas coming from the works of the defendant, but not near as strong as since the change to naphtha; that since that time the air has been impure, and that there has been a disagreeable smell at all times; that at certain times it is greater than at others, causing a nauseous, disagreeable feeling, obliging her to close the windows of her house to keep out the smells. While on the part of the defendant it was claimed that the odor proceeding from the works was not near as strong since the change from coal to naphtha; that the works were constructed in the best possible manner, according to plans of the most approved character, and were managed in the highest degree of care and skill. In submitting the case to the jury, the defendant's counsel asked the court to charge "that unless the jury find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at the works were unskillful and incapable, their verdict should be for the defendant;" also "that if the odors which affected the plaintiff were those that were inseparable from the manufacture of gas with the most approved apparatus, and with the utmost skill and care, and do not result from any defect in the works, or from want of care in their management, the defendant is not liable in this action;" and also "that if the jury find that the plaintiff became the owner of the premises described in the complaint after the erection of the defendant's works, and after it was engaged in the manufacture of gas therein, she took them subject to such odors as were inseparable from the manufacture of gas conducted in the most careful and skillful manner, and with the most approved machinery for that purpose."

These requests were severally refused, and an exception taken, and the court charged the jury that "if this defendant's works gave out foul odors or noxious vapors to an extent sufficient to contaminate or pollute the air, and substantially to interfere with the plaintiff's enjoyment of her property, then that would be a nuisance as against her, and this plaintiff would be entitled to recover," to which charge the defendant excepted.

The question is thus presented as to whether the works of the defendant are, in the absence of negligence either in their construction or operation, a nuisance *per se*; for if the odors emanating therefrom are inseparable from the manufacture of gas with the most approved apparatus, and with the utmost skill and care, and do not result from any defects in their management, it follows that all works for the manufacture of gas are nuisances as to those living near enough to the plant to be affected by the

odor, even though they located there subsequent to the works. The question is one of importance. It is not free from difficulty, and the authorities treating upon the subject are not in entire harmony. A nuisance, as it is ordinarily understood, is that which is offensive, and annoys and disturbs. A common or public nuisance is that which affects the people, and is a violation of a public right, either by direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which the common good requires, and which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct, working an obstruction or injury to the public, and producing material annoyance, inconvenience and discomfort. Founded upon a wrong, it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public, and to refrain from the doing of that which materially injures and annoys or inconveniences the people; and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort or morals is of paramount importance; and that which affects or impairs it must give way for the general good. In such cases, the question of negligence is not involved, for its injurious effect upon the public makes it a wrong which it is the duty of the courts to punish rather than to protect. But a private nuisance rests upon a different principle. It is not necessarily founded upon a wrong, and consequently cannot be indicted and punished as for an offense. It is founded upon injuries that result from the violation of private rights, and produce damages to but one or few persons. Injury and damage are essential elements, and yet they may both exist and still the act or thing producing them not be a nuisance. Every person has a right to the reasonable enjoyment of his own property; and so long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful, and it is *damnum absque injuria*. *Thurston v. Hancock*, 12 Mass. 222.

So that a person may suffer inconvenience and be annoyed, and if the act or thing is lawful, and no rights are violated, it is not such a nuisance as the law will afford a redress; but if his rights are violated, as, for instance, if a trespass has been committed upon his land by the construction of the eaves of a house so that the water will drip thereon, or by the construction of a ditch or sewer so that the water will flow over and upon his premises, or if a brick-kiln be burned so near his premises as that the noxious gases generated therefrom are borne upon his premises, killing and destroying his trees and vegetation, it will be a nuisance for which he may be awarded damages. *Campbell v. Seaman*, 68 N. Y. 568.

Hence it follows that in some instances a party who devotes his premises to a use that is strictly lawful in itself may, even though his intentions are laudable and motives good, violate the rights of those adjoining him, causing them injury and damage, and thus become liable as for a nuisance. It therefore becomes

important that the courts should proceed with caution, and carefully consider the rights of the parties, and not declare a lawful business a nuisance except in cases where rights have been invaded, resulting in material injury and damage. People living in cities and large towns must submit to some inconvenience, annoyance and discomforts. They must yield some of their rights to the necessity of business which from the nature of things must be carried on in populous cities. Many things have to be tolerated that under other circumstances would be abated, the necessity for their existence outweighing the ill results that proceed therefrom. Therefore, as to business which is lawful and reasonable, and is not of itself a nuisance when properly conducted, which is carried on upon one's own premises, invading no right of a neighbor, it is not such a nuisance as the law will afford redress, even though it produces an inconvenience and annoyance, unless such inconvenience and annoyance is the result of negligence and carelessness; but, where the business is of that character as to become a common nuisance, the damages may be recovered, even though no negligence is shown. *Rockwood v. Wilson*, 11 Cush. 221-226.

The distinction between the two cases is that in the former the business is not of that nature as to injuriously affect others, but may become so by the negligent manner in which it is carried on; while in the latter case the nature of the business is such as must necessarily be injurious, even though managed with the greatest care and skill. Wood, Nuisance, 2d ed. § 127.

Again, there is another class of cases in which the question of negligence is material, as, for instance, where the Legislature has authorized the doing of that which would otherwise be a nuisance. In such cases the person is shielded from liability for damages that ensue, unless he is chargeable with negligence for the manner in which the act was done (*Radcliff v. Brooklyn*, 4 N. Y. 195; *Beilinger v. New York Cent. R. Co.* 23 N. Y. 42; *Kellinger v. Forty-Second St. & G. St. F. R. Co.* 50 N. Y. 206-212; *Utine v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 107, 2 Cent. Rep. 116; *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 107, 3 Cent. Rep. 194; *Ottenot v. New York, L. & W. R. Co.* 119 N. Y. 608); as, for instance, a person may be annoyed and inconvenienced by the noise and tread of passing railroad trains, and yet, where the railroad is lawfully built, and is managed with proper care and skill, it is not a nuisance, even though it passes near to a dwelling-house, and materially disturbs the quiet and slumber of the occupants. *Beesman v. Pennsylvania R. Co.* 50 N. J. L. 235, 11 Cent. Rep. 563.

But the authority of the Legislature should doubtless be express (*Cogswell v. New York, N. H. & H. R. R. Co.* 103 N. Y. 10), and relate to matters of public utility in which the people have an interest and the right of control. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317-332 [27 L. ed. 789-746].

We are thus brought back to the question as to whether the business of manufacturing gas by the defendant is, in and of itself, a nuisance. As we have seen, the defendant was incorporated under the general laws of the State, for the purpose of manufacturing illuminating gas, § 9 L. R. A.

and under the provisions of chapter 811 of the Laws of 1859, § 6, it is required to furnish gas for lighting purposes to any applicant within 100 feet of any main laid by it for the distributing of gas. It is subject to legislative control and its meters to the inspection and test of the public inspector, appointed by the governor for that purpose. The Legislature may give it the power to exercise the right of eminent domain, and the discharge of its duty to individuals and the public may be compelled by mandamus. *People v. Manhattan Gas-Light Co.* 45 Barb. 184; *Williams v. Mutual Gas Co.* 52 Mich. 499; *Bloomfield & R. Nat. Gas-Light Co. v. Richardson*, 63 Barb. 437.

It is therefore a business of a public nature and utility, for which the State can control and make provision. Justice Harlan, in delivering the opinion in the case of *New Orleans Gas Light Co. v. Louisiana L. & H. Co.*, 115 U. S. 650-669 [20 L. ed. 518-523], says: "The manufacture of gas, and its distribution for public and private use by means of pipes, laid under legislative authority in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted for the accomplishment of public objects to whomsoever and upon what terms it pleases. It is a business of a public nature and meets a public necessity, for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety." It is undoubtedly true that in the manufacture of gas the escape of some is unavoidable, and it may inconvenience those who live in the immediate vicinity of the works; but the necessities of the people living in large cities and villages impose some inconvenience on others, and have compelled recognition of the principle that each member of society must submit to annoyances consequent upon the use of property, provided such use is reasonable as respects the owner and those immediately affected in view of time, place and circumstances. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642-646; *Cooley*, Torts, 593-601.

We are aware that a different view has been expressed in reference to gas-works (*Carhart v. Auburn Gas-Light Co.* 23 Barb. 297-312), but notwithstanding this, our conclusions are that, in view of the circumstances, the public character and utility, the business is lawful, authorized by the Legislature, and that it is not a nuisance if properly conducted. It may, however, be carried on in such a manner as to unnecessarily affect and injure others, in which case it would become a nuisance. If we are correct in this view, the question of negligence was involved in the case and should have been submitted to the jury. As we have seen, time, place and circumstances have an important bearing upon the question. A person may negligently select an improper place for the establishment of his business. That which would be proper and tolerated in one locality would not be in another. Negligence may also exist in the construction as well as in the management and operation. Each person should conduct his business with the best approved appa-

ratus, with such skill and care as experienced and prudent persons may possess, in order that he may do his neighbor as little harm as possible. *People v. Sands*, 1 Johns. 78-88.

We do not understand it to be claimed that the defendant was guilty of maintaining a public nuisance, or that it is chargeable with any fault or negligence in the selection of the locality in which it erected its works. It is claimed that they were constructed of the best material, according to the best known plan, and operated with the highest degree of skill and care. For twenty years they were operated without complaint. The plaintiff, subsequent to the location of the defendant, purchased the adjoining property and took up her residence thereon. It is true that she claimed to be affected from the odors that came from the naphtha tank constructed near her premises, and that that was constructed after she became a resident there. It is possible that the defendant negligently located its tank in an improper place, but that question was not submitted to the jury. Neither was the question as to whether the odors proceeding from this tank produced the nuisance. The question submitted was as to whether the odors proceeding from the entire gas-works constituted a nuisance. It was also true that there was some evidence tending to show that the plaintiff's health had been affected. She testified that on some occasions she had been affected with nausea, but the question as to whether the works affected the health of the public or of the plaintiff was not submitted. On the contrary, it was expressly taken from the jury by the instruction to which the exception was taken, in which the court stated that it would be a nuisance "whether it affected the health of the plaintiff and her family or not." Thus far we have proceeded upon the theory that the business was lawful, proper and reasonable, and was not a nuisance if properly managed and conducted, and that consequently the question of negligence was involved; but we are also inclined to the view that the business is authorized by the Legislature and is for that reason protected, unless negligence may be shown. As we have seen, the business is of a public nature and utility, subject to the control of the Legislature; and all individuals living upon the lines of its pipes may demand and enforce service therefrom. It was authorized to acquire land by purchase on which to erect its works. It is true the Legislature has not expressly designated any particular lot or parcel of land upon which its works should be erected. The selection of the place was left to the Company; and, in making its selection, it was doubtless bound to take into consideration the nature of the business and the surrounding locality, and so locate as to produce as little harm to others as possible. As we have seen, no complaint has been made in reference to the selection of the locality that was made by the defendant in 1860. The authority to manufacture and supply gas for lighting the streets and public and private buildings of the Village of Port Jervis is express; and if it is conducted in a proper place, with the most approved apparatus, with the utmost skill and care, and without the escape of odors that are not inseparable from such manufacture, there can be no liability for consequential

injury to others. The learned general term was of the opinion that the case of *Cogswell v. New York, N. H. & H. R. Co.*, *supra*, held adversely to this view, but we do not so understand that case. The New York, New Haven & Hartford Railroad Company had purchased a lot adjacent to the plaintiff's dwelling, and had erected thereon an engine-house and coal-bins for the use of its road. The engine-house was designed to accommodate eleven locomotives, and had eleven smoke-stacks extending above the roof to about the height of the third-story window of plaintiff's house. The coal-bins were unprovided with covers to prevent the dust from the coal stored therein from passing into and upon the plaintiff's dwelling. The smoke, gases, soot and cinders from the smoke-stacks, and the dust from the coal-bins when loading and unloading the coal, produced the damage complained of. The facts found clearly established negligence. The court, it is true, held that in that case the defendant was not protected by any authority that it had from the Legislature, there being no express authority for the selection of the lot on which this engine-house was constructed, and that the selection made was an improper one. Our views are fully in accord with the principles decided in that case.

In the case of *Heeg v. Licht*, 80 N. Y. 579, the defendant had constructed upon his premises a powder-magazine, in which he kept stored a quantity of powder, which without apparent cause exploded, damaging the plaintiff's building. It was held that the plaintiff could recover, without showing carelessness or negligence. Miller, J., in delivering the opinion of the court, said: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and diligence, evinces its dangerous character and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business when free from negligence has no application." The rule we have contended for is thus recognized and conceded. There is a distinction between an action for a nuisance in respect to an act producing a material injury to property and one in respect to an act producing personal discomfort. This difference is clearly pointed out in the case of *St. Helen's Smelting Co. v. Tipping*, *supra*.

We have already shown that any business which endangers the safety or health of others is a common nuisance and must give way for the public good, and that in such cases negligence was not involved. The keeping of gunpowder may not constitute a nuisance *per se*. That depends upon the locality and quantity. A thimbleful might not be dangerous, while fifty barrels full might be. It thus becomes a question of fact as to whether it is dangerous; and, if it is found to be, then it is a nuisance *per se*. The court very properly distinguished this case from those in which the business engaged in is lawful and not dangerous, which in and of itself is not a nuisance when properly conducted, but may become such by the negligent manner in which it is carried on. The claim that the defendant, in order to be brought within the protection of the Statute, must have the right of eminent domain and acquire the

land upon which its works are constructed by proceedings to condemn is not sustained by any well-considered case. What difference can it make whether the land is acquired by voluntary purchase or by proceedings to condemn? It is the business which is expressly authorized by the Statute; and, in order to carry it on, the right to acquire land on which to conduct it is given. As we have already shown, no claim has been made that the defendant's works were improperly located, and it is consequently not apparent how the question of location can deprive it of the protection of the Statute. It is true that a railroad corporation is given the right of eminent domain, and may acquire lands for the purposes of its incorporation by proceedings to condemn; but, in order to institute such proceedings, it must be shown that they are unable to agree upon the purchase thereof. If they can agree, then the proceedings cannot be instituted. Can it be that such a company would be liable for the maintaining of a nuisance by reason of the noise, jar and

smoke of its passing trains, because it has acquired the right of way by voluntary purchase instead of by proceedings to condemn? We think not. The answer would be that it makes no difference how the company acquired the title to the land upon which it was operating its road. The defendant's business is of a public nature and utility. If it is a nuisance *per se* and without the protection of the Statute, an individual may procure it to be enjoined and thus drive it from place to place, while another individual, living upon the line of its mains, may compel the Company by mandamus to proceed with its business and supply his residence with illuminating gas, thus producing a condition in which the Company would be liable if it did, and would also be liable if it did not.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Follett, Ch. J., concurs.

MICHIGAN SUPREME COURT.

PEOPLE OF the State of MICHIGAN
v.
DETROIT WHITE LEAD WORKS *et al.*

(....Mich....)

1. A business will be abated as a public nuisance which, located in the midst of a populous community, constantly produces odors, smoke and soot of such a noxious character and to such extent that they produce headache, nausea and other pains and aches injurious to health among, and taint the food of, the surrounding inhabitants.
2. If smoke, soot and the emission of noxious odors and gases are so inseparably connected with a business that the conducting of it constitutes a nuisance, the facts that it is carried on in a careful and prudent manner, and that nothing is done by those managing it that is not a reasonable and necessary incident of it, cannot be relied on by its owners to defeat a prosecution for the maintenance of a nuisance.
3. The fact that a business, the conducting of which constitutes a nuisance, was established upon an open common remote from habitations will not defeat a prosecution of the proprietors for the maintenance of a nuisance after the land in its vicinity has been built up and occupied; such business must give way to the rights of the public, and when buildings and habitations approach the place of its location means must be devised to avoid the nuisance, or it must be removed or stopped.
4. The officers of a corporation, as well as the corporation itself, may be convicted and fined for the maintenance of a nuisance if the business of the corporation is permitted to become such.
5. A city ordinance providing punishment for the maintenance of a nuisance

is not invalid nor unconstitutional because the General Statutes of the State provide for the punishment of like offenses.

(October 10, 1890.)

CERTIORARI to the Recorder's Court of the City of Detroit to review a judgment convicting and fining defendants for the maintenance of a nuisance. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Edwin F. Conely, for appellant:

Creating or maintaining a public nuisance is an indictable misdemeanor at common law, punishable in Michigan by a fine of not more than \$250 or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment.

2 How. Stat. p. 2243, § 9261.

In this class of cases the common law and the Constitution secure to the accused indictment or preliminary examination, trial by jury with all of its incidents, and other defensive rights, privileges and immunities. Such, however, is not the case in a proceeding based on the charter and ordinances.

Detroit Charter, p. 152, §§ 243, 252, 253.

Both proceedings cannot be had.

Southport v. Ogden, 28 Conn. 128; *Murphy v. Jacksonville*, 18 Fla. 318; *Mayor v. Hussey*, 21 Ga. 80; *Adams v. Albany*, 29 Ga. 56; *Jenkins v. Thomasville*, 35 Ga. 145; *Vason v. Augusta*, 38 Ga. 542; *Madison v. Hatcher*, 8 Blackf. 341; *Horr & Bemis, Municipal Police Ord.* pp. 79-87.

The municipal ordinance does not suspend the operation of the general law of the State.

Wayne County v. Detroit, 17 Mich. 390; *People v. Bay City*, 36 Mich. 185.

Mr. John W. McGrath, with Mr. Henry M. Cheever, for appellee:

It is no defense to an indictment for erecting or maintaining a nuisance that the business or trade or occupation has for a long time been carried on in the locality designated without

1 NOTE.—See note to *Bohan v. Port Jervis Gas Light Co.* (N. Y.) *ante*, 711, and see *Wylie v. Elwood* (Ill.) *post*, 723.

complaint from anyone; nor is it a defense in any measure that the business is a useful one, that it was necessary or its products and operations a public benefit and it contributes largely to the enhancement of the wealth, prosperity and commercial importance of the community.

Wood, Nuisance, § 19; *Reg. v. Train*, 2 Best & S. 640; *Works v. Junction R. Co.* 5 McLean, 425; *Respublica v. Caldwell*, 1 U. S. 1 Dall. 150, 1 L. ed. 77; *Ross v. Butler*, 19 N. J. Eq. 296; *Fowler v. Sanders*, Cro. Jac. 446; *Rez v. Ward*, 4 Ad. & El. 384; *Rez v. Tindall*, 6 Ad. & El. 148.

Where the thing complained of is in a city or town, or upon a public highway, street or other public place, where people pass and repass and have a lawful right to be and congregate, and it produces material annoyance, inconvenience, discomfort and injury to those exercising those rights, it is punishable.

Rez v. Pappineau, 1 Strange, 686; *Michael v. Alestres*, 2 Lev. 172; *Dixon v. Bell*, 5 Maule & S. 198; *Harmond v. Pearson*, 1 Camp. 515.

Noxious vapors may become a public nuisance.

See *Campbell v. Seaman*, 63 N. Y. 568; *Saville v. Kilner*, 26 L. T. N. S. 277; *Salvin v. North Brancepeth Coal Co.* 81 L. T. N. S. 154; *Tipping v. St. Helen's Smelting Co.* 4 Best & S. 608; *Poynton v. Gill*, 2 Rolle, Abr. 141; *Rez v. Wilcox*, 2 Salk. 458; *Rez v. Pierce*, 2 Shower, 827; *Aldred's Pig Sty Case*, 9 Coke, 59.

It makes no difference whether the works are in the interests of society, and necessary for the preservation of the health of a community; if of a noxious character the person maintaining them is liable for all damages resulting to individuals injured thereby, and to indictment as for a public nuisance where they injure the public.

Atty-Gen. v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146; *Poynton v. Gill*, *supra*; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 885; *Beardmore v. Tredwell*, 3 Giff. 668; *Atty-Gen. v. Leeds*, 39 L. J. Ch. 354.

The question as to what is a convenient place for the exercise of a noxious trade is determined by the single test whether it is prosecuted in a locality where no injury results to others; if injurious to others, it is not a convenient place, and the works are a nuisance.

Pinckney v. Evans, 4 L. T. N. S. 741; *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 167; *Tipping v. St. Helen's Smelting Co.* 11 H. L. Cas. 642; *Gilbert v. Shoverman*, 28 Mich. 455; *Com. v. Upton*, 6 Gray, 478; *McCaffry's App.* 105 Pa. 255; *Ross v. Butler*, 19 N. J. Eq. 294.

There is no use of one's own property, productive of noxious smells to such an extent as to operate as an essential annoyance to others, that can be regarded as coming within the ordinary use of property.

Wood, Nuisance, § 494; *Aldred's Pig Sty Case*, 9 Coke, 58; *Rez v. Pappineau*, *supra*.

It is not necessary that the smells should be hurtful or unwholesome; it is sufficient if they are so offensive, or produce such annoyance, inconvenience or discomfort as to impair the comfortable enjoyment of property by persons of ordinary sensibilities.

Port Worth v. Crawford, 74 Tex. 404; *Pickard v. Collins*, 28 Barb. 444; *Story v. Ham-* 9 L. R. A.

mond, 4 Ohio, 376; *Francis v. Schoellkopf*, 53 N. Y. 152; *Manhattan Mfg. & F. Co. v. Van Keuren*, 23 N. J. Eq. 256; Wood, Nuisance, § 495.

A smell which is simply disagreeable to ordinary persons is such a physical annoyance as makes the use of property producing it a nuisance, whether it is hurtful in its effect or not.

Walter v. Selfe, 4 Eng. L. & Eq. 20; *Smith v. McConathy*, 11 Mo. 517; *Taylor v. People*, 6 Park. Cr. Cas. 847; *Stowe v. Mills*, 39 Conn. 426; *Rez v. Neil*, 2 Car. & P. 485; *Westbourne v. Mordant*, Cro. Eliz. 191; *Penruddock's Case*, 5 Coke, 101; *Staple v. Spring*, 10 Mass. 74; *Alexander v. Kerr*, 2 Rawle, 88; 2 Bl. Com. 220; *Blunt v. Aiken*, 15 Wend. 526; *Berwick v. Crunden*, Cro. Eliz. 408; *Tipping v. St. Helen's Smelting Co.* L. R. 1 Ch. App. 66; Wood, Nuisance, § 531; *Hole v. Barlow*, 27 L. J. C. P. 208; *Com. v. Upton*, 6 Gray, 478; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

Smoke may be a nuisance.

Ross v. Butler, 19 N. J. Eq. 294; *Com. v. Gallagher*, 1 Allen, 592; *Walter v. Selfe*, 4 Eng. L. & Eq. 15; *Saville v. Kilner*, 26 L. T. N. S. 277; *Huckenatine's App.* 70 Pa. 102; *Rhodes v. Dunbar*, 57 Pa. 275; *Richards v. Phœnix Iron Co.* 7 Am. L. Reg. N. S. 856; *Duncan v. Hayes*, 23 N. J. Eq. 26; *Cook v. Montagu*, 26 L. T. N. S. 471; *Whitney v. Bartholomew*, 21 Conn. 218; *Cartwright v. Gray*, 12 Grant, Ch. 400; Wood, Nuisance, § 438, cases cited in note; *Atty-Gen. v. Sheffield Gas Co.* 19 Eng. L. & Eq. 639; *Crump v. Lambert*, L. R. 3 Eq. Cas. 407; *Cleveland v. Citizens Gas Co.* 20 N. J. Eq. 209.

A corporation is liable to indictment where it has the power and neglects to do that which the common good requires.

Wood, Nuisance, § 78; *Rez v. Medley*, 6 Car. & P. 292; see also cases cited in note to Wood, Nuisance, § 78.

It is no defense to an action to abate a nuisance that the nuisance was a business, lawful in itself, and carried on by defendant with all proper care, where it appears that plaintiff must necessarily sustain injury by its continuance.

Barrick v. Schifferdecker, 48 Hun, 355; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; *Fletcher v. Rylands*, L. R. 3 H. L. 830; *Cahill v. Eastman*, 18 Minn. 824; *McKeon v. See*, 4 Robt. 469; *Atty-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 147; Wood, Nuisance, §§ 495, 497.

The existence of the state law does not prevent a conviction under the ordinance.

Cooley, Const. Lim. 4th ed. p. 242, and cases cited; *Minnesota v. Ludwig*, 21 Minn. 202; *Shafer v. Mumma*, 17 Md. 331; *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Cafferata*, 24 Mo. 94; *Blatchley v. Moser*, 15 Wend. 215; *Levy v. State*, 6 Ind. 281; *Ambrose v. State*, Id. 351; *Brownville v. Cook*, 4 Neb. 101; *Mayor v. Rouse*, 8 Ala. 515; *Mayor v. Allaria*, 14 Ala. 400; *Rogers v. Jones*, 1 Wend. 238; *People v. Stevens*, 13 Wend. 341; *People v. Jackson*, 8 Mich. 112; *Wayne County v. Detroit*, 17 Mich. 390; *People v. Bay City*, 36 Mich. 186; *People v. Manistee County*, 26 Mich. 421; *People v. Controller of Detroit*, 18 Mich. 445; *People v. Swift*, 59 Mich. 529.

Grant, J., delivered the opinion of the court:

This case is brought to this court by writ of certiorari from the Recorder's Court of the City of Detroit. The defendants were convicted for unlawfully and willfully creating and maintaining a nuisance, consisting of the creation and emission of unwholesome, offensive and nauseating odors, smells, vapors and smoke, to the great damage and common nuisance of all people living in the neighborhood thereof, and of all people passing and repassing on the streets and alleys adjacent thereto, contrary to an ordinance of the city in such case made and provided, being § 5, chap. 55, Rev. Ord. 1894. The ordinance in question is set forth in the return of the judge to the writ. The defendant the Detroit White Lead Works is a corporation organized under the laws of the State. Defendant Hinchman is president, defendant Dean is vice-president and defendant Rogers is treasurer and manager. The defendants Hinchman, Dean and Rogers were fined \$1 each, and the defendant the Detroit White Lead Works \$10 and costs. No other penalty was imposed. The following is the return of the court to the writ. We give it nearly in full, on account of the importance of the case:

"The testimony tended to show the following: Eighteen to twenty years prior to the filing of the complaint, a paint manufactory was started by private parties on both sides of Jones Street, directly opposite and about fifty feet from the place described in the complaint. The business was that of mixing white lead, oils and colors for use as paint. The manufacture of white lead, or carbonate of lead, as by corrosion, was never carried on here. Lead, oils and colors were merely mixed. This business was continued at this point about ten years, when it was moved across the street to the place named in the complaint. Here it was pursued by private parties until December, 1880, when the defendant the Detroit White Lead Works, a manufacturing corporation organized under the laws of this State, succeeded to the business and property. The Detroit White Lead Works continued the same business uninterruptedly from the time last mentioned to and including the time of trial. The method of mixing lead, oils and colors remained the same, though carried on with improved machinery, somewhat larger, better and more cleanly buildings and increased trade. No corrosive process was used, the dry, heavy carbonate of lead (600 lbs. to the barrel) being mixed at once with oil, and thereafter remaining in a moist or semi-fluid condition. Whiting was also used (weight 250 lbs. to the barrel) in the manufacture of putty. Also various well-known earths and clays were used in making paints. In 1882, the manufacture of varnish and also liquid driers for use in the manufacture of paints was added, and was continued without interruption to and including the time of trial. In the manufacture of varnish and driers, various resinous gums, asphaltum, boiled linseed oil and naphtha were used. The gums were melted, and the oil boiled over a fire-place, and directly under a chimney carrying away the fumes or vapors into the air. When cooling, the large kettles

were put under a ventilating shaft, thus carrying away any fumes or vapors. Machinery was used only in the mixing rooms, and was propelled by means of a boiler and engine which was also used in supplying heat to the buildings. The coal used was, in the main, hard, though soft coal was also used. The furnace was supplied with a smoke consumer. The buildings are brick, cover about four lots, are three stories high, and, in addition to the above, are used for storage, office, printing, labeling, loading and the ordinary incidents of a large manufactory business. When the business was originally started but few persons lived near, the property all around being vacant for the most part. Subsequently population thickened, and at the time of the complaint the manufactory was surrounded with considerable resident population, though but a short distance from Michigan Avenue,—a street devoted wholly to business. The resident population were largely tenants, most of whom rented from month to month or for short periods. Nearly all of the surrounding buildings had been built since the manufactory originally started. During the time covered by the complaint the business, in all respects, had been carried on in a careful manner, and nothing had been done by those managing it that was not a reasonable and necessary incident to the business. No complaint had been made against the business, or anyone running it, in any court before. The defendant Hinchman was president of the corporation. The evidence did not otherwise connect him with the business or its operation. Rogers and Dean were actively engaged in managing and operating it. Shotwell was secretary, and kept and had charge of the books."

The city attorney, in behalf of the City of Detroit, introduced testimony tending to show that odors of a disagreeable and unpleasant character had been experienced by residents in the vicinity of the works. These odors were described by witnesses as "the smell of paint," "paint smell," "heavy," "the smell of varnish," "resinous smell," and "piney." Residents in the vicinity of the works testified that, during the time mentioned in the complaint, they had been constantly annoyed by odors, smoke and soot which came from the works and entered their houses, producing, as they testified, headache, nausea, vomiting and other pains and aches injurious to health; that in warm weather, to keep out the soot and smoke, they were compelled, to their great discomfort, to close their doors and windows; that smoke settled on their furniture, and on their clothes which had been washed and hung out to dry, and which they were obliged to wash again; and in some instances tainted their food. Many of the witnesses claim that the odors were nauseating, others say disagreeable, while some did not mind it. On behalf of the defendants, testimony was introduced tending to show that nothing of an unhealthful or injurious character emanated from the manufactory, and that the only "paint smell" there could be was simply the smell caused by boiling linseed oil, about once a week, in the manufacture of varnish; that no smells emanated from the other parts of the factory at all, and could not; that the men, women and girls in

the factory were in excellent health, and had never been ill from being there; that one witness, Mr. H. A. Champion, member of the committee to investigate the business in question, had visited the place thirty-one times before he could detect an unpleasant odor, and that in warm weather; and that there was nothing unwholesome or injurious to health about the business.

The ordinance under which the complaint was made and the trial was had read as follows: "Sec. 5. No owner or occupant of any grocery, cellar, tallow-chandler shop, soap, candle, starch or glue factory, tannery, butcher-shop, slaughter-house, stable, barn, privy, sewer or other building or place, shall allow any nuisance to remain on his or her premises; nor shall any person, persons or corporation, operating, owning, occupying or using any public or private street, alley, way or any premises whatever, within the limits of the City of Detroit, create or maintain any nuisance thereon."

The common council of the City of Detroit has never prescribed any territorial limits within which the business in question, or other like business, should be conducted or carried on. The court filed a written opinion and finding, of which the material part is as follows: "The defendant corporation was established in 1880, and succeeded to the business previously carried on by parties not incorporated under the same name as that of said corporation, and started some fifteen or sixteen years ago. In 1882 the corporation added to their business the making of varnish and driers. There is nothing to show that the business of the lead works was not properly and skillfully conducted, or that the alleged nuisance might have been avoided by any greater care. The part of the city wherein the corporation is carried on is principally occupied by dwelling-houses, and many residents in the vicinity of the lead works, during the time mentioned in the complaint, have been constantly annoyed by odors, smoke and soot which came from the lead works and entered their houses, and produced headache, nausea, vomiting and other pains and aches injurious to health. In warm weather, to keep out the smoke and soot, they were compelled, to their great discomfort, to close their doors and windows. The smoke and soot settled on their furniture, and on their clothing which had been washed and hung out to dry, and which they were obliged to wash again, and in some instances tainted their food. The counsel for defendants claimed on the hearing that the ordinance under which this complaint was made, so far as these defendants are concerned, is not authorized by the charter, and also claimed, or rather suggested, that the common council cannot constitutionally be authorized to punish, under an ordinance, that which, under the general law of the State, can be punished as a crime. The defendants' counsel also claimed that the case, as proven, is not within the ordinance. I am unable to agree with the defendants' counsel with regard to these propositions. I find the complaint as made out against all the defendants, except the defendant Shotwell, whom I find not guilty, and the others guilty." The charter of the 9 L. R. A.

City of Detroit gives to the common council power to provide for the preservation of the general health of the city; to make regulations to secure the same; to prohibit, prevent, abate and remove all nuisances in said city; to punish the authors or maintainers thereof; to compel the owner or occupant of any unwholesome or nauseous house or place to cleanse or abate the same, whenever necessary for the health, comfort or convenience of the inhabitants of said city; to prohibit and prevent any person from keeping or having on the premises owned or occupied by him any article, substance or thing that is unwholesome or nauseous. Similar powers are conferred upon municipal corporations of the State by general statute. How. Stat. §§ 1678, 2572, 2573, 2576, 2684.

The facts found and returned by the recorder's court clearly establish a nuisance, according to all the authorities. These facts so found are conclusive in this court, and we can only apply the law to the facts. Counsel for defendants cannot, therefore, seriously contend that we can enter into a discussion and determination of that question, especially as the evidence is not before us. Defendants are not aided by the fact found by the court that, during the time covered by the complaint, the business, in all respects, had been carried on in a careful and prudent manner, and nothing had been done by those managing it that was not a reasonable and necessary incident of the business; nor by the further fact that, when the defendant company commenced its business, the lands in the vicinity of its works were open common. It is undoubtedly true that the defendants, or their predecessors, established their works at a point remote from habitation, possibly in recognition of the fact that such a business was at least not pleasant, if not injurious, to the health and enjoyment of those living near it. The City of Detroit has extended to the defendants' works, and the owners of adjoining lands have erected dwellings thereon. This they, of course, had the legal right to do. The defendants cannot be protected in the enjoyment of their property, and the carrying on of their business, if it becomes a nuisance to people living upon the adjoining properties, and to those doing legitimate business with them. Whenever such a business becomes a nuisance, it must give way to the rights of the public, and either devise some means to avoid the nuisance or must remove or cease its business. It may not be continued to the injury of the health of those living in its vicinity. This rule is founded both upon reason and authority. Nor is it of any consequence that the business is a useful one, or necessary, or that it contributes to the wealth and prosperity of the community. Wood, Nuisance, § 19; *Reg. v. Train*, 2 Best & S. 640; *Works v. Junction R. Co.* 5 McLean, 425; *Respublica v. Caldwell*, 1 U. S. 1 Dall. 150 [1 L. ed. 77]; *Ross v. Butler*, 19 N. J. Eq. 296; *Robinson v. Baugh*, 81 Mich. 290.

It is true that, in places of population and business, not everything that causes discomfort, inconvenience and annoyance, or which perhaps may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the

productive of mere distress, annoyance, discomfort and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity. Such a case was *Gilbert v. Showerman*, 23 Mich. 448.

A case similar in its facts was before this court in *Robinson v. Baugh*, *supra*, which was distinguished by the court from *Gilbert v. Showerman*. In the former case the business was legitimate and necessary. The suit was brought in equity to enjoin the business at the place where carried on. The facts were that smoke and soot from defendant's works were often borne by the wind in large amount to the premises of the complainants, and sometimes entered their dwellings by the chimneys, and through cracks by the doors and windows, in such measure as to be extremely offensive and harmful, and the noise so great as to be disagreeable, and positively hurtful, the jar annoying and disturbing the sick, and in some cases causing substantial damage to dwellings. The court laid down the rule as follows: "However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably and substantially damages the property of others, unless the operator is able to plant himself on some peculiar ground of grant, covenant, license, privilege or prescriptive right." No case has been cited, and we think none can be found, sustaining the continuance of a business in the midst of a populous community, which constantly produced odors, smoke and soot of such a noxious character, and to such an extent, that they produce headache, nausea, vomiting and other pains and aches injurious to health, and taint the food of the inhabitants.

and not in business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employes. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted. A fine can be collected against the defendant company, and therefore it is subject to prosecution.

The ordinance under which defendants were convicted is not invalid nor unconstitutional, because the general statutes of the State provide for the conviction and punishment of the like offenses. This was settled in this State in the case of *People v. Hanrahan*, 75 Mich. 611. See also *Cooley*, Const. Lim. 4th ed. 242; *State v. Ludwig*, 21 Minn. 202; *Shafer v. Mumma*, 17 Md. 331; *St. Louis v. Bente*, 11 Mo. 61; *St. Louis v. Cafferata*, 24 Mo. 94; *Blatchley v. Moser*, 15 Wend. 215; *Levy v. State*, 6 Ind. 281.

We infer the defendants have a valuable plant in which they have invested considerable amounts of money. Courts should abate a legitimate business of such magnitude as a nuisance only upon clear and convincing proof. We are not satisfied that the method chosen in this case to test the question was the fairest towards the defendants. While no other conclusion than affirmation of the judgment is possible under this record, we deem it proper to say that we shall not consider the result now reached as binding upon us in another proceeding where the evidence and the facts may be fully presented. We consider the course pursued in *Robinson v. Baugh*, *supra*, the proper one, as it certainly is much fairer to those occupied in a legitimate business.

Judgment affirmed.

The other Justices concurred.

ILLINOIS SUPREME COURT.

J. S. WYLIE *et al.*, *Appls.*,

v.

James G. ELWOOD.

(....Ill.....)

1. The fact that coal sheds, as maintained and used, constitute a public nuisance, does not prevent a person living near them from maintaining a private action against their owners to recover damages for injuries inflicted upon him by the coal dust falling upon the furniture, food and clothing in his house and the disturbance of his rest and quiet by the noise of the grinding machinery, which deafens him in his own dwelling.
2. A grant of land to a railroad company while a State Constitution is in force which permits compensation in proceedings to condemn land for railroad purposes for the land taken, but not for injuries to adjoining land, the deed not stating the use to which the land is to be applied,

NOTE.—See note to *Bohan v. Port Jervis Gas Light Co.* (N. Y.) *ante*, 711, and *People v. Detroit White Lead Works* (Mich.) *ante*, 722.

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does not prevent a subsequent grantee of the grantor's adjoining lands from maintaining an action against the railroad company's lessee to recover damages for injuries resulting to his land in consequence of the use to which the railroad land is put.

3. The erection of coal sheds upon lands of a railroad company many years after it acquired them and after the real estate in the vicinity has been built up and surrounded by residences and stores, and their use in such manner as to create grinding and grating noises and scatter dust and dirt so as to destroy the comfort and injure the health of those living upon the adjoining property, will constitute a nuisance which will give the adjoining owners a right of action for the injuries specially suffered by them.
4. That the unloading of coal into a particular shed situated upon a railroad company's right of way by means of particular machinery is a part of the necessary operation of the road will not preclude a recovery of damages from the company for injuries thereby inflicted upon adjoining property owners unless the process of unloading was prudent, careful and proper.

See also 9 L. R. A. 722; 29 L. R. A. 700; 33 L. R. A. 541.

(October 31, 1890.)

APPPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Will County in favor of plaintiff in an action brought to recover damages for injuries alleged to have resulted to plaintiff's comfort and property by reason of the maintenance and use of coal sheds on defendant's lands. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Haley & O'Donnell, for appellant:

If the acts complained of by plaintiff amount to a nuisance, it is a public, and not a private, nuisance.

Williams' Case, 5 Coke, 72 b; 1 Co. Inst. 56, 569; *Hackney v. State*, 8 Ind. 494.

The annoyance complained of by the plaintiff is only such as he in common with the public is subjected to, and therefore he cannot have a private action to redress his supposed injury.

Lansing v. Smith, 4 Wend. 10; *Milbau v. Shark*, 37 N. Y. 611; *Soltau v. DeHeld*, 9 Eng. L. & Eq. 104; *Bruning v. New Orleans Canal & Bkg. Co.* 12 La. Ann. 541; *Barnes v. Racine*, 4 Wis. 454; *Jewson v. Moor*, 8 Ld. Raym. 436, 12 Mod. 263.

Persons living in a locality where business is carried on must expect to hear a great deal of noise, and if they choose to leave their windows open, they will be more disturbed by it than if they close them; but rather than compel business to cease to please the fastidious, as said by the court in *Hez v. Lloyd*, 4 Esp. 200, they ought to "shut" their windows.

No complaint being made as to the mode and manner in which Wylie conducted his business at this shed, the location of the coal shed where it is and the method of doing business there do not amount to a nuisance.

Doellner v. Tynan, 38 How. Pr. 176; *Ray v. Lynes*, 10 Ala. 63; *Hole v. Barlow*, 4 C. B. N. S. 334; *Atty-Gen. v. Lea*, 3 Ired. Eq. 301; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Williams v. New York Cent. R. Co.* 18 Barb. 247; *Gilbert v. Showerman*, 23 Mich. 443.

Deeds of rights of way are presumed to include all damages arising from proper construction of the improvement.

Mills, Em. Dom. §§ 110, 216; *Norris v. Vermont Cent. R. Co.* 28 Vt. 99; 2 Wood, Railway Law, 919, 923. See 1 Redfield, Railways, § 81; *Mason v. Kennebec & P. R. Co.* 81 Me. 215; *Stonell v. Flagg*, 11 Mass. 364; *Chicago & E. I. R. Co. v. Loeb*, 5 West. Rep. 687, 113 Ill. 203; *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 132; *Clark v. Hannibal & St. J. R. Co.* 38 Mo. 202; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.* 67 Ill. 142; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363.

This is a railroad use.

Hoggatt v. Vicksburg, S. & P. R. Co. 34 La. Ann. 624; *Reg. v. Bradford Nav. Co.* 6 Best & S. 649; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582.

Messrs. Benjamin Olin and C. W. Brown, for appellee:

Annoyances far less serious than those of which appellants are guilty have been repeated—9 L. R. A.

ly declared to be a nuisance for the maintaining of which an action or suit would lie.

Wood, Nuisance, ed. 1875, p. 471, § 429, p. 599, § 570; *Cooper v. Randall*, 53 Ill. 24, 59 Ill. 324; *Wahle v. Reinbach*, 76 Ill. 323; *Whitney v. Bartholomew*, 21 Conn. 213.

A railroad company can claim no greater rights in the use of its property than a private citizen would have under like circumstances.

Illinois Cent. R. Co. v. Grabill, 50 Ill. 241, 242; *Snell v. Buresh*, 11 West. Rep. 690, 123 Ill. 156.

To erect a building and use it in an improper place, to the injury of another, is of itself a wrongful act.

Whitney v. Bartholomew, *supra*.

Private persons who sustain special damages from the acts of the corporation can recover therefor.

Stone v. Fairbury, P. & N. W. R. Co. 63 Ill. 895; Wood, Nuisance, p. 789, § 751, p. 792, § 752; *Shively v. Cedar Rapids, I. F. & N. W. R. Co.* 74 Iowa, 169, 7 Am. St. Rep. 471.

If railroad pens become a nuisance, the company is liable. They should be built distant from populous neighborhoods.

Illinois Cent. R. Co. v. Grabill, *supra*.

The acts here complained of constitute a use of the premises purchased which was not contemplated or anticipated, and create an injury in the nature of a new and additional burden to the adjoining premises not purchased.

Wabash, St. L. & P. R. Co. v. McDougall, 6 West. Rep. 321, 118 Ill. 229, 1 L. R. A. 207, 126 Ill. 111; *Ohio & M. R. Co. v. Wachter*, 13 West. Rep. 812, 123 Ill. 440; *Chicago, B. & Q. R. Co. v. Schaffer*, 14 West. Rep. 239, 124 Ill. 119.

The claim that Elwood has no right of private action for the injuries set forth is without merit.

Lansing v. Smith, 4 Wend. 10, 25. See also *Barnes v. Racine*, 4 Wis. 454, 466; *Cooper v. Randall*, 59 Ill. 317; *Walker v. Shephardson*, 3 Wis. 384; Wood, Nuisance, §§ 649, 676; *Francis v. Schoellkopf*, 53 N. Y. 152.

Magruder, J., delivered the opinion of the court:

This is an action on the case, brought in the Circuit Court of Will County by the appellee, Elwood, against the appellants Wiley and Sutherland, and also against the Michigan Central Railroad Company and the Joliet & Northern Indiana Railroad Company, to recover damages sustained by the plaintiff below during the month from June 4 to July 5, 1888, in the use, occupation and enjoyment of his dwelling-house, caused by the erection and operation by the appellants of a large coal-shed adjoining said dwelling-house, in the City of Joliet, and the handling therein of large quantities of coal by means of machinery driven by steam power, whereby intolerable noises were produced, and great quantities of coal dust and dirt were cast upon and into said house, which dust and dirt continually settled down in large quantities upon the furniture, books, food, clothing and other things in the house, to the great annoyance of the plaintiff, and so as to be destructive of the comfort and health of himself and his family, and cause material injury to his

upon the trial below, found the two railroad companies not guilty, and returned a verdict of guilty against the other defendants, the two appellants here. Judgment was entered upon the verdict. The appellate court has affirmed the judgment, and the case comes here by reason of a certificate of importance granted by that court.

The dwelling-house and the coal-shed are both located upon the south half of block 17 in Bowen's Addition to Joliet. The south half of this block lies between Jefferson Street, on the north, and Washington Street, on the south, and between Michigan Street, on the west, and Eastern Avenue, on the east. On July 3, 1854, Joel A. Matteson and wife executed a deed conveying to the Joliet & Northern Indiana Railroad Company the south part of the south half of the block lying between Michigan Street and Eastern Avenue, fronting south on Washington Street, and having a width or depth of 180 feet. It is claimed that this strip, 180 feet wide, was leased by the Joliet & Northern Indiana Railroad Company to the Michigan Central Railroad Company, though no such lease was produced in evidence. On May 2, 1887, the Michigan Central Railroad Company leased the strip to the appellant J. S. Wiley, of Davenport, Iowa, for three years, at a nominal rental of \$1 per year for the storage and sale of coal, the lessor reserving the right to terminate the lease if the business should not be conducted to the satisfaction of the company, or the latter should desire the property for its own use. The coal-shed in question was erected upon this strip early in the summer of 1888 by Wiley, whose superintendent or manager is the appellant Sutherland. On July 4, 1854, Joel A. Matteson and wife also executed a deed conveying to N. D. Elwood, the father of the appellee, the undivided half of that part of block 17 lying between the south line of Jefferson Street and the north line of the strip sold on the day before to the Joliet & Northern Indiana Railroad Company, said strip having a depth or width of about 145 feet, and extending from Michigan Street to Eastern Avenue. Appellee acquired his title as devisee under his father's will, and by deed from his father's executor. His house is located upon the strip so sold to his father, and fronts upon Jefferson Street. The south line of his lot adjoins the north line of the lot on which the coal-shed stands, and water from the eaves of the latter falls upon the lot. He built his house, and improved the grounds around it, and occupied it as a home, many years before the coal-shed was erected. The coal shed is about 810 feet long, 28 feet high, and from 54 to 56 feet wide, built of lumber, with a stone foundation, and a roof covered with tarred paper. It is open at the west end and on the south side, and has an open space on the north side, between the siding and roof, so that the coal dust escapes upon the adjoining premises. Cars are switched from the railroad tracks into the shed upon a raised platform. The coal is thrown into an iron hopper by means of an iron scraper operated by steam-power, and is then received into an iron conveyor, run by steam, and lifted from 20 to 28 feet high, and emptied into a chute or trough

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openings in the chute. The shed will store 24,000 tons of coal. In June, 1888, from fifteen to twenty-three carloads of coal per day were delivered into it, each carload holding from twelve to twenty tons. About twenty-three cars would be unloaded in one day. This process of lifting, conveying and dumping the coal by means of machinery from the top of the shed to the floor below, in large masses, causes the coal to break and grind when coming in contact with the iron conveyor, etc., and produces, not only deafening noises, but clouds of coal dust. The evidence tends to show that the locality in question is in a thickly-settled portion of the city, and that there are many houses and stores near plaintiff's residence on Jefferson Street, and also south of Washington Street, and east and west of the other streets above named. Many of the owners and occupants of these houses and stores were put upon the witness stand, and swore that they also were annoyed and injured by the noises and coal dust in question in the use and enjoyment of their respective properties.

In *Cooper v. Randall*, 59 Ill. 317, we held that such testimony was admissible to show the extent and character of the injury sustained by the plaintiff, and as tending to prove that the nuisance objected to was capable of inflicting the injury complained of. It is urged, however, by the appellant that, by the testimony thus admitted, the nuisance was shown to have been a public one, and that a private action will not lie for injuries suffered from a public nuisance. Counsel for appellants thus state their position: "The annoyance complained of by the plaintiff is only such as he, in common with the public, is subjected to, and therefore he cannot have a private action to redress his supposed injury." Undoubtedly the general rule is that public or common nuisances, which are defined by Blackstone to be those "which affect the public, and are an annoyance to all the king's subjects," can only be proceeded against by indictment, but it is also a well-established rule that where a person sustains, by reason of a public nuisance, a special damage, different from that which is common to all, he is not precluded from maintaining his action for such damage. *Wood, Nuisance*, §§ 618, 653.

The doctrine that special damage must be shown in order to justify a private action for injury growing out of a public nuisance had its origin in the consideration of nuisances growing out of obstructions to highways and navigable streams. For instance, if a man dug a ditch across a public highway, the traveler would have no action for the inconvenience which he suffered from the interruption in common with the rest of the public; but if his horse fell into the ditch, and was killed, he would thereby suffer a special damage, not common to others. The strictness of the original rule has been greatly modified since the days of *Lord Coke*. Recovery may be had for damages which are consequential, as well as direct. *Id.* §§ 620, 621.

An individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be

many others in the same situation. *Lansing v. Smith*, 4 Wend. 10.

The doctrine now is that a nuisance may be at the same time both public and private. The use of a steam-engine in a crowded street may be a public nuisance, but in a case where the smoke from it also injured the goods in a man's shop, and made his dwelling uncomfortable, it was held to be such a private nuisance as would give him a right of action. *Wood, Nuisance*, § 649.

In *Francis v. Schoellkopf*, 58 N. Y. 152, it was held that, although the stench from a tannery injured a large number of houses, yet the plaintiff, whose dwelling was made uncomfortable, and almost uninhabitable, was entitled to sue for her particular injury. In the case at bar, if the coal dust falls upon the furniture, food and clothing in appellee's house, he suffers a special damage to his own property, even though it be true that coal dust from the same coal shed falls upon the man who passes on the street in front of his door, or upon similar articles of property in his neighbor's house. If the noise of the grinding machinery deafens him in his own dwelling, the rest and quiet which he is entitled to enjoy in his home are disturbed, and he is none the less injured because the home of his neighbor is rendered unendurable from the same cause. Injury to a vested right is a sufficient special damage to maintain an action against the promoter of a public offense. *Wood, Nuisance*, § 656.

As was said in *Francis v. Schoellkopf*, *supra*: "It is no defense for a wrong-doer, when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted a like injury upon numerous other persons." We therefore think that the court below committed no error in overruling the motion of the defendants to exclude the plaintiff's evidence, inasmuch as the plaintiff was entitled to maintain his action, even though the nuisance in question could be regarded as a public one.

The next error assigned by the appellants is the refusal of the trial court to give certain instructions, which stated to the jury, in substance, that the Michigan Central Railroad Company would have had the right to erect and operate the machinery in the coal-shed, upon the alleged ground that such operation was a lawful railroad use of the right of way, and that the company had a right to license Wylie to do what it could itself thus do; that the original owner of the south half of block 17, by his deed to the lessor of the Michigan Central Railroad Company, received a consideration thereby for all future injury to the portion of the block retained by him growing out of such lawful railroad use of the part so deeded and sold; that, therefore, appellee, holding title under such original owner, is without redress for the damages occasioned by such use. We are of the opinion that there was no error in the refusal of the instructions in question, for the reasons hereinafter stated. The charter of the Joliet & Northern Indiana Railroad Company has not been introduced in evidence, and therefore it does not appear whether or not that company had any authority to lease the property to the Michigan Central Railroad Company; and, if it did so lease it, it does not
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appear, in the absence of such lease, and of the charter of the Michigan Central Railroad Company from the record, whether or not the latter company was authorized to make the lease to Wylie. Nor does it appear from either of the deeds above referred to, or otherwise, that the land on which the shed stands was conveyed to the Joliet & Northern Indiana Railroad Company, or held by it, as right of way. But we will treat the case, as the counsel on both sides seem to do, as though the Michigan Central Railroad Company was the lessee of the Joliet & Northern Indiana Railroad Company, and as though the coal-shed stood upon the railroad right of way, and as though the appellants were authorized to use the shed and the machinery in it for the same purposes for which their lessor could have used it.

1. The deed from Matteson to the Joliet & Northern Indiana Railroad Company did not recite that the strip therein described was conveyed for the purpose of constructing a railroad, or for any purpose connected with the construction or use of a railroad, or for any purpose connected with the preservation, occupation and enjoyment of a railroad. It was a simple conveyance of land in fee simple, without any reference to the use to which it was to be applied. When it was made, no part of the Joliet & Northern Indiana Railroad had been built. Moreover, the deed was executed in 1854, while the Constitution of 1848 was in force. Under that Constitution, compensation in condemnation proceedings was only awarded for the land taken, and not for damages for the land not taken. It cannot be claimed that a simple deed or grant of land for right of way to a railroad company will be presumed to have any greater effect than a condemnation judgment. It is said that, as condemnation proceedings are presumed to consider and include all damages suffered, so deeds of rights of way are presumed to include all damages arising from a proper construction of the improvement. But it is difficult to understand how, under the Constitution of 1848, where the owner only received, as the result of the condemnation proceeding, compensation for the land taken, and not damages to the land not taken, a deed of land to a railroad company made when that Constitution was in force can be presumed to have been in consideration both of compensation for the land conveyed and of future damages to the land not conveyed, in the absence of anything on the face of the deed to show that the land was conveyed for any particular purpose, or that the parties had in mind any damages to accrue to other land. *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 863; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 5 West. Rep. 887.

The position of appellants is that the consideration of the deed from Matteson to the Joliet & Northern Indiana Railroad Company included, not only the value of the strip 130 feet wide thereby conveyed, but also all the damages thereafter to result from the construction and operation of the railroad to the strip 145 feet wide, deeded the next day to N. D. Elwood.

In *Chicago, R. I. & P. R. Co. v. Smith*, *supra*, we said: "A mere conveyance of a tract of land might not give to the grantee the right to

tach the same condition as in general exists with respect to the holding of all land—that the owner shall so use it as not to produce injury to another. But in the case before us there is the grant for this very use itself, which will injuriously affect other land, and for no other use.”

The doctrine announced in some of the textbooks, that where land has been acquired for railroad purposes by deed or grant, as well as by condemnation, all damages to the portion of the owner's land not taken, for which an action would lie at common law, are presumed to have been considered in fixing the price, may well be applied to such a deed or grant made in this State since the Constitution of 1870 went into force. That instrument provides that “private property shall not be taken or damaged for public use without just compensation.” But the doctrine can certainly have no reference to a simple deed made before the adoption of the Constitution of 1870, and containing no statement of any use which was to be made of the land conveyed. It is to be noted that the point here discussed is not whether there was any remedy for injury to the land not taken before the adoption of the Constitution of 1870, but whether damages for such injury could be regarded as paid for by the price named in such a deed, conveying the land taken, as the deed above described. We think that such could not be the effect of the deed.

2. In any case where the doctrine contended for can be applied, it only contemplates that the grantor, or those holding under him, shall be prevented from recovering damages for such injuries as arise from the proper construction of the road, and such as necessarily result from or attend upon its ordinary and prudent operation. Railroads are a public necessity and a public benefit. Many inconveniences and annoyances grow out of their operation, which must be borne by the public. The passage of a train of cars upon the street of a city or town is necessarily attended with noise, with the emission of smoke, with detention at the crossing, etc. No recovery can be had for injuries suffered from such causes. But a railroad company has the power to do certain things which it has also the discretion to do in particular ways and at particular places. It needs grounds upon which it may receive and discharge its freight and passengers. It may use its right of way for such purposes. Its discharge of a certain kind of freight at one place upon its right of way may work serious injury to property owners, while its discharge of the same at another place thereon may not produce any such injury. The selection of a locality where damages are inflicted, in preference to one where damages will not be inflicted, cannot be said to be necessary to the ordinary and prudent operation of the road. In the present case, the company, or those authorized by it, thirty-three or thirty-four years after the original construction of the road, erected this coal-shed, and placed in it a new contrivance, worked by steam-power, for unloading coal, in the heart of a city, in a locality thickly settled, and surrounded by residences and stores, cre-

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tor, and injure the health, or those living upon the adjoining property. Here was a new use of the right of way, not contemplated at the time of the original grant, and not resorted to for many years thereafter. The construction of the shed in 1888 could not have been anticipated by appellee, who built his house in 1876, and began to occupy it in 1881. This structure, though not a nuisance *per se*, became such by reason of the particular locality in which it was situated. It is as much the duty of a railroad company as of an individual to so use its property as not to injure others. The question whether or not the coal-shed and its machinery were located in a proper place was fairly left to the jury by the instructions of the court.

In *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241, where a cattle-pen, kept by the railroad company near the premises of the plaintiff, was the source of noxious smells, rendering such premises unwholesome and uninhabitable, it was held that such indispensable structures, even though the right existed to erect them in the heart of a city, ought to be located at such a distance from populous neighborhoods as to avoid the injurious results produced by them.

In *Cooper v. Randall*, 59 Ill. 317, which was an action for damages to plaintiff's premises, arising from a flouring-mill on a lot near such premises, which threw upon them chaff, dust, dirt and other impurities, the following instruction was approved: “A flouring-mill is not necessarily a nuisance, nor unlawful in its use, management or purpose. A man has a right to erect a mill in a proper place, to run, use it, etc., in a proper manner; and, if said mill is in a proper place, used and operated in a proper manner, and without material injury to the possession of the reversionary right or interest of plaintiff, the jury should find for defendants.” “Material injury” was there defined to be a real and not an imaginary or fanciful interference with the reasonable enjoyment of the property.

In *Whitney v. Bartholomew*, 21 Conn. 213, the action was for damages to plaintiff's property by reason of a carriage factory and blacksmith shop occupied by defendant on his own land, adjoining the lot on which stood the plaintiff's dwelling-house. It was shown that cinders, ashes and smoke from the chimneys of the shop were thrown upon plaintiff's house, land, clothes, etc., and that the ashes, etc., fell into her well, etc. Judgment for plaintiff was affirmed, and it was there held that the factory and shop were not nuisances *per se*, but that “the shop was erected, and the business pursued, in an improper place;” that some things not unlawful, became so “in respect to the time, place or manner of their performance;” that defendant was bound to use the shop, even though on his own land, so as not to injure his neighbor; “that, of trades which are lawful, some may be nuisances in cities which are harmless in the country.”

Shively v. Cedar Rapids, I. F. & N. W. R. Co., 74 Iowa, 169, was an action against a railroad company to recover damages, wherein it appeared that the company built and maintained stock-yards within sixty feet of plaintiff's lot, for the use of shippers over the road,

and that there were omitted therefrom foul odors, which rendered plaintiff's house almost uninhabitable, and endangered his health, etc. It was claimed that the yards were necessary to the operation of the road, and that the odors could not be prevented, even where the yards were properly conducted. Judgment for plaintiff was sustained, and the court said: "It is not shown that they [the odors] are unavoidable; nor does it appear that the yards might not have been located at another place, where they would have met the necessities of the road and its patrons." It was thus left to

the jury, by the instructions in this case, to say whether this particular mode of handling coal, and unloading it from cars, was a proper mode or not. If unloading coal in this shed, with such machinery, upon the company's right of way was a part of the necessary operation of the road, plaintiff could not be precluded from a recovery for injuries thereby suffered unless such process of unloading was prudent, careful and proper. We perceive no error in the record which would justify a reversal.

The judgment of the Appellate Court is accordingly affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Nelson K. HOPKINS, *Respnt.*,

v.

Mary A. ENSIGN *et al.*, *Appts.*

(.....N. Y.)

1. An agreement between two or more persons that all but one shall refrain from bidding at a judicial sale, and that he shall be permitted to purchase the property, is not necessarily void, but will be upheld if the intention of the parties is fair and honest, and the primary purpose is not to suppress competition but to protect their own rights, and there is

no fraudulent purpose to injure or defraud others interested in the sale.

2. An agreement between a person who thinks of attempting to collect a debt due him from the estate of one who died insolvent after having mortgaged his property and devised it subject to the mortgage by bidding at the foreclosure sale and the devisee, who wishes to bid in the property for the value of the mortgage, by which, in consideration of the creditor's refraining from bidding at the sale, the devisee is to give him a mortgage on the property for the amount of his claim, provided the latter is thereby enabled to secure the property at the desired price, is not illegal in the absence of unlawful

NOTE.—Judicial sale, setting aside.

A party who attacks the validity of a foreclosure sale, after the rights of third parties have accrued, must do so by an original proceeding in which an issue can be formed and tried. *Crawford v. Tuller*, 85 Mich. 87.

So if a sale has been fraudulently conducted to the prejudice of an interested party he may bring an action to set the sale aside, although he has a concurrent remedy by motion. *McMurray v. McMurray*, 66 N. Y. 175; *McCotter v. Jay*, 30 N. Y. 80; *Vanderbrook v. Cohoes Sav. Inst.* 5 Hun, 641; *Smith v. American L. Ins. & T. Co.* *Clarke*, Ch. 307, 7 N. Y. Ch. L. ed. 127.

A sale may be set aside, especially before confirmation, for fraud, unfairness or irregularity. *Gardiner v. Schermerhorn*, *Clarke*, Ch. 101, 7 N. Y. Ch. L. ed. 63.

Every person whose rights are injuriously affected by the foreclosure proceedings has a right to have the sale set aside or amended on motion, even though he is not a party to the suit. *Goodell v. Harrington*, 78 N. Y. 547; *Kellogg v. Howell*, 68 Barb. 280; *Gould v. Mortimer*, 26 How. Pr. 167; *Fulmer v. Brown*, 85 Hun, 163; *Rohrback v. Germania F. Ins. Co.* 63 N. Y. 47.

A resale of mortgaged premises may be ordered where the sale was improperly, unfairly or unlawfully conducted. *Lents v. Craig*, 13 How. Pr. 72; *Wolcott v. Schenck*, 23 How. Pr. 386; *Griffith v. Hadley*, 10 Bosw. 597; *Lefevre v. Laraway*, 28 Barb. 167; *Marsh v. Ridgeway*, 18 Abb. Pr. 232; *King v. Platt*, 37 N. Y. 155, 36 How. Pr. 23.

In Texas it is not objectionable for persons unitedly to bid and purchase at an execution sale, if done in good faith for their united benefit. *James v. Fulcrood*, 5 Tex. 512.

Execution sales of realty will be set aside, when the sale is for an undervalue made under the influence of rumors calculated to prevent competition in bidding. *Underwood v. Jeans*, 4 Harr. (Del.) 201.

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Sales to one who fraudulently combines with others to buy at an undervalue, and thereby procures the purchase at a sacrifice, will be set aside as fraudulent. *Underwood v. McVeigh*, 23 Gratt. 408.

If one by means of promise of favor prevents others from bidding at an execution sale, and thereby purchases for himself at an undervalue, such a sale will be set aside. *Mills v. Rogers*, 2 Litt. 217.

Where the plaintiff or his agent, by verbal promises, which he afterwards refuses to keep, induces defendant not to bid, and thereby becomes the purchaser for a price less than the value of the property, the sale will be set aside. *Banta v. Maxwell*, 12 How. Pr. 479.

Where the purchaser misled the owner by assuming to act for him, and obtained an adjournment of the sale so that all parties remained away, and he became the purchaser for a nominal price, the sale was set aside. *Slocum v. Glass*, 8 How. Pr. 178; *Francis v. Church*, *Clarke*, Ch. 473, 7 N. Y. Ch. L. ed. 176.

The formation of an association for the purpose of bidding off property at auction for the joint benefit is not unlawful as tending to prevent competition. *Kearney v. Taylor*, 56 U. S. 15 How. 494, 14 L. ed. 787.

An objection to the validity of a mortgage sale of public land, on the ground of a combination to prevent competition in bidding, can only be taken by the government itself. *Kealey v. Kellom*, 81 U. S. 14 Wall. 279, 20 L. ed. 800.

The employment of another person to bid at an auction sale of a vessel is not improper, although done with a view that less competition may thereby be stimulated. *The Raleigh*, 37 Fed. Rep. 125.

If it is sought to set aside the sale on the ground of a collusive and fraudulent combination between bidders, such agreement and combination must be established by proof beyond a reasonable doubt. *Whitbeck v. Rowe*, 26 How. Pr. 403.

intent although incidentally preventing competition; and in case it is carried out and acquiesced in by the other persons interested in having a large amount realized by the sale the mortgage cannot be repudiated by the devisee.

3. While the remainderman of mortgaged land acquiesces in a sale thereof under the mortgage at which the title was acquired by the life tenant for much less than the real value of the property, a contract between the life tenant and a third person, by which the former was enabled to secure the property so cheaply because of the latter's agreement not to bid at the sale in consideration of the execution to him of a mortgage on the property after it should be secured, cannot be assailed by the remainderman in a suit to foreclose the latter mortgage: the remedy is by application to set aside the first foreclosure sale.
4. The relinquishment of his right to bid at a judicial sale by a creditor who has no other means of obtaining payment of his debt is a sufficient consideration to support a mortgage for the amount of his claim given him by the one who at the sale secures the legal title to the lands sold.

(October 7, 1890.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment entered in the Erie County Clerk's Office upon the report of a referee in favor of plaintiff in an action brought to foreclose a mortgage. *Affirmed.*

Statement by **Brown, J.:**

This action was to foreclose a mortgage upon real estate in the City of Buffalo, and made by the defendant Mary A. Ensign to Truman C. White to secure the payment of \$2,500 and interest, and by said White assigned to the plaintiff.

The material facts were as follows: Charles Ensign died insolvent, seised of the property in question, and by his will devised the same to his wife, the defendant Mary A. Ensign, for life.

The premises were of the value of \$35,000 and upwards, and at the death of Charles Ensign were incumbered by a mortgage held by one Potter, which was thereafter foreclosed and the premises decreed to be sold. The amount due upon said mortgage at the date of the said decree was \$16,225.

George W. Holt was the sole executor of the will of said Charles Ensign, and the surviving partner of a firm, composed of himself and said Ensign; and one Cornelia Hamilton, prior to the commencement of the foreclosure action, had obtained a judgment against said Holt as surviving partner for \$600,000 and had commenced an action to subject said premises to the lien of said judgment.

The plaintiff and Truman C. White were partners in business as attorneys-at-law, and as such were the attorneys for Potter in the foreclosure suit above mentioned. Mr. White had also been engaged on behalf of said Holt in numerous business and professional transactions growing out of the affairs of said firm of Holt & Ensign, in which he had rendered a large amount of professional services and for
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which he had received no compensation, and for which compensation could not be compelled from said Holt on account of his insolvency.

The parties interested in the premises at the time of the sale under the judgment in the Potter foreclosure action were Mr. Potter, the plaintiff in that action, Cornelia Hamilton, the holder of the judgment against Holt as surviving partner, Mary A. Ensign as the holder of a life estate therein, and the defendant May Ensign, as heir-at-law of said Charles Ensign. Mary A. Ensign desired to become the purchaser of said property at the sale under the Potter foreclosure for an amount sufficient to satisfy that judgment, and Mrs. Hamilton had consented, so far as she was concerned, to permit her to buy the property at the sale for the amount aforesaid, and to carry out that purpose Mrs. Ensign had negotiated a loan of \$18,000 from a savings bank, and Mr. C. A. Sweet, a friend, had agreed to advance the amount necessary to be paid on the day of sale, and reimburse himself from said loan when made.

Mr. White also intended to attend said sale and bid, not merely on account of his client, Mr. Potter, the amount necessary to satisfy his judgment, but also on behalf of another client, one Pratt, a much larger amount, if necessary, in order to obtain said property.

This purpose coming to the knowledge of Mrs. Ensign, it was after negotiations agreed by her that if the said White and Pratt would abstain from bidding at such sale, and if thereby the premises should be obtained by Mrs. Ensign for the amount necessary to satisfy the Potter judgment, she would execute and deliver to said White in consideration thereof the bond and mortgage set forth in the complaint.

Neither Pratt nor White bid at such sale, and Mrs. Ensign thereupon became the purchaser of the premises for the amount due in the foreclosure action, and thereafter executed and delivered to said White the bond and mortgage in question.

The referee found, as a fact, that the same were executed by Mrs. Ensign intelligently, without duress, and with full knowledge of all her rights, and for a good and valuable consideration, and as a conclusion of law that the plaintiff as assignee of said bond and mortgage was entitled to the usual judgment of foreclosure and sale.

Messrs. George M. Osgoodby and L. N. Bangs, with Mr. Adelbert Moot, for appellant:

Every one of White's acts in relation to the transaction of exacting the bond and mortgage in suit from the mortgagor was oppressive, unjust and wholly without a conscientious regard to his duties as an attorney in the premises.

O'Donnell v. Lindsay, 7 Jones & S. 523; *King v. Platt*, 87 N. Y. 155; *Hall v. Hallett*, 1 Cox, Eq. 184; *Howell v. Baker*, 4 Johns. Ch. 118, 1 N. Y. Ch. L. ed. 784; *Ex parte James*, 9 Ves. Jr. 352; *Case v. Carroll*, 35 N. Y. 338; *Hoyt v. Martense*, 16 N. Y. 238.

If White was incapacitated from purchasing on his own account, he could not purchase in any case or under any circumstances by or as the agent of the third person.

Ex parte Bennett, 10 Ves. Jr. 384; *Crooks v.*

Cornell, 75 N. Y. 99, 100; *Burling v. King*, 2 Thomp. & C. 546; *Crawford v. Russell*, 62 Barb. 96.

Transactions between attorney and client, by which the former is benefited, will be set aside upon an action brought for the purpose, unless clearly shown by the attorney to have been either just or fair or purely voluntary on the part of the client.

Mason v. Ring, 2 Abb. N. S. 827; *Evans v. Ellis*, 5 Denio, 648.

If this was a simple agreement between the parties that one should abstain from bidding at a judicial sale, the agreement and every right sought to be secured thereunder are absolutely void, and, being so, it could not be enforced either at law or equity.

People v. Stephens, 71 N. Y. 527, 545; *Dewitt v. Brisbane*, 16 N. Y. 508-512; *Osborne v. Williams*, 18 Ves. Jr. 879; *Ford v. Harrington*, 16 N. Y. 293.

The bond and mortgage were voidable by reason of the undue influence exercised over the mortgagor, and of duress.

King v. Platt, 87 N. Y. 160; *Harris v. Carmody*, 181 Mass. 51.

Mrs. Ensign being in a position where she would have acquired the property without this incumbrance to White thereon, if he had simply let her alone, but being given to understand that if she did not execute the instruments she should not get the property, all the resource she had for her support, it became a case of duress of property, and the instruments are therefore void.

McPherson v. Cox, 86 N. Y. 478, 479; *Haynes v. Rudd*, 80 Hun, 288; *Fisher v. Bishop*, 86 Hun, 112; *Barry v. United States Eq. L. Assur. Soc.* 59 N. Y. 587; *Scholey v. Mumford*, 60 N. Y. 498, 501; *Baldwin v. Liverpool & G. W. S. S. Co.* 74 N. Y. 128-132; *Harmony v. Bingham*, 12 N. Y. 100; *Decker v. Morton*, 1 Redf. 477; *Loomis v. Ruck*, 56 N. Y. 462; *Farr v. Pym*, 2 Ch. Sent. 20, 5 N. Y. Ch. L. ed. 1085; *Stenton v. Jerome*, 54 N. Y. 480; *Bates v. New York Ins. Co.* 3 Johns. Cas. 238.

Messrs. Hopkins & White, for respondent:

Defendant could not execute the mortgage in suit for the purpose of enabling her to get title to the property in question at much less than half its value, and then repudiate the mortgage.

Greenhood, Pub. Pol. pp. 161, 162; *Bronwer v. Appleby*, 1 Sandf. 158; *Moore v. Remington*, 34 Barb. 427; *Evans v. Dravo*, 24 Pa. 62; *Lyon v. Summers*, 7 Conn. 399; *Dos v. Roberts*, 2 Barn. & Ald. 367; *Hartley v. M'Anulty*, 4 Yeates, 95; *Reichart v. Castator*, 5 Binn. 112; *Kiltinger v. Reidenhauer*, 6 Serg. & R. 585; *Hassam v. Barrett*, 115 Mass. 256; *Maffat v. Ijama*, 103 Pa. 266.

When an agreement not to bid at a sheriff's sale is made for the purpose and with the view of preventing fair competition and by reason of want of bidders to depress the price of the article offered for sale below the fair market value, it will be illegal and may be avoided as between the parties as a fraud upon the rights of the vendor. But on the other hand if the arrangement is entered into for no such fraudulent purpose, but for mutual convenience of the parties and for a reasonable and honest

purpose such agreement will be valid and binding.

Marsh v. Russell, 66 N. Y. 294; and see *People v. Stephens*, 71 N. Y. 546; *Ryan v. Dox*, 84 N. Y. 807; *Maffat v. Ijama*, *supra*.

Brown, J., delivered the opinion of the court:

The defense to this action was placed upon two grounds: *first*, that the bond and mortgage in suit were obtained by duress; *second*, that it was not supported by a valid and legal consideration.

The referee found that Mrs. Ensign executed the bond and mortgage "intelligently and without duress, with full knowledge of all her rights," and as there was ample evidence to support that conclusion the exception to that finding need not be further referred to.

The lack of a valid consideration to support the contract is said to result from the agreement on the part of the mortgagee not to bid at the foreclosure sale under the Potter mortgage, and it is contended that that agreement was one to prevent or suppress competition at a public sale, and was therefore void as against public policy. There is authority for this contention in many of the older cases. *Jones v. Carwell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112. See also 1 Story, Eq. Jur. § 293.

But the rule applied in these cases has been very materially modified by the later decisions of the courts, and it is now settled that agreements between two or more persons that all but one shall refrain from bidding, and permitting that one to become the purchaser, are not necessarily and under all circumstances void. They may be entered into for a lawful purpose and from honest motives, and in such cases will be upheld, and they will not vitiate the purchase or necessarily destroy the completed contracts to which they refer and in respect to which they are made. *People v. Stephens*, 71 N. Y. 537-546; *Marsh v. Russell*, 66 N. Y. 288; *Marie v. Garrison*, 88 N. Y. 14-23; *Myers v. Dorman*, 84 Hun, 115; *Kearney v. Taylor*, 56 U. S. 15 How. 494 [14 L. ed. 787]; *Wicker v. Hoppock*, 78 U. S. 6 Wall. 94 [18 L. ed. 752]; *Phippen v. Stickney*, 8 Met. 384; *Maffat v. Ijama*, 103 Pa. 266; *Garrett v. Moss*, 20 Ill. 549; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Re Carow's Estate*, 26 Beav. 187.

It was said in *Phippen v. Stickney*: "When such an agreement is made for the purpose and with the view of preventing fair competition and by reason of want of bidders to depress the price of the article offered for sale below the fair market value, it will be illegal and may be avoided as between the parties as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into from no such fraudulent purpose, but for the mutual convenience of the parties and for a reasonable and honest purpose, such agreement will be valid and binding." The rule thus stated was approved by this court in *Marsh v. Russell*.

In *Marie v. Garrison* it was said that "the mere fact that an arrangement fairly entered into with honest motives for the preservation of existing rights and property may incidentally restrict competition at a public or judicial sale

one for the jury upon the whole facts as they shall appear at the trial."

And in *Wicker v. Hoppock* Justice Swayne, speaking for the court, said: "The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair, if there be no indirection, no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained."

It would be impossible to distinguish in their facts many of the cases I have cited from the earlier decisions in Johnson's Reports, and so far as those early cases lay down the broad rule that every agreement of which the consideration is the forbearance of bidding at a public sale is *per se* void, they must be deemed to be overruled, and the extent to which the doctrine will now be carried seems to embrace only cases of fraudulent acts and combinations having for their object to suppress fair competition at the sale with the purpose of acquiring the property at less than its fair value.

The courts will now look to the intention of the parties, and if that be fair and honest and the primary purpose be, not to suppress competition, but to protect their own rights, and there be no fraudulent purpose to injure or defraud others interested in the result of the sale, the agreement may be upheld.

The question is one of fact to be determined by the trial court upon the evidence before it.

We have then in this case to inquire as to the character of the agreement which the appellant assails.

Mr. White, the mortgagee, had rendered a large amount of professional services to the surviving partner of the firm of Holt & Ensign, for which he had received no compensation and for which compensation could not be compelled on account of Holt's insolvency.

He might have secured the amount by bidding at the sale, and expected to reimburse himself in that way. He refrained from so doing on account of Mrs. Ensign's promise to pay the debt. It was her desire to obtain title to the property for the amount due on the Potter mortgage, and the only creditor of her husband's estate who appears to have been peculiarly interested in that estate was willing she should do so. If all parties interested in the land had agreed that Mrs. Ensign might purchase the property freed from their claims, upon paying to White the amount of his debt, no one could question the legality of such an agreement. Public policy would not forbid it, and no one being injured there would be no one who could complain. Substantially that is what was done. Mrs. Hamilton's attorney made the arrangement with White by which he refrained from bidding in consideration of receiving security for his claim, and he testified that it was important for Mrs. Hamilton's interests that some compromise should be made. Everyone who had any substantial interest in

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We are of the opinion that this agreement was not illegal, although it had the effect incidentally to prevent competition between White and Mrs. Ensign.

The referee has not found that the intention of the parties was to suppress competition, and the evidence shows that such was not their purpose. Mrs. Hamilton, who was the only person who would have benefited by such competition, consented to the arrangement.

If it be said that May Ensign, as the owner of the legal title to the land, was prejudiced or injured by the agreement, the answer is that if she was she cannot attack it in this action. If she has been injured, it was by the sale of the land for less than its value, and it would be a gross perversion of a salutary principle of law to permit her, while acquiescing in the purchase of the land by her mother, to successfully assail the agreement by which her mother was enabled to acquire the title. If this defendant has cause for complaint, her remedy must be found in an application to set aside the sale, and not in this action, which involves only the validity of the agreement and the parties to it.

There is no analogy between such an agreement as we are considering and one made to suppress bidding when a contract for the performance of a public work is to be awarded to the lowest bidder, or one where the intention is to have property sell for less than its real value, and thus deprive those interested therein of their just rights.

The first class are justly declared void on grounds of public policy, and the second because of their corrupt purpose and the fraudulent intent of the parties to them.

Here there was no corrupt intent and no illegality in White's attempting to obtain payment or security for that which was equitably due to him, and there was no valid ground for the claim that his purpose was injurious to those interested in the sale.

The purpose of the agreement being lawful and the motive of the parties honest, in the absence of a finding of unlawful intent the case falls within the principle of the authorities cited.

We are also of the opinion that White's relinquishment of his right to bid at the sale was a sufficient consideration to support the mortgage. It is not essential that the consideration should import a gain or loss to either party. If the party in whose favor the contract was made foregoes some right or benefit it is sufficient.

In the cases cited from Johnson's Reports, *supra*, it was conceded by the learned judges, who held that the agreements were illegal, that in other respects foregoing the right to bid was a valid and valuable consideration. *Jones v. Caswell*, 3 Johns. Cas. 29; *Thompson v. Davies*, 13 Johns. 112; *Myers v. Dorman*, 34 Hun. 115.

We have examined the other points made by the appellant, but there are none which require further discussion.

The judgment should be affirmed, with costs.
All concur, except **Bradley, J.**, not sitting.

A. E. ALEXANDER

v.

Clark WILCOX *et al.*, Appts.

(.....Neb.....)

*1. Where a person has been in the open, notorious, exclusive, adverse possession of real estate, as owner, for ten years, he thereby acquires an absolute title to the land, free from the lien created by a tax deed on the property, issued prior to the commencement of such adverse possession. *D'Gette v. Sheldon* (Neb.) Nov. 12, 1889.

2. A tax-deed, issued more than five years after the expiration of the time to redeem from the tax sale, is invalid and creates no lien upon the real estate therein described.

(November 19, 1890.)

APPEAL by defendants from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to foreclose certain tax liens on land in possession of defendant Wilcox. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Beeson & Root, for appellants:

Plaintiff's action is barred by the general Statute of Limitations.

Wygant v. Dahl (Neb.) May 31, 1889; *D'Gette v. Sheldon* (Neb.) Nov. 12, 1889.

The sale and conveyance to Walker cut out all prior claims to the land.

Preston v. Van Gorder, 81 Iowa, 250; *Jarvis v. Peck*, 19 Wis. 74; *Sayles v. Davis*, 23 Wis. 225; *Dougherty v. Henarie*, 47 Cal. 14; *Blackwell, Tax Titles*, p. 544, and cases cited.

No appearance for appellee.

NORVAL, J., delivered the opinion of the court:

This suit was brought by A. E. Alexander, on the 7th day of August, 1888, in the District Court of Cass County, to foreclose two tax liens. The petition contains two counts. The first cause of action is based upon a tax deed bearing date July 11, 1870, and the second is upon a tax deed issued on October 18, 1885, upon a certificate of purchase dated September 18, 1875. The answer sets up the Statute of Limitations, and to the first cause of action the further defense that the tax purchaser failed to pay the taxes levied and assessed on the land after the purchase—that the land was sold for such subsequent taxes to one Peter Walker, and that a tax deed was afterwards issued to said Walker. Upon a trial to the court, a decree was entered in favor of the plaintiff foreclosing the tax liens. The defendants appeal. The facts in the case are undisputed. On the 25th day of September, 1866, one J. J. Monroe purchased at tax sale the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 8, town 10, range 14, in Cass County, for the taxes levied

thereon for the year 1865, amounting to \$11.52, and that he received a certificate of purchase from the county treasurer. Monroe afterwards paid the taxes on the land for the years 1869, 1872, 1874, 1875, 1878 and 1880, amounting in the aggregate to \$30.80. On the 11th day of July, 1870, he surrendered said certificate to the treasurer, and received a tax deed for said land, to which the treasurer failed to attach his official seal. On the 11th day of January, 1885, Monroe sold and conveyed the land to the plaintiff. On the 15th day of September, 1875, one S. N. Merriam purchased from the treasurer of Cass County the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 8, same town and range, for the taxes of 1874, for the sum of \$7.43. Afterwards he paid the taxes assessed thereon for the years 1874, 1875, 1877, 1878, 1880, 1881 and 1882, amounting in the aggregate to \$34.82. On the 18th day of October, 1885, the plaintiff, A. E. Alexander, being the owner of the tax certificate, presented it to the treasurer, and received a tax deed for the land. On the 8th day of September, 1868, the taxes levied on the land first above described for the year 1867 being unpaid and delinquent, the land was sold by the treasurer to one Perry Walker, and a certificate of purchase was delivered to him. On the 1st day of September, 1874, the treasurer executed and delivered to said Walker a deed to the land, which deed conveyed no title for the reason that it does not bear the seal of the county treasurer. Subsequently, Walker conveyed by quitclaim deed to E. Robert Maxwell, who afterwards conveyed the lands to the defendant Clark Wilcox on the 26th day of January 1875. Wilcox immediately took possession of the land, and has been in the continuous, open, notorious, exclusive, adverse possession thereof ever since. The defendant Gilmore holds a mortgage on the premises given by his co-defendant Wilcox. Are the plaintiff's actions barred by the Statute of Limitations? It will be observed that the tax deed, which is made the foundation of the first count of the petition, was issued July 11, 1870, or more than eighteen years prior to the commencement of this suit. The same land included in that deed was again sold for taxes to Perry Walker, and a tax deed was issued to him September 1, 1874. The defendant Wilcox purchased this tax title on January 25, 1875, and immediately took possession of the land. He had been in the open, exclusive, adverse possession thereof as owner for more than ten years prior to the bringing of this suit. He thereby acquired an absolute title to land free from the tax lien acquired by the plaintiff prior to Wilcox's possession.

The precise question here involved was before this court in *D'Gette v. Sheldon* (Neb.), 44 N. W. Rep. 30. That was an action to foreclose a tax lien. The defense was ten years' adverse possession. Judge Maxwell in the opinion of the court says: "It was the evident intention of the Legislature to limit the time in which to bring an action for the foreclosure of tax liens to five years from the time the cause of action accrued. This is in conformity to the

*Head notes by NORVAL, J.

NOTE.—Tax title, acquired by actual possession. See notes to *Gage v. Hampton* (Ill.) 3 L. R. A. 512; *Cramer v. Clow*, post, 772.
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general purposes of the Statute of Limitations that state claims shall be barred. The whole tenor of the legislation of this State has been in favor of the repose of titles to real estate after a fair opportunity has been given any party claiming an adverse interest therein to assert his claim thereto; hence an action for the possession of real estate must be brought in ten years; otherwise it is barred. This gives security to titles, and is designed to be, and is, a statute of quiet enjoyment. The Statute, in effect, says to everyone: 'Here is a party in possession of real estate as owner. If you dispute his claim, you must assert your rights in the courts within the period fixed by law, or the doors of the courts will be closed against you.' This applies to everyone. The law does not distinguish between claims and claimants, but gives to the adverse occupant for ten years an absolute title in fee."

We see no reason to doubt the correctness of that decision. It follows that the rights of the plaintiff are cut off by the adverse possession of the defendant.

Again the first cause of action is barred by the special limitation fixed by the Statute for the foreclosure of tax liens. The plaintiff never acquired any title under the tax deed, but the same was void on account of the omission of the treasurer's seal therefrom. He acquired a lien on the land for the amount of the taxes paid, but the cause of action to foreclose such lien accrued at the date of the deed. He could have brought his suit for that purpose immediately on the delivery of the deed. He cannot now, after the lapse of eighteen years, assert his claim.

The tax deed referred to in the second count of the petition was based upon a tax certificate issued and dated September 15, 1875. Comp. Stat. 1889, § 179, chap. 77, authorizes the owner of any certificate of tax sale to foreclose the same by bringing an action for that

purpose, "at any time before the expiration of five years from the date of such certificate." Section 180 of the same chapter provides that, "if the owner of any such certificate shall fail or neglect, either to demand a deed thereon or to commence an action for the foreclosure of the same, as provided in the preceding section, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto and all other persons, and as against the State, county and all other municipal subdivisions thereof." It has been held by this court in a number of cases that an action to foreclose a tax certificate cannot be brought until the time given to redeem has expired, and that such suit is barred after the expiration of five years from the time the cause of action accrued. *Helphrey v. Radick*, 21 Neb. 80; *Parker v. Matheson*, Id. 546; *D'Getta v. Sheldon* (Neb.) 44 N. W. Rep. 80.

It follows from the reason of those cases, that when a tax deed is demanded after the expiration of five years from the time limited by law for the redemption from a tax sale, no lien is acquired by such deed.

The tax deed to Alexander not having been issued until October 18, 1885, or more than ten years after the date of the certificate, and more than seven years after the expiration of the time to redeem it, it is plain that the plaintiff acquired no rights in the land thereby. The lien acquired by the issuing of the tax certificate of September 15, 1875, was barred when the tax deed was issued thereon. The plaintiff could not revive the lien by afterwards taking out a tax deed. What effect the subsequent sale of land, on which a tax deed is outstanding, has on the holder of such prior deed, it is unnecessary to decide.

The judgment of the District Court is reversed, and the action dismissed.

The other Judges concur.

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MARYLAND COURT OF APPEALS.

SUSQUEHANNA FERTILIZER CO., of
Baltimore City, *Appt.*,

v.

Daniel MALONE.

(.....Md.....)

1. Where in carrying on the business of manufacturing sulphuric acid and commercial fertilizer, gases are generated and escape into the surrounding atmosphere, which are so offensive and noxious as to affect the health of the family of an adjoining resident and land owner and to compel them at times to abandon the table and even the house, and to materially injure his property, such owner sustains an actionable injury for which he may recover damages.
2. In an action to recover damages for injuries resulting from the conducting of a business which is a nuisance the questions whether or not the business is carried on in a convenient and proper place, and whether or not the use made by its owner of his land is under the circumstances reasonable, should not be submitted to the jury, since no place can be convenient for the carrying on of a business which is a nuisance and which causes substantial injury to the property of another, and no use of one's own land can be reasonable which deprives an adjoining owner of the lawful use and enjoyment of his property.
3. When expensive works have been erected and are used in carrying on a business which is useful and needful to the public, adjoining property-owners cannot maintain actions for every trifling annoyance which such business causes them. In determining the question of nuisance in such cases the locality and all the surrounding circumstances must be taken into consideration.
4. The fact that a business was established before plaintiff acquired his property and came into the neighborhood is no defense to an action to recover damages for injuries resulting to plaintiff's property from the conducting of the business, in the absence of a prescriptive right to conduct the business.
5. Evidence as to the capital invested in a business is not admissible in an action brought to recover damages for injuries resulting to plaintiff's property from the conducting of it, since the law in such cases will not undertake to balance conveniences or estimate the difference between the injuries sustained by plaintiff and the loss which may result to defendant from having the business declared a nuisance.

(December 12, 1890.)

APPPEAL by defendant from a judgment of the Circuit Court for Baltimore County in favor of plaintiff in an action brought to recover damages for injuries alleged to have resulted to plaintiff's property from the conducting of defendant's business. *Affirmed.*

Argued before Alvey, *Ch. J.*, and Irving, Bryan, McSherry, Fowler and Robinson, *JJ.* The facts are stated in the opinion.

NOTE.—See note to Bohan v. Port Jervis Gas Light Co. *ante*, 711.

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Messrs. Charles Marshall and William L. Marbury, for appellant:

In all such cases the question is whether the nuisance complained of will, or does, produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of all the circumstances of the case, is unreasonable, and in derogation of the rights of the plaintiff; and in determining the question of nuisance from smoke or noxious vapors, or from noise or vibration, such as is alleged in this case, reference must always be had to the locality, the nature of the trade, the character of the machinery and the manner of using the property producing the annoyance complained of.

Dittman v. Repp, 50 Md. 521-522.

If a man lives in a town, of necessity he must submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property and for the benefit of the inhabitants of the town.

Tipping v. St. Helen's Smelting Co. 4 Best & S. 608, 11 H. L. Cas. 642-650.

If the proximity of the factor were injurious to his property, plaintiff must be presumed to have made a deduction from the purchase price to cover the difference in value. If he did this, he has suffered no injury. If he did not, it was his own fault. In either event, he would have no claim for compensation.

Ellis v. State, 7 Blackf. 534; *Orthwein v. Baltimore*, 16 Md. 395.

Where the nuisance was existing before the plaintiff bought his property, notice to the defendant is necessary before bringing suit.

Pickett v. Condon, 18 Md. 416.

Messrs. David G. McIntosh and R. R. Boorman, for appellee:

In determining whether a particular trade or its exercise is a nuisance, it is sufficient to show it to be offensive to the senses, and such as renders the enjoyment of life and property uncomfortable.

Catlin v. Valentine, 9 Paige, 575, 4 N. Y. Ch. L. ed. 821; *Brady v. Weeks*, 3 Barb. 157; *Whitney v. Bartholomew*, 21 Conn. 218; *Com. v. Upton*, 6 Gray, 478; *Bamford v. Turnley*, 3 Best & S. 62-65; *Jones v. Powell*, Palm. 536.

When a case of nuisance is sought to be made out, it is not a right question to put to the jury, to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing it in that place was a reasonable use by the defendant of his own land.

Bamford v. Turnley, 3 Best & S. 62-65.

A defendant is liable for sensible injury done to a plaintiff's property, notwithstanding the business may be an ordinary business, carried on in a proper manner, and in a neighborhood more or less devoted to manufacturing purposes.

Addison, *Torts*, ed. 1878, § 219, and *note*; *Stockport Water Works Co. v. Potter*, 7 Hurlst.

& N. 167; *McNee v. 586*, 51 N. Y. 500; *Saville v. Kline*, 26 L. T. N. S. 277.

There is no claim of prescriptive right on the part of defendant set up in this case, and in the absence of such claim the question of priority of possession, as between the plaintiff and defendant, is immaterial.

Elliotson v. Feetham, 2 Bing. N. C. 184; *Northwestern Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 739.

Robinson, J., delivered the opinion of the court:

This is an action for a nuisance, and the questions to be considered are questions of more than ordinary interest and importance. At the same time, it does not seem to us that there can be any great difficulty as to the principles by which they are governed. The plaintiff is the owner of five dwelling-houses on Eighth Avenue in Canton, one of the suburbs of Baltimore City. The corner house is occupied and kept by the plaintiff as a kind of hotel or public house, and the other houses are occupied by tenants. On the adjoining lot is a large fertilizer factory, owned and operated by the defendant, from which the plaintiff alleges noxious gases escape which not only cause great physical discomfort to himself and his tenants, but also cause material injury to the property itself. The evidence on the part of the plaintiff shows, that this factory is used by the defendant for the manufacture of sulphuric acid and commercial fertilizers; that noxious gases escape therefrom and are driven by the wind upon the premises of the plaintiff and of his tenants; that they are so offensive and noxious as to affect the health of the plaintiff's family, and at times to oblige them to leave the table and even to abandon the house. It further shows that these gases injure materially his property, discolor and injure clothing hung out to dry, stain the glass in the windows and even corrode the tin spouting on the houses.

The evidence on the part of the defendant is in direct conflict with the evidence offered by the plaintiff; but, still assuming the facts testified to by plaintiff's witnesses to be true, and this was a question for the jury, an actionable injury was done to the plaintiff for which he was entitled to recover. No principle is better settled than where a trade or business is carried on in such a manner as to interfere with reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner for which an action will lie; and this, too, without regard to the locality where such business is carried on; and this, too, although the business may be lawful business and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business. *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 147; *Pinckney v. Evans*, 4 L. T. N. S. 741; *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 160; *Fletcher v. Rylands*, L. R. 3 H. L. Cas. 330. As far back as *Poynton v. Gill*, 2 Rolle, Abr. 140, an action, it was held, "would lie for melting lead so near the plaintiff's
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house as to cause actual injury to his property, even though the business was a lawful one, and one needful to the public," for the defendant, says the court, "ought to carry on his business in waste places and great commons remote from inclosures, so that no damage may happen to the owner of adjoining property." And the doctrine thus laid down has been, to this day, the doctrine of every case in which a similar question has arisen.

We cannot agree with the appellant that the court ought to have directed the jury to find whether the place where this factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a reasonable use; and if they should so find the verdict must be for the defendant. It may be convenient to the defendant, and it may be convenient to the public, but in the eye of the law no place can be convenient for the carrying on of a business which is a nuisance and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property.

The only case which gives countenance to such a doctrine is *Hole v. Barlow*, 4 C. B. N. S. 384, decided in 1858, in which it was held that if the place where the bricks were burnt was a proper and convenient place for the purpose, the defendant was entitled to a verdict, notwithstanding the burning of the bricks may have interfered with the physical comfort of the plaintiff. And it was upon the authority of this case that in *Bamford v. Turnley*, 3 Best & S. 61, where an action was brought for a nuisance arising from the burning of bricks on the defendant's land, near to the plaintiff's house, Cockburn, *Chief Justice*, directed the jury that if they thought that the spot was a convenient and proper one, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict, although the burning of bricks was an interference with the plaintiff's comfort.

This ruling was, however, on appeal to the Exchequer Chamber, reversed, and in the opinion delivered by *Mr. Justice Williams* and concurred in by *Erie, Ch. J.*, *Keating* and *Shields, B.*, after referring to a passage in *Comyn's Digest*, on which the decision in *Hole v. Barlow* was founded, he says:

"In *Hole v. Barlow*, however, the court appear to have read the passage containing a doctrine that a place may be proper and convenient for the carrying on of a trade notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbor. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole v. Barlow*, and, moreover, the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar, during the argument, and more especially with the case of *Walter v. Selfe*, 4 De G. & S. 315. And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship. . . . If it be good law that the fitness of the locality prevents the carrying on of an offensive trade

from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is that, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot be asked whether the causing of the nuisance was a reasonable use of the land."

The question was again fully considered in *Tipping v. St. Helen's Smelting Co.*, 6 Best & S. 608, where an action was brought for a nuisance, caused by noxious vapors proceeding from the smelting works of the defendant, and, the verdict being for plaintiff, a motion was made for a new trial, on the ground of misdirection by Mellor, J., before whom the case was tried at the Liverpool Summer Assizes in 1868. In overruling the motion Cockburn, Ch. J., said: "The direction of my brother Mellor cannot be found fault with, if looked at by the light of the majority of the judges of the Exchequer Chamber, in *Bamford v. Turnley*. That decision overruled the previous one of the Common Pleas in *Hole v. Barlow*, and establishes that where a cause of nuisance is sought to be made out, it is not a right question to put to the jury, to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing it in that place was a reasonable use by the defendant of his own land."

An appeal was then taken to the House of Lords, and in his argument Sir Roundell Palmer contended that the learned judge who tried the case had misdirected the jury, inasmuch as sensible discomfort from carrying on a necessary trade in an ordinary and proper manner and in a convenient and suitable locality was not an actionable injury.

The Lord Chancellor: "It is said that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction of the value of the plaintiff's property. I apprehend that that is not the meaning of the word 'suitable' or the meaning of the word 'convenient' when the law is laid down on the subject. The word 'suitable' unquestionably cannot carry with it this consequence—that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course I except the cases where any prescriptive right has been acquired by a lengthened use of the place."

Lord Cranworth said: "I have always understood that the proper question was, and I cannot do better than adopt the language of Mr. Justice Mellor: 'It must be plain that a person using a lime-kiln or other works, which emit noxious vapors, may not do an actionable injury to another, and that that place where it is carried on so that it does occasion an actionable injury to another is not in the meaning of the law a convenient place.'"

So we take the law to be well settled that in actions of this kind the question whether the place where the trade or business is carried on

is a proper and convenient place for the purpose, or whether the use by the defendant of his own land is, under the circumstances, a reasonable use, are questions which ought not to be submitted to the finding of the jury.

We fully agree that in actions of this kind the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; that in determining the question of nuisance in such cases the locality and all the surrounding circumstances should be taken into consideration; and that where expensive works have been erected and carried on, which are useful and needful to the public, persons must not stand on extreme rights and bring actions in respect of every trifling annoyance; otherwise business could not be carried on in such places. But still, if the result of the trade or business thus carried on is such as to interfere with the physical comfort by another of his property, or such as to occasion substantial injury to the property itself, there is wrong to the neighboring owner, for which an action will lie. *Tipping v. St. Helen's Smelting Co.* 11 H. L. Cas. 643.

But then it is said there was a fertilizer factory on the lot on which the appellant's works are now erected, and that this factory was used for the manufacture of sulphuric acid and fertilizers several years before the plaintiff built his house, and that the plaintiff has no right to complain because he "came to the nuisance." But this constitutes no defense in this action. If the appellant had acquired a prescriptive right, that is to say, a user of the place for twenty years, that would present a different question. But no such right is claimed in this case. And that being so, the appellant had no right to erect works which would be a nuisance to the adjoining land owned by the plaintiff, and thus measurably control the uses to which the plaintiff's land may in the future be subject. It could not, by the use of its own land, deprive the plaintiff of the lawful use of his property.

The question of coming to a nuisance was fully considered in *Bliss v. Hall*, 4 Bing. N. C. 183, where, in an action for a nuisance arising from carrying on the business of making candles, the defendant pleaded that he had carried on his business at the same place, in the same manner and to the same extent three years before the plaintiff became possessed of his messuage. In sustaining the demurrer to this plea Tindal, Chief Justice, says: "That is no answer to the complaint in the declaration; for the plaintiff came to the house he now occupies with all the rights which the common law affords, and one of them is a right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business the plaintiff is entitled to judgment."

Park, J., in *Elliotson v. Feetham*, 2 Bing. N. C. 184, said that the defendant should at least have alleged a holding of twenty years' duration; here he does not go beyond three.

And in *Crump v. Lampert*, L. R. 8 Eq. Cas. 407, "Whether one," says Lord Romilly, "comes to a nuisance or the nuisance comes to him, he still retains his right to have the air that passes over his land pure and unpolluted."

And so in *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch. App. 66, Vice-Chancellor Pagewood

held that the fact that the plaintiff had come to the nuisance did not disentitle him to relief in equity.

It does not seem to us, therefore, that the defendant has any reason to complain of the several instructions granted by the court at the request of the plaintiff, or to the refusal of its own prayers. If there was any error on the part of the court it was perhaps in granting the defendant's fifth prayer, to which, however, we take it for granted the defendant Company makes no objection. Now as to the evidence offered in the first exception, it does not seem to us that the fact that \$500,000 had been invested in other fertilizer factories in the neighborhood could have any bearing upon the issues before the jury. The defendant had already proved that there was a number of fertilizer factories in the neighborhood, and had offered evidence tending to prove that the nuisance complained of was caused by these factories. Such evidence as this was admissible and proper evidence. But the fact that \$500,000 had been invested in other works in the neigh-

borhood could not in any manner affect the plaintiff's right to recover.

The only effect of such evidence, it seems to us, would be to show what loss or injury the owners of these factories might sustain if the business carried on by them should be found to be a nuisance. But that was not a question for the consideration of the jury. The law in cases of this kind will not undertake to balance the conveniences or estimate the difference between the injury sustained by the plaintiff and the loss that may result to the defendant from having its trade and business as now carried on being found to be a nuisance. No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to the protection of the law, let the consequences be what they may.

Judgment affirmed.

OHIO SUPREME COURT.

Arthur L. CLARK *et al.*, *Plffs. in Err.*,
v.

Joseph F. LINDSEY.

(47 Ohio St. —.)

***1. Where a person seised of lands as tenant in dower neglects to pay the taxes thereon so long that they are sold for the payment of taxes, if one of several tenants in common of the remainder in fee of such lands purchase the lands at the tax sale, the purchase will be held to inure to the benefit of all the co-tenants in remainder.**

*Head notes by the COURT.

NOTE.—Tenant in common cannot assert adverse claim by payment of taxes.

The principle of equity, that a tenant in common joint tenant or parcener being in possession, cannot purchase and assert an adverse claim to the joint claim, grows out of the privity between them, and inculcates good faith. *Sneed v. Atherton*, 6 Dana, 276, 33 Am. Dec. 72; *Wunderlich v. Reis*, 81 Hun, 8; *Venable v. Beauchamp*, 8 Dana, 324; *Holridge v. Gillespie*, 2 Johns. Ch. 30, 1 N. Y. Ch. L. ed. 364.

A tenant in common, by the payment of taxes on the land to save her interest from forfeiture, without any sale of the land for taxes, acquires no right to a lien on the land for reimbursement of any part of the amount so paid, especially where there was no reason why, upon her application, she could not have had her interest taxed separately. *Preston v. Wright*, 81 Me. 306.

Right to reimbursement by contribution among co-tenants.

Where land is owned by tenants in common a purchase by one gives him no other or greater interest than he held before, except that he has a claim upon the others for reimbursement according to their respective shares. *Baker v. Whiting*, 8 Sumn. 475; *Downer v. Smith*, 38 Vt. 464; *Willard v. Strong*, 9 L. R. A.

***2. The tenant in common so purchasing will be entitled to contribution from his co-tenants, toward the cost and expense incurred in the purchase of the tax title.**

(June 27, 1890.)

ERROR to the Circuit Court for Marion County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendants in an action brought to reach the alleged interest of a judgment debtor in certain real estate. *Affirmed.*

Statement by **Dickman, J.:**

Joseph F. Lindsey, the defendant in error,

14 Vt. 532; *Lloyd v. Lynch*, 23 Pa. 419; *Maul v. Rider*, 51 Pa. 377; *Davis v. King*, 37 Pa. 251; *Harrison v. Harrison*, 56 Mich. 174; *Allen v. Poole*, 54 Miss. 822; *Platt v. St. Clair*, 6 Ohio, 227; *Busch v. Huston*, 73 Ill. 349; *Bracken v. Cooper*, 80 Ill. 221; *Choteau v. Jones*, 11 Ill. 322; *Brown v. Hogle*, 30 Ill. 119; *Chickering v. Faile*, 38 Ill. 342; *Weare v. Van Meter*, 43 Iowa, 128; *Fallon v. Chidester*, 46 Iowa, 588; *Sheil v. Walker*, 54 Iowa, 836; *Conn v. Conn*, 58 Iowa, 747; *Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Mich. 292; *Cooley v. Waterman*, 16 Mich. 366; *Dubois v. Campan*, 24 Mich. 360; *Phelan v. Boylan*, 25 Wis. 679; *State v. Williston*, 20 Wis. 230; *Black, Tax Titles*, 175, 176.

A tenant in common, who pays off a lien against the joint property, is entitled to contribution from his co-tenants; and in order to enforce such contribution he has an equitable lien against their interests, of the same character as that which he has removed. *Moon v. Jennings*, 119 Ind. 386.

One who redeems property from a tax sale, in which property he afterwards becomes a tenant in common, is entitled to have the lien kept alive as against his co-tenant, until the latter shall have paid his share of the taxes. *Hurley v. Hurley*, 2 L. R. A. 172, and *note*, 148 Mass. 444; *Watkins v. Eaton*, 30 Me. 529. See *Brown v. Pool*, *post*, 767.

commenced the original action in the Court of Common Pleas of Marion County, against J. W. Clark, Arthur L. Clark, C. F. Seffner and Susan E. Seffner, his wife, alleging that on the 20th day of June, 1884, he caused a transcript of judgment which he had recovered against said J. W. Clark, before a justice of the peace, to be filed in the office of the clerk of the Court of Common Pleas of Marion County, and thereafter caused an execution to be issued upon such judgment, and a levy to be made on the undivided interest of the defendant, J. W. Clark, in the following described real estate, situate in the County of Marion, and State of Ohio, to wit: lots Nos. 89 and 100 in the Village of Marion. That said judgment became a lien upon the real estate above described, from the 20th day of June, 1884, the day of the filing of the transcript; and that there was due the plaintiff, at the filing of the petition, on said judgment, from J. W. Clark, the sum of \$514.52, with interest and costs; that Arthur L. Clark, C. F. Seffner and Susan E. Seffner claimed some interest in said premises, and the plaintiff therefore prayed that they be required to set forth what claim, if any, they had in and to the premises; that such claim be declared subsequent to that of the plaintiff; that the interest of J. W. Clark in the premises be sold, and out of the proceeds the plaintiff be paid the amount of his judgment, with interest and costs, and all proper relief.

J. W. Clark was in default for answer and demurrer. Arthur L. Clark, C. F. Seffner and Susan E. Seffner filed a joint answer, in which it was averred that, before said levy, lot number 89 was duly sold for nonpayment of taxes, to Arthur L. Clark and C. F. Seffner. The plaintiff replied, alleging that when lot number 89 became delinquent for taxes, and was purchased by Arthur L. Clark and C. F. Seffner, the interest therein of J. W. Clark was held by the purchasers in trust for J. W. Clark, and subject to his debts. The death of C. F. Seffner was thereafter suggested, and it was ordered that Susan E. Seffner, as the executrix of his last will and testament, be made a party defendant. The cause afterwards came on to be heard; the court found for the defendants, and the plaintiff's petition was dismissed at his costs. The cause was appealed by the plaintiff to the circuit court, and on the 18th day of September, at the September Term, 1887, the following entry was made on the journal of the circuit court, to wit:

"This day this cause came on to be heard upon the petition of the plaintiff, the joint answer of Arthur L. Clark, C. F. Seffner and Susan E. Seffner, defendants, and the reply of plaintiff thereto, and the evidence, and was argued by counsel; on consideration whereof, and the court being duly advised in the premises, and on request of the defendants, Arthur L. Clark, Susan E. Seffner, executrix of the last will of C. F. Seffner, deceased, and Susan E. Seffner, that its conclusions of fact be separately stated from its conclusions of law, find and state as its conclusions of fact: that said J. W. Clark, being in default for answer and demurrer, the petition as to him is taken as confessed to be true; that the plaintiff obtained judgment against the defendant J. W. Clark, as alleged in his petition, on June 11, 1878, and

that the same remains in full force, unreversed and unsatisfied; that on the 12th day of February, 1885, the plaintiff obtained a levy of an execution under said judgment on the following described real estate, in Marion County, Ohio, to wit: lots numbers eighty-nine (89) and one hundred (100), in the Village of Marion; that the defendant, J. W. Clark, did not then, nor at any time since the rendition of said judgment, have any interest in said lot number one hundred (100); that said lot number eighty-nine (89) was set off and assigned in partition to Isabel Clark, as and for her dower in the lands of John G. Clark, deceased, the father of said J. W. Clark, Arthur L. Clark and Susan E. Seffner, subject to the dower estate of said Isabel Clark; that said Isabel Clark so held and occupied the same until she suffered the same to go delinquent for taxes for the years 1875 and 1876; that said lot eighty-nine (89) was duly sold for the taxes for the years 1875 and 1876, by the auditor of Marion County, Ohio, to the defendants Arthur L. Clark and C. F. Seffner, the husband of Susan E. Seffner; that on the 24th day of April, 1882, the said auditor executed and delivered to the said Arthur L. Clark and C. F. Seffner a deed in fee simple of said lot, which was left for record April 26, 1882, and recorded in volume 24, page 28, of the records of deeds of Marion County, Ohio; that said J. W. Clark and Isabel Clark knew of said sale for taxes and the execution of said deed, and have not redeemed or offered to redeem said premises, nor have the said Arthur L. Clark, or said C. F. Seffner, demanded such redemption; that said widow, Isabel Clark, died June 18, 1884; that said defendant C. F. Seffner was the husband of said Susan E. Seffner, and said J. W. Clark, Arthur L. Clark and Susan E. Seffner were the only heirs-at-law of said John G. Clark, deceased. And as conclusions of law upon the above facts the court find that said Arthur L. Clark and C. F. Seffner hold said auditor's deed in trust for said J. W. Clark, Arthur L. Clark and Susan E. Seffner, and that said J. W. Clark is the owner of one-third part of said lot number eighty-nine (89), subject to an account for taxes paid by said Arthur L. Clark and C. F. Seffner, and for repairs, if any were made by them, and also entitled to an account of the rents thereof; that said plaintiff has a lien on the interest of said J. W. Clark, by virtue of the judgment aforesaid; that there is now due thereon, on the 20th day of January, 1887, for principal and interest, the sum of five hundred and forty dollars and ninety-nine cents (\$540.99). It is therefore ordered that, unless said defendant J. W. Clark pay, or cause to be paid, the said sum, with interest thereon from this date, and the costs herein, that the interest of the said J. W. Clark in said premises, viz.: the one undivided third part of said lot number eighty-nine (89), in the Village of Marion, Marion County, Ohio, be appraised, advertised and sold as upon execution, and that an order issue from this court to the sheriff of Marion County, Ohio, commanding him to so appraise, advertise and sell the same, and to bring the proceeds into this court for further order. And it is further ordered that the defendants Arthur L. Clark, Susan E. Seffner, executrix of the last will of C. F. Seffner, deceased, and Susan E. Seffner have leave

ises, and that the plaintiff have leave to reply thereto."

To reverse the decree of the circuit court, this proceeding in error is prosecuted by Arthur L. Clark and Susan E. Seffner, for herself and as executrix of the last will and testament of C. F. Seffner, deceased.

Mr. W. Z. Davis for plaintiffs in error.

Messrs. McNeal & Wolford for defendant in error.

Dickman, J., delivered the opinion of the court:

It is provided by section 2852 of the Revised Statutes that, if any person who shall be seised of lands as tenant in dower shall neglect to pay the taxes thereon, so long that such lands shall be sold for the payment of taxes, and shall not within one year after such sale redeem the same, according to law, such person shall forfeit to the person or persons next entitled to such lands in remainder or reversion all the estate which he or she, so neglecting, may have in such lands; and the remainderman or reversioner may redeem such lands in the same manner that other lands may be redeemed after having been sold for taxes.

Lot number 89 was set off and assigned, in partition, to Isabel Clark for her dower in the lands of her deceased husband, John G. Clark, and subject to her dower estate; J. W. Clark, Arthur L. Clark and Susan E. Seffner, children and only heirs-at-law of John G. Clark, had a vested remainder in fee in the land, as tenants in common. When the dowress suffered the land to become delinquent for taxes, and to be sold, and failed to redeem the same within one year after sale, she forfeited her estate to those entitled in remainder. From such forfeiture no benefit could have accrued to the remaindermen, if the land had been purchased by strangers, and the remaindermen had neglected to redeem within the statutory period of two years. But the purchasers at the tax sale were Arthur L. Clark, one of the tenants in common, and C. F. Seffner, the husband of one of the tenants in common, and, under the deed of conveyance from the auditor, the purchasers held the premises disincumbered from the dower interest.

The auditor's deed under the Statute vests in the grantee, his heirs and assigns, "a good and valid title, both in law and equity;" but the question arises, whether, by virtue of the tax sale and auditor's deed, J. W. Clark was divested of all interest in the land, upon his failure to redeem his separate interest from his co-tenants, within two years. In our view, the relations existing between tenants in common—whether in possession of the property or entitled to an estate in remainder—is of a nature to preclude such a result. Just dealing and the confidence necessarily reposed in each other would suggest that owners in common of real estate should consult for the mutual benefit. While one should do no act intentionally to the detriment of the other, good faith should withhold him from all action, in reference to the common property, that would work exclusively to his own advantage.

The Supreme Court of Tennessee, in *Tisdale* 9 L. R. A.

mon, correctly says: "Tenants in common by descent are placed in a confidential relation to each other, by operation of law, as to joint property, and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third party. Being associated in interest as tenants in common by descent, an implied obligation exists to sustain the common interest. The reciprocal obligation will be vindicated and enforced in a court of equity, as a trust. These relations of trust and confidence bind all to put forth their best exertions, and to embrace every opportunity to protect and secure the common interest, and forbid the assumption of a hostile attitude by either. Nor is that trust and confidence that should exist between owners in common to be diminished, because they happen not to be in present possession of the estate in common, but are tenants in remainder, awaiting the termination of the precedent particular estate."

From the facts as disclosed by the record, we think that Arthur L. Clark and C. F. Seffner, in making the purchase at the tax sale, stood in a fiduciary capacity, and held the auditor's deed in trust for J. W. Clark, Arthur L. Clark and Susan E. Seffner. It is said, however, that so far as C. F. Seffner was concerned, it was a purchase by a stranger, and not by a tenant in common. But though there may be a purchase at a tax sale by one not then a co-tenant, yet, if he be the agent of one of the co-tenants, or otherwise occupies a confidential relation to one of them, his purchase will generally be allowed no further effect than if made by his principal. This rule, it is said by Mr. Freeman, in his treatise on Co-tenancy, § 158, has probably been enforced to prevent co-tenants from eluding the force of the prohibition against their acquisition of and enforcement of a hostile title, by colluding with their agents and others occupying confidential relations with them. And in *Lee v. Fox*, 6 Dana, 172, it was decided that the husband of a co-heiress, who had purchased an outstanding incumbrance on the lands of the heirs, should be held to have purchased for the benefit of all the tenants, upon condition only that they should contribute their respective proportion of the consideration actually paid for the incumbrance.

Recognizing the rule that prohibits one tenant in common from buying in an outstanding adverse title for his exclusive benefit, and which holds it to inure to the benefit of his co-tenants, at their option, the Supreme Court of the United States, in *Rothwell v. Dewees*, 67 U. S. 2 Black, 618 [17 L. ed. 809], applied the rule to the case of a purchase of an outstanding interest by a husband of one of the tenants in common, who held the property as heirs of a common ancestor; and it was there recognized and considered that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated.

It is manifest that if a tenant in common, in whom a co-tenant and joint heir reposes con-

aidence, could, by allowing the common property to become delinquent for taxes, and then purchasing the same at tax sale, become the absolute owner as against his co-tenants, sound policy would sanction the rejection of such a rule. By holding the purchaser to be a trustee of the title for the benefit of all the owners in common, the co-tenant might be protected in his rights. But that protection would be taken away if the tenant in common, after suffering the property to be sold for the nonpayment of taxes, could, by buying it in at tax sale in the name of the husband, escape the obligations of a trustee, and absorb the interest of the co-tenant.

It is stated as a well-settled principle, by the text-writers, and in numerous decisions, that a tenant in common will not be permitted to assert against his co-tenant a title acquired by him at a sale for taxes imposed on the joint property. The purchase in such case will be held to inure to the benefit of the joint owners. A tenant in common holds a several interest in the lands, which is, however, so far identical with his co-tenants' interest that, in all matters affecting the estate, he will be regarded as acting for them as well as himself. He cannot, therefore, as the owner of an undivided portion of the realty, acquire a title at a tax sale to defeat the title of the owners of other portions, and whatever interest he acquires will be simply a trust for all the co-tenants. *Weare v. Van Meter*, 42 Iowa, 128; *Fallon v. Chidester*, 46 Iowa, 588; *Page v. Webster*, 8 Mich. 263; *Venable v. Beauchamp*, 8 Dana, 321; *Choate v. Jones*, 11 Ill. 300; *Allen v. Poole*, 54 Miss. 328; *Davis v. King*, 87 Pa. 261.

In *Van Horns v. Fonda*, 5 Johns. Ch. 338, 1 N. Y. Ch. L. ed. 1118, it was held that, if it is admitted that one tenant in common may, in a particular case, purchase in an outstanding title, for his own benefit; yet, where two devisees are in possession of land, under an imperfect title, devised to them by their common ancestor, one of them cannot buy up an outstanding or an adverse title, to disseise or expel his co-tenant, but such purchase will inure to their common benefit subject to an equal contribution to the expense. In the case at bar, it is said that the dowress, and not the tenants in common, were in actual possession of the land at the time of the purchase at tax sale. But, at common law, the tenant for life and remainderman in fee are deemed so closely connected in interest that, if in the first place an estate for life is created or carved out of the fee and given to one person, and the residue or remainder of it is given to another person, both these interests are in fact only one estate. 2 Bl. Com. chap. 11; 2 Cruise, Dig. title 16, chap. 1.

The lien of the State for taxes attached to the entire estate, and all the proceedings under the Statute for the sale of the land for nonpayment of taxes are *in rem*. They operate, if at all, upon the land itself, and not merely upon the title of the person in whose name it may have been listed for taxation. *Jones v. Devore*, 8 Ohio St. 430.

Upon the sale of any land for delinquent taxes, the lien which the State has upon the land for taxes then due is transferred to the purchaser at such sale. Rev. Stat. § 2880. But if the purchaser is one of several tenants in

common by descent, he should not, we think, stand in any better position in relation to his co-tenants, than one of two devisees of a common ancestor, in possession under an imperfect title, who buys up an outstanding title to expel his co-tenant. The lien of the State for taxes is upon the common property; there is a community of interest in the preservation of the title, and the purchase should be considered as made for the common protection. Certainly the inequitable rule should not be applied, that, if the co-tenant does not redeem his separate estate within two years after the sale, all his interest in the estate shall pass to the purchasing tenant in common as absolute owner.

Where the tenant of the particular estate is in possession, and one tenant in common of the remainder in fee purchases the land when sold for taxes at delinquent sale, the deed of conveyance from the auditor, which the Statute provides shall vest in the grantee "a good and valid title," will not, in our judgment, be void, but will operate for the benefit of all the owners in common. But, it is laid down in authoritative decisions, as a general principle, that one who ought to pay the taxes on property cannot, by omitting to do so, purchase at a sale of the property for the nonpayment of taxes, and thereby strengthen his title; that the deed to him will convey no title; and that the payment of the money will be regarded as a payment of the tax, and not as a purchase of the property. *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Blake v. Howe*, 1 Aik. 306, 15 Am. Dec. 684, note; *Johnston v. Smith*, 70 Ala. 118.

In *Douglas v. Dangersfield*, 10 Ohio, 152, it was held that one in possession of lands claiming title, and in whose name it is listed for taxation, acquires no additional interest by suffering the land to be sold for taxes, and purchasing the same himself. Hitchcock, J., in delivering the opinion of the court, said: "The sale was made to the individual in whose name the land was taxed, who had it in possession, and who claimed to be the owner—to the individual who, under the circumstances was bound to pay the tax, and who did in fact pay it. . . . In our view, the complainant acquired no additional right by this purchase, and must be held to be in the same situation that he would have been had he paid the taxes before the sale." It is contended, however, for the plaintiffs in error, that, in the case at bar the remaindermen were under no obligation to pay the tax; that the tax was not assessed against them; and that they did not therefore stand in the position of persons who, being bound to pay the tax, neglect to do so, and buy in the property at delinquent tax sale. And yet, as said by the court, in *Middletown Sav. Bank v. Bacharach*, *supra*: "In those cases in which there is a direct legal obligation there can be no question about the duty to pay the taxes. But other parties may acquire an interest in real estate who are not directly responsible to the public for the taxes, and who enter into no contract in respect to them, and yet may be so situated that it is their duty to pay the taxes,—for instance, a purchaser of the property or of the equity of redemption subject to a tax lien; he may be compelled to pay the taxes in order to protect his own title. In such cases it is for his interest to do so. Necessity and interest combine to make it, in a

broad sense, his duty to do so. Such a party ordinarily cannot be a purchaser of a tax title." It was accordingly held that Bacharach was not capable of purchasing at a tax sale, and that the deeds to him conveyed no title.

And in *Christy v. Fisher*, 58 Cal. 256, it was declared to be the well-settled doctrine that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes; and that if such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase will be deemed one made of paying the taxes.

By virtue of section 2854 of the Revised Statutes, any part owner who shall pay the tax on the whole tract or tracts of which he is part owner shall have a lien on the shares or parts of the other part owners for the tax paid in respect of their shares or parts. And upon principles of equity, one tenant in common so making payment might compel a just contri-

bution toward the payment of the amount expended. The circuit court, therefore, did not err in decreeing that J. W. Clark was the owner of the one-third part of lot number 89, subject to an account for taxes paid by Arthur L. Clark and C. F. Seffner, and for repairs that may have been made by them, but was entitled to an account of the rents of the premises.

The original petition prays that priorities may be determined, and the property sold, and the plaintiff paid the amount of his judgment out of the proceeds, with a prayer for general relief. Whether the judgment debtor, J. W. Clark, had a legal interest in the land that could be sold on execution to satisfy the judgment, or only an equitable interest that was not the subject of seizure or levy under an execution at law, the exception taken in argument by the plaintiff in error, at this stage of the proceedings, to the form of the original action, should not avail to prevent such interest from being applied in satisfaction of the claim of the judgment creditor, and the judgment of the Circuit Court should in our opinion be affirmed.

ARKANSAS SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,

Appt.,

v.

C. T. SHORT.

(....Ark....)

1. A stipulation in a printed form upon which telegraph messages are required to be written before being accepted by the company for transmission, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for the non-delivery of unrepeatd messages, beyond the amount received for sending them, is contrary to public policy and void so far as it seeks to relieve the company from liability for the negligence of itself or its servants.
2. Failure by a telegraph company to transmit and deliver a message in the form or language in which it was received is prima facie evidence of negligence, for which the company is liable.
3. The measure of damages for failure to deliver as written a telegraph message notifying a witness of the day the case is set for trial, and delivering one in place thereof, naming a day so much earlier that upon arriving at the place of trial he returns home to await the arrival of the true date, is his expenses in going to and returning from the place of trial and the value of the time lost. Losses resulting from the stoppage of his business, such as salaries of men, cost of keeping teams and the value of their services, and anticipated profits, cannot be recovered unless the company was notified

that such losses would follow a failure to correctly deliver the message.

(October 18, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Hempstead County in favor of plaintiff in an action brought to recover damages for defendant's failure to deliver as written a telegraph message received by it for transmission. *Affirmed upon condition.*

The facts are fully stated in the opinion.

Mr. George H. Fearons, for appellant:

The stipulation in the telegraph blank against liability for errors in unrepeatd messages is valid. A telegraph company is not a common carrier, and therefore the peculiar liability of a common carrier does not exist in an action involving the transmission of a dispatch.

Southern Exp. Co. v. Caldwell, 88 U. S. 21 Wall. 264, 266, 23 L. ed. 556, 557; *Breece v. United States Tel. Co.* 48 N. Y. 182; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. American Tel. Co.* 18 Allen, 226; *Leonard v. New York, A. & B. E. M. Tel. Co.* 41 N. Y. 544; *Camp v. Western U. Tel. Co.* 1 Met. (Ky.) 164; *De Rutte v. New York, A. & B. E. M. Tel. Co.* 80 How. Pr. 403; *Birney v. New York & W. P. Tel. Co.* 18 Md. 341; *Passmore v. Western U. Tel. Co.* 78 Pa. 238; *Aiken v. Telegraph Co.* 5 S. C. 858; *Grinnell v. Western U. Tel. Co.* 113 Mass. 299; *Hart v. Western U. Tel. Co.* 66 Cal. 579; *Shields v. Washington Tel. Co.* Allen, Tel. Cas. 5.

NOTE.—Action for penalty. *Western U. Tel. Co. v. Taylor* (Ga.) 8 L. R. A. 189. See note to *Western U. Tel. Co. v. Yopet* (Ind.) 8 L. R. A. 224.

Liability for neglect to deliver message. See note to *Reese v. Western U. Tel. Co.* (Ind.) 7 L. R. A. 583. See *Western U. Tel. Co. v. Adams*, 6 L. R. A. 844, 75 Tex. 581; *Alexander v. Western U. Tel. Co.* 8 L. R. A. 71, 56 Miss. 161; and note to *Western U. Tel. Co. v. Brown* (Tex.) 2 L. R. A. 766.

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Messages. See notes to *Postal Tel. Cable Co. v. Lathrop* (Ill.) 7 L. R. A. 474; *Milliken v. Western U. Tel. Co.* (N. Y.) 1 L. R. A. 261.

Liability for mistake in message. See *Western U. Tel. Co. v. Stevenson*, 3 L. R. A. 515, 128 Pa. 442; note to *Gillis v. Western U. Tel. Co.* (Vt.) 4 L. R. A. 611.

See also 11 L. R. A. 102, 664; 17 L. R. A. 648; 33 L. R. A. 404; 34 L. R. A.

Telegraph companies can protect themselves against liability for mistakes not occasioned by gross negligence or willful misconduct.

Schwartz v. Atlantic & P. Teleg. Co. 18 Hun, 158; *Western U. Teleg. Co. v. Graham*, 1 Colo. 280, and cases above cited.

The message was written on a telegraph blank, and the parties are held to a notice and knowledge of the conditions.

Western U. Teleg. Co. v. Carew, 15 Mich. 536; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 807; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62; *Wolf v. Western U. Teleg. Co.* 62 Pa. 88; *Western U. Teleg. Co. v. Buchanan*, 35 Ind. 429; *United States Teleg. Co. v. Gilderstone*, 29 Md. 232; *Western U. Teleg. Co. v. Edsall*, 68 Tex. 668.

The fact that a telegraph company has not promptly and correctly delivered a dispatch which has been entrusted to it does not by itself support a conclusion of negligence on the part of the company; but the plaintiff must also adduce proof in support of the conclusion.

Western U. Teleg. Co. v. Carew, 15 Mich. 536.

The measure of damages allowed in this case was erroneous.

Hadley v. Baxendale, 9 Exch. 341, 354; *Wood's Mayne*, Dam. § 14; *Griffin v. Colver*, 16 N. Y. 489; *Miller v. Mariner's Church*, 7 Ma. 51; *Squire v. Western U. Teleg. Co.* 98 Mass. 232; *Leonard v. New York, A. & B. E. M. Teleg. Co.* 41 N. Y. 544; *Western U. Teleg. Co. v. Graham*, 1 Colo. 280; *Hamlin v. Great Northern R. Co.* 1 Hurst. & N. 408; *Lane v. Montreal Teleg. Co.* 7 U. C. C. P. 23; *Reliance Lumber Co. v. Western U. Teleg. Co.* 58 Tex. 894; *First Nat. Bank of Barnesville v. Western U. Teleg. Co.* 80 Ohio St. 555; *Berry v. Dwinel*, 44 Me. 255.

Neither the plaintiff nor his agents gave the Company notice of the importance of the message, nor of the probable damage that would result from an error occurring in its transmission. The damages must therefore be limited to those resulting from the ordinary and obvious purpose of the contract between the defendant Company and Short's agents and correspondents.

Baldwin v. United States Teleg. Co. 45 N. Y. 744; *Mackay v. Western U. Teleg. Co.* 16 Nev. 222; *Behm v. Western U. Teleg. Co.* 8 Biss. 181.

Loss of profit cannot be recovered.

Cutting v. Grand Trunk R. Co. 18 Allen, 881; *Harvey v. Connecticut & P. R. R. Co.* 124 Mass. 421; *Weston v. Grand Trunk R. Co.* 54 Me. 876; *Lord v. Midland R. Co.* L. R. 2 C. P. 339; *Horne v. Midland R. Co.* L. R. 8 C. P. 181; *Cooper v. Young*, 23 Ga. 289; *Smith v. Western U. Teleg. Co.* 83 Ky. 104; *Hart v. Western U. Teleg. Co.* 66 Cal. 579; *Clement v. Western U. Teleg. Co.* 137 Mass. 458; *Allis v. McLean*, 49 Mich. 428.

Damages for loss of time are unrecoverable. *Squire v. Western U. Teleg. Co.* 98 Mass. 232. *Waite v. Gilbert*, 10 Cush. 177; *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 860; *Western U. Teleg. Co. v. Connelly* (Tex. Ct. App. 1894), 8 Tex. Law Rep. 164; *Jones v. Western U. Teleg. Co.* 18 Fed. Rep. 717.

Messrs. U. M. Rose, G. B. Rose and Smoote & McRae, also for appellant:

Where the evidence shows a mere error in transmission, with nothing to indicate that it

resulted from fraud, intentional wrong or gross negligence, no recovery can be had.

MacAndrew v. Electric Teleg. Co. 17 C. B. 8; *Redpath v. Western U. Teleg. Co.* 112 Mass. 73; *Clement v. Western U. Teleg. Co.* 187 Mass. 468; *Baldwin v. United States Teleg. Co.* 45 N. Y. 751; *United States Teleg. Co. v. Gilderstone*, 29 Md. 232; *Wann v. Western U. Teleg. Co.* 87 Mo. 472; *Sweatland v. Illinois & M. Teleg. Co.* 27 Iowa, 438, 1 Am. Rep. 285; *Akin v. Western U. Teleg. Co.* 18 Am. & Eng. Corp. Cas. 586.

Companies are bound to explain how mistakes like this complained of here occurred.

Finckney v. Western U. Teleg. Co. 19 S. C. 84; *Becker v. Western U. Teleg. Co.* 11 Neb. 87; *Lassiter v. Western U. Teleg. Co.* 89 N. C. 384; *Western U. Teleg. Co. v. Neill*, 57 Tex. 283; *White v. Western U. Teleg. Co.* 14 Fed. Rep. 710.

A person seeking damages at the hands of another in consequence of a breach of contract can only recover such as in contemplation of the parties are reasonably incident to the breach.

Hadley v. Baxendale, 9 Exch. 354; *St. Louis, I. M. & S. R. Co. v. Mumford*, 48 Ark. 509; *Baldwin v. United States Teleg. Co.* 54 Barb. 504; *United States Teleg. Co. v. Gilderstone*, 29 Md. 232; *Behm v. Western U. Teleg. Co.* 8 Biss. 181; *Shields v. Washington Teleg. Co.* Allen, Tel. Cas. 5; *Daniel v. Western U. Teleg. Co.* 61 Tex. 453; *Western U. Teleg. Co. v. McKinney* (Tex.) 8 Am. & Eng. Corp. Cas. 123; *First Nat. Bank of Barnesville v. Western U. Teleg. Co.* 80 Ohio St. 555; *Candee v. Western U. Teleg. Co.* 84 Wis. 471; *Mackay v. Western U. Teleg. Co.* 16 Nev. 223; *Landberger v. Magnetic Teleg. Co.* 82 Barb. 580; *Reliance Lumber Co. v. Western U. Teleg. Co.* 58 Tex. 895; *Lane v. Montreal Teleg. Co.* 7 U. C. C. P. 23, Allen, Tel. Cas. 61.

Mr. R. B. Williams for appellee.

Battle, J., delivered the opinion of the court:

On the 24th day of July, 1886, the Western Union Telegraph Company was engaged in the business of operating a telegraphic line between Bonham, Texas, and Hope, Arkansas. Prior to that day C. T. Short was recognized to appear as a witness in a case pending in court at Bonham, and known as Seaton's case. Desiring to be present when called as a witness, he wrote to Lusk & Thurman, attorneys, at Bonham, to notify him of the day upon which the case was set for trial. Not hearing from them by mail, he requested them to notify him by telegram. On the 24th of July, 1886, Lusk & Thurman delivered at Bonham, to the Western Union Telegraph Company, a message notifying him that the case was set for August 17. It was delivered written upon one of the printed forms of the Western Union Telegraph Company. A portion of the form and the message as it was written in the form are as follows:

"All messages taken by this Company are subject to the following terms: To guard against mistakes, or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the

mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delay, nor for the non delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case of delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages; and this Company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination. . . .

"Send the following message subject to the above terms, which are hereby agreed to:

"Bonham, Texas, July 24th, 1886.

"To C. T. Short,

"Nashville Ark.

"Seaton's case is set for Saturday, August the Seventeenth.

"Lusk & Thurman."

The telegram as delivered was intended to notify Short, and so specified upon its face as delivered to the Company at Bonham, that Seaton's case was set for the 17th of August. A telegram was transmitted and delivered to Short by the Company, at Nashville, Arkansas, upon a form the same as that upon which the message was written. The message received differed from the one delivered at Bonham in this: the one received by Short specified the 7th of August as the day upon which Seaton's case was set for trial and the one delivered to the Company specified the 17th of August. Short did not have the telegram repeated; but acting upon it as he received it went to Bonham, in obedience, as he supposed, to his recognizance, and reached there on the 6th of August, and found that Seaton's case had in fact been set for the 17th of August, as specified in the message delivered to the Company by Lusk & Thurman.

Short sued the Western Union Telegraph Company for \$422.35, the amount of the damages he alleged he suffered on account of the failure of the defendant to send the message as it was delivered to it. In the course of the trial of his action an agreed statement of the foregoing facts was read in evidence, and he testified, over the objections of the defendant, as follows: "It took me six days to go to Bonham and return. At this time (when the message was received) I was running a saw-mill near Nashville, Ark., and superintending the business of the mill. In going to Texas as a witness in response to said telegram as delivered to me, it became necessary for me to stop my mill operations, as there was no one else to manage it for me. The value of my time during the six days that I was absent was \$50. My railroad fare to Bonham, Texas, and return was \$18.35. My hotel bills on this trip were \$9. And during that time my teams for hauling stock and lumber were idle, and their services if I had been at home would have been worth \$75, and it cost me during that time \$25 to feed them, and I lost the services

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my mill was cutting upon an average 15,000 feet of lumber per day, at a cost of \$4.75 per thousand, which I was selling at \$8.50 per thousand, and had more orders and contracts to furnish lumber than I could fill, and by reason of the stoppage of my mill during the six days of my absence, as above stated, I lost the profits I would have made in cutting lumber during that time, which I estimate at the sum of \$200.

The result of the trial was a verdict and judgment in favor of the plaintiff against the defendant for the sum of \$422.35. The defendant saved exceptions and appealed.

The court below held that the stipulation in the printed form upon which the message in question was delivered, as to the liability of the appellant for mistakes or delays in the transmission or delivery or for the non-delivery of unrepeated messages, was contrary to public policy and void, and so instructed the jury. Was this error?

Common carriers of goods, and telegraph companies, are not subject to the same rule of responsibility. The common carrier is held to the strictest accountability for the safe transportation and delivery of property intrusted to him for safe carriage. In the absence of a contract or regulation limiting his liability he is treated as an insurer against all losses not caused by the act of God or the public enemy. On the other hand, in the absence of a contract or regulation fixing the liability of telegraph companies, they are not held responsible as insurers of absolute safety and accuracy in the transmission of messages as against all contingencies, but, holding themselves out to the public ready to transmit all messages delivered to them, they are bound to furnish suitable instruments and competent servants, and to use ordinary care and diligence in transmitting messages, and for any failure to use such care and diligence they are responsible to those sustaining loss or damage thereby. They are, however, not liable for the want of any skill or knowledge not reasonably attainable in the present state of telegraphy, "nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid." *Little Rock & F. S. Teleg. Co. v. Davis*, 41 Ark. 79; *Fowler v. Western U. Teleg. Co.* 80 Me. 881, 6 Am. St. Rep. 211; 2 Shearm. & Redf. Neg. 4th ed. §§ 587, 539, and cases cited.

Telegraph companies are public agents and exercise a public employment. They are chartered for public purposes, and are vested with the power of eminent domain, which they cannot lawfully exercise if they are not public agents. By virtue of their public employment it is their duty, for a reasonable consideration, to receive and transmit all messages over their wires with that integrity, skill and diligence which appertain to their business. "They are a commercial necessity. Business can be transacted without them only at a great disadvantage. In most places there is no choice as to lines, and where there is, it is so limited that a virtual monopoly exists. On the other hand, the occasion for sending a message often comes

suddenly, or with so short notice" as to compel the sending of the message by telegraph without delay or the sufferance of pecuniary loss by the failure to do so. Often the customer cannot afford to wait and must submit to the terms of the telegraph company. They do not stand upon an equality. The public is compelled to accept the services of the telegraph company and to rely upon its discharging its duty. In this and other respects the employments of the telegraph company and the common carrier of goods are strongly analogous. The businesses in which each is engaged are almost equally important to the public: vast interests are committed to each and good faith and diligence in the discharge of the duties of each are essential to the interest of the public. In both cases the demand of a sound public policy alike forbids any stipulations to relieve them of the duty to use the care and diligence resting upon them. To hold otherwise would be to give license and immunity to carelessness and negligence on the part of each, and would be disastrous to the interests of the public. *Smith v. Western U. Teleg. Co.* 8 Am. & Eng. Corp. Cas. 15; *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299; *Sweatland v. Illinois & M. Teleg. Co.* 27 Iowa, 433; *Harkness v. Western U. Teleg. Co.* 78 Iowa, 190; *Bartlett v. Western U. Teleg. Co.* 63 Me. 209; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 269 [22 L. ed. 558]; *Western U. Teleg. Co. v. Meredith*, 95 Ind. 98; *Western U. Teleg. Co. v. Tyler*, 74 Ill. 168; *Tyler v. Western U. Teleg. Co.* 60 Ill. 421; *Candee v. Western U. Teleg. Co.* 84 Wis. 471; *Thompson v. Western U. Teleg. Co.* 64 Wis. 581; Gray, *Communication by Telegraph*, §§ 46-52; 2 Redf. *Railways*, 6th ed. p. 842, § 12, p. 845, § 16, p. 846, § 17; 2 Shearm. & Redf. *Neg.* 4th ed. § 558; 8 Am. & Eng. Corp. Cas. p. 44, *note*, and cases cited; *White v. Western U. Teleg. Co.* 14 Fed. Rep. 720, and cases cited; 2 *Thomp. Neg.* p. 841, § 6, p. 843.

In this case the agreement between the sender of the message and the Company was, that the Company should not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of the message sent, unless it was repeated, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same. By this stipulation the Company clearly undertakes to relieve itself of all liability for negligence, the message not having been repeated, and is contrary to public policy and void. It is true that many authorities have held that such an agreement is "binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except for willful misconduct or gross negligence on the part of the company." One of the reasons assigned by these authorities for so holding is, "the risks and uncertainties attendant on the transmission of messages by reason of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such a service, and the very extensive liability to damages which may be incurred by a failure to deliver a message accurately." But it seems to us that this is not a sufficient reason why such stipulations should be sustained. The Telegraph Company is only bound to use ordinary care and diligence in

transmitting messages, and is not responsible for any errors or failures which such care and diligence are insufficient to guard against or avoid.

The same authorities further hold that the regulation or agreement that the message must be repeated in order to hold the company liable for negligence beyond the amount received for sending the message is a reasonable precaution taken by the company and binding on all who assent to it. They say: "The repetition of a message may be unimportant. A mistake in its transmission might occasion no serious damage or inconvenience to the parties interested. Whether it would do so or not would be within the knowledge of the sender or receiver, rather than within that of the operator who transmitted it. The latter could rarely be expected to know what would be the consequences of an error in its transmission. It is therefore a most reasonable requisition that it should be left to those who know the occasion and the subject of the message, and who can best judge of the consequences attendant upon any mistake in sending it, to determine whether it is of a nature to render a repetition necessary to ascertain its accuracy, instead of throwing this burden on the owner or conductor of the telegraph, who cannot be supposed to know the effect of a mistake, or the consequences in damages of a failure to transmit it correctly." This may be true. But we think the failure to repeat should not relieve the Company of the duty to use due care and diligence in transmitting the message without repetition, and of liability for losses incurred by reason of the failure to do so. The fact that the Company could not from an inspection of the message know its importance and foresee the consequences of a failure to send it correctly, or had no notice of the special circumstances under which it was sent, is a matter that ought to affect only the amount of damages for which the Company should be held liable.

The court below in effect held, and instructed the jury, that the failure to transmit and deliver the message in the form or language in which it was received was prima facie evidence of negligence, for which the Company is liable. It is urged that this was error. But we do not think so. If the failure was not the result of negligence the means of showing that fact is, almost invariably, in all cases, within the exclusive possession of the Company. To require the sender to prove the negligence, after showing the mistake, "would be to require in many cases an impossibility, not infrequently resulting in enabling the Company to evade a just liability." *Western U. Teleg. Co. v. Orall*, 38 Kan. 679, 5 Am. St. Rep. 795; *Bartlett v. Western U. Teleg. Co.* 62 Me. 209, 18 Am. Rep. 437; *Telegraph Co. v. Grinnold*, 37 Ohio St. 801, 41 Am. Rep. 500; *Candee v. Western U. Teleg. Co.* 84 Wis. 471; *Tyler v. Western U. Teleg. Co.* 60 Ill. 421; *Western U. Teleg. Co. v. Carew*, 15 Mich. 588; *Western U. Teleg. Co. v. Tyler*, 74 Ill. 168; *De La Grange v. Southwestern Teleg. Co.* 25 La. Ann. 388; *Western U. Teleg. Co. v. Fontaine*, 58 Ga. 433; *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 306; Shearm. & Redf. *Neg.* 4th ed. §§ 542, 556; 2 *Thomp. Neg.* p. 841, § 6, p. 843; Gray, *Communication by Telegraph*, §§ 53, 54.

The court below erred as to the measure of

damages in this case. The general rule is, damages recoverable for breach of contract "are only those which are incidental to, and directly caused by, the breach, and may reasonably be presumed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses."

In *Hadley v. Baxendale*, 9 Exch. 854, the rule is correctly laid down as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." *Leonard v. New York, A. & B. E. M. Tele. Co.* 41 N. Y. 544; *United States Tele. Co. v. Gildersleeve*, 29 Md. 232; *First Nat. Bank of Barnesville v. Western U. Tele. Co.* 80 Ohio St. 553, 27 Am. Rep. 485; *St. Louis, I. M. & S. R. Co. v. Mudford*, 48 Ark.

502; 8 Suth. Dam. 298-307, and cases cited; *Gray, Communication by Telegraph*, §§ 82-96, and authorities cited.

In this case the message indicated that a certain case pending in a court at Bonham was set for hearing or trial on a certain day. The fact that it was sent by telegraph was sufficient to indicate that it was important that Short should know at once the fact intended to be communicated by it. There was enough in it to indicate that Short would probably be induced thereby to go to Bonham to attend the trial of the *Seaton* case on the day specified therein. This was enough to entitle Short to recover damages. *Gray, Communication by Telegraph*, § 96, and authorities cited.

The damages recoverable, according to the evidence, were the reasonable expenses incurred by Short in going to Bonham and returning, and the value of his time lost in so doing.

There was no evidence that the Telegraph Company had notice of any special circumstances connected with the sending of the message. The message contained all the information the Company had. All the evidence about the stopping of a mill, idleness of teams, value of their services and cost of feeding them, the loss of the services of a valuable man and loss sustained by reason of the stoppage of the mill, was clearly inadmissible.

The loss sustained on account of expenses of trip to Bonham and return was \$22.85, and the value of the time lost in the making it was \$50, making his damage, recoverable according to the evidence \$72.85. The verdict should have been for that amount.

If appellee shall enter a remittitur here of \$350, the difference between \$422.85 and \$72.85, within the next fifteen days, according to the rules of this court, the judgment of the court below will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Roland E. BURBANK *et al.*

v.

BURBANK *et al.*

(.....Mass.....)

The attorney-general is the proper party to represent the interests of the public in a suit brought under Pub. Stat., chap. 142, §§ 14-17, by the heirs and next of kin of a deceased person, to establish and authorize a compromise between themselves and a certain town to which decedent bequeathed property in trust for purposes of a public charity; individual inhabitants of the town have no such interest in the subject matter that they can become parties to the proceeding and appeal from the judgment rendered therein.

(October 22, 1890.)

A PPEAL by intervenors R. W. Adam *et al.* from a judgment of the Supreme Judicial Court for Berkshire County (Knowlton, J.) permitting a compromise of a certain bequest
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made to the Town of Pittsfield for charitable purposes. *Dismissed.*

The case fully appears in the opinion.

Mr. Thomas Pingree for appellants.

Messrs. W. Turtle and E. M. Wood for Roland E. Burbank *et al.*

Mr. Marshal Wilcox for the Town of Pittsfield.

Devens, J., delivered the opinion of the court:

It is primarily to be considered whether the case at bar is regularly before us by appeal, and whether the petitioners, R. W. Adam and others, have such an interest in the subject matter thereof that they were entitled to become parties to the original proceeding, and to appeal from the decree rendered therein. The bill is brought under the provisions of Pub. Stat., chap. 142, §§ 14-17 (Stat. 1889, chap. 266), by the heirs and next of kin of Abraham Burbank, to establish and authorize a compromise between themselves and the Town of Pittsfield of a bequest and devise made to the Town for

certain purposes. The proposed compromise is to be effected by the present payment of a certain sum of money, and by conveyance of a certain tract of land by them in lieu of the rights which the Town will, some years hereafter, acquire in the estate of Abraham Burbank in property to be held by it in trust for certain purposes set forth in the will. To this bill the attorney-general was made a party defendant to represent all rights or interest which the public might have therein, and has answered that, after careful examination, he does not care to be further heard, and that he has no objection to the granting of the prayer of the bill. By the twenty-third article of Abraham Burbank's will he devised the income of certain specified property to his children and grandchildren, the property to be held in trust and for life, this trust to continue until the death of the last survivor of his children or grandchildren, then to be transferred to the Town of Pittsfield. By the twenty-fourth article he devised and bequeathed the one half of the income of all the rest of his property not specifically disposed of to his children and grandchildren for life, this trust to continue until the death of the last survivor. The twenty-fifth article gave to the Town of Pittsfield the rest and residue of his estate, including the one half of the income not before disposed of, for the purpose of establishing a fund and maintaining a hospital for the benefit of "infirm, afflicted and unfortunate persons who are residents of said Pittsfield at any time, and who may be admitted into said hospital by the officers or authorities thereof for treatment, and also for all who may reside elsewhere, and who may be admitted therein for treatment." The twenty-sixth article devised to the Town, at the death of the last survivor or his grandchildren, a tract of land for a park. The bequest and devise to the Town are accompanied by many onerous duties and responsibilities to be assumed by the Town of Pittsfield, as well as payments of money to be made by it, extending over the long period which must elapse before in the course of nature the last surviving child or grandchild will de cease. They are also subject to provisions and conditions, upon the occurrence of which they will become void, some of which conditions have no relation to the property devised, but refer to the action of the Town in regard to other matters. It is clear that the trust conferred upon the Town could not be executed by anyone else, assuming that the Town is itself competent to do so. We do not find it necessary to recapitulate these various duties and responsibilities, or to consider their character and that of the conditions sought to be imposed in determining the limited question we are now discussing.

The testator sought by his will to form a fund, and thereby to establish a hospital for the benefit of the residents of Pittsfield and others who might be there admitted for treatment. That this is a public charity requires no citation of authorities. The establishment of hospitals is indeed one of the objects enumerated in the Statute of 43 Elizabeth. The 9 L. R. A.

proposed devise of the testator of a tract of land for a park was also a public charity. Bequests to improve a town, as by providing for a public garden, by improving its streets, by providing for the planting of shade-trees, have been held to be of this character. *Perry, Tr. § 704*. A gift is a public charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specified classes, as decayed seamen, laborers, farmers, etc., of a particular town, it is well settled that it is a public charity. *Kent v. Dunham, 142 Mass. 216, 2 New Eng. Rep. 655*.

The petitioners, R. W. Adam and others, show no other interest in these charitable devices and bequests than that of the general public and of all other citizens of Pittsfield. They appear to have filed their petition without any leave of court so to do, and have sought to bring here by appeal the decree sanctioning the proposed compromise which was rendered by a single judge after a hearing to which the attorney-general was a party. They claim the right to represent the beneficiaries of this charitable trust, and complain that "this decree has been rendered without the appointment of trustees to act for the beneficiaries, and without the concurrence or assent of the beneficiaries, and without such beneficiaries or trustees for them being made parties, thereto," etc. But the law has provided a suitable officer to represent those entitled to the beneficial interest in a public charity. It has not left it to individuals to assume this duty, or even to the court to select a person for its performance. Nor can it be doubted that such a duty can be more satisfactorily performed by one acting under official responsibility than by individuals, however honorable their character and motives may be. "The attorney-general," says Mr. Tudor, "as representing the crown, is the protector of all the persons interested in the charity funds. He represents the beneficial interest. Consequently, in all cases in which the beneficial interest requires to be before the court, the attorney-general must be a party to the proceedings." *Tudor, Charitable Trusts, § 28; Ware v. Cumberlege, 20 Beav. 511; Strickland v. Weldon, L. R. 28 Ch. Div. 480*.

No proceedings in regard to a public charity, no matter how general the assent of those beneficially interested, would bind him if not made a party; nor can any proceeding in regard to a public charity to which he has been made a party be invalidated by those beneficially interested, but having no peculiar and immediate interests distinct from those of the public. This duty of maintaining the rights of the public is vested in the Commonwealth, and it is exercised here, as in England, by the attorney-general. *Jackson v. Phillips, 14 Allen, 589; Pub. Stat. chap. 17, § 6*.

The appellants have, therefore, no proper standing before this court. Through the attorney-general, who is the guardian and protector of their interests, they have been fully represented and heard.

Appeal dismissed.

INDIANA SUPREME COURT.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO., *Appt.*,

v.

August NITSCHKE.

(....Ind....)

1. It is a tortious act to start a fire on a bed of turf or peat in a season of great drought when the ground is parched and dry, so that the fire will run through the bed of peat on to another's land upon which the bed extends, and so as to cause serious loss to the latter.
2. Fire cannot be rightfully used by a railroad company to remove combustible material from its right of way, where the conditions are such as to put in great peril adjacent property.
3. From the use of fire under ordinary conditions negligence or wrong is not necessarily inferable; but where it is used in an improper manner or under circumstances such as to inexcusably imperil adjacent property, the person so using it is a wrong-doer.
4. Railroad companies are not liable

NOTE.—Duty and obligations of railroad company to guard against setting out fires.

A railroad company is bound to remove combustible material from its road, or at least prevent such accumulation of rubbish as will, in consequence of fire falling upon it, be the cause of danger to another's property. *O'Neill v. New York, O. & W. R. Co.* 5 L. R. A. 591, 115 N. Y. 579.

A fire on the track of a railroad company is the fire of the company as much as if confined in the engine, and it owes a like duty to see that no harm results therefrom. *Ibid.*

It is not contributory negligence on the part of those owning haystacks near a railroad, which are burned by fire spreading from the right of way, to fail to keep the grass burned off of the lands between the stacks and the right of way. *Louisville, N. A. & C. R. Co. v. Hart*, 4 L. R. A. 549, 119 Ind. 278.

Fire communicated by sparks from locomotive.

To avoid liability for damage caused by fire from sparks by its locomotive, it is not sufficient alone for a railway company to show that it used the best machinery to avoid accidents by fire; it must show full exercise of due care. *Gulf, C. & S. F. R. Co. v. Witte*, 68 Tex. 235.

A railroad company is not liable for fire caused by sparks from an engine provided with the best spark-arrester known and in common use. *Pennsylvania R. Co. v. Page* (Pa.) 11 Cent. Rep. 424.

In an action for damages to timber land from fire caused by sparks from an engine, proof that the spark-arrester was worn out and full of holes justifies the jury in finding the defendant guilty of negligence which was the proximate cause of the damage. *Ryan v. Gross*, 11 Cent. Rep. 502, 68 Md. 877.

Liability for damage caused by fire.

A railroad company which allows explosive or combustible materials to accumulate at a station until they become a nuisance is liable for any injury sustained by reason of a fire which breaks out in such materials. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 643.

A railroad company is liable for loss sustained by a fire which spreads to land adjoining the railroad, where it is occasioned by fire emitted from a locomotive falling upon grass or combustible matter

for setting fire on their own right of way, but are liable for negligently suffering it to escape and injure adjacent property. Where it is reasonably certain that the fire will escape onto lands of others, such companies are responsible for the consequences of its so doing.

5. Where one was guilty of a positive wrong in setting fire in the edge of a peat bed in a dry time, he cannot escape liability for an injury thereby to another, for the reason that the fire burnt across the premises of third persons before it reached and did the injury to the lands of such other to which the bed extended; an ordinary wind is not an independent intervening agency.
6. The question whether a cause is a *causa sine qua non*, without the existence of which the injury would not have taken place, is a question of fact.

(December 9, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Lake County in favor of plaintiff in an action brought to recover damages for injuries alleged to have resulted

that has been allowed to accumulate on the right of way from want of proper care. *Louisville, N. A. & C. R. Co. v. Hart*, 4 L. R. A. 549, 119 Ind. 278.

The measure of damages for the destruction of an orchard of fruit trees by a fire ignited by a passing railroad train is the value of the trees destroyed. *Norfolk & W. R. Co. v. Bohannon*, 85 Va. 238. See *Louisville, N. A. & C. R. Co. v. Hart*, 4 L. R. A. 549, 119 Ind. 278.

In an action for damages caused by fires ignited by a passing train, the jury may assess the damages as a whole, whether the fire originated by sparks cast upon plaintiff's premises or by igniting combustibles on defendant's right of way. *Ibid.*

Action for damages.

Under Minn. Gen. Stat. 1878, chap. 34, § 60, the fact that the fire causing the damage was scattered or thrown from a railway engine is *prima facie* evidence only of defects in the engine and negligence of the employees of the company in operating it, and not of negligence in leaving the right of way in an unsafe condition. *Bowen v. St. Paul, M. & M. R. Co.* 36 Minn. 522.

Where, in an action against a railroad company for damages caused by fire from its locomotives, the only evidence offered to rebut the charge of negligence is affidavits of the master mechanic of the road as to the condition of certain locomotives as to stack-nets, ash-pans, etc., and the evidence does not disclose whether the fire complained of was caused by either or all of such engines, the plaintiff is entitled to damages. *Missouri Pac. R. Co. v. Texas & P. R. Co.* 38 Fed. Rep. 360.

In an action for damages to plaintiff's wood lands, alleged to have been caused by sparks from defendant's locomotives, a motion for a nonsuit on the ground that there was no evidence of negligence was properly denied, where it appeared that the defendant allowed old ties, brush, briars and other dry and combustible material to lie upon the railroad lands, and where there was some evidence that sparks as "large as walnuts, chunks and cinders" came from the smokestack. *O'Neill v. New York, O. & W. R. Co.* 45 Hun. 458. See notes to *Knowlton v. New York & N. E. R. Co.* (Mass.) 1 L. R. A. 625; *Missouri Pac. R. Co. v. Platzer* (Tex.) 3 L. R. A. 630.

from defendant's negligence in burning the grass and other combustible material from its right of way. *Affirmed.*

The facts are stated in the opinion.

Meurs, George W. Friedley, E. C. Field and C. C. Matson for appellant.
Mr. J. Kopelke for appellee.

Elliott, J., delivered the opinion of the court:

Gathered and grouped in a form sufficiently full and clear to exhibit the questions of law which arise in this case, the facts, as they appear in the special finding, may be thus stated: The appellee is the owner of lands used for ordinary farming and grazing purposes adjoining the appellant's railroad. On the 19th day of July, 1887, the section hands of the appellant, by order of its roadmaster, set fire to grass, weeds and other combustible materials on the appellant's right of way a short distance from the appellee's land, and burned off a great part of the space occupied by the track. The object of the sectionmen was to remove from the right of way all combustible materials. At the time the fire was set out it was very dry, no rain having fallen for more than four weeks. The sectionmen extinguished all the blaze and flame caused by the fire set out by them, but fire remained in some pieces of turf which had been ignited, and although there was no flame the fire was still alive and smouldering. These pieces of burning turf were cast back upon the space which had been burned over. The appellant's right of way extended over beds of turf or peat, and the same material formed the surface of the body of the adjoining lands and also of the appellee's land which was adjacent to the right of way of the appellant. Turf or peat, when dry, will ignite and burn to the depth at which it ceases to be dry. On the 22d day of July, 1887, the wind shifted to the northeast and blew fresh but not unusually strong for the locality. The fire smouldering in the pieces of turf cast back upon the track was kindled into a flame, and passing from the right of way, communicated fire to the land owned by Hawkinson, burned there for a time, but finally all the fire that was visible was fought out and extinguished by persons residing in the neighborhood. The fire had, however, communicated with the turf on Hawkinson's farm, where it remained dormant until the morning of the 28d day of the month named; on that day it broke out and spread over the land of Schaffer. For the second time neighbors extinguished such flame as was visible, but the turf still held fire and burned slowly. On the 24th day of the same month the wind shifted to the south and the fire from Schaffer's land was communicated to the turf or peat on the appellee's farm. For the third time such fire as could be seen or reached was extinguished by persons residing in the neighborhood, assisted by the employes of the appellant; but still the fire remained in the turf, smouldering, but not extinguished. On the 2d day of August the wind increased, but it did not blow stronger than is usual in the locality, and again the fire smouldering in the turf on appellee's farm broke out. It ran over ten acres and caused the appellee serious loss. "By reason of the dryness of the season and

the character of the soil," says the trial court in its finding, "it was negligence on the part of the defendant to set fire to and burn off the right of way at the place and time where the same was so burned."

An essential and ruling element of this case is this: It was a tortious act to set out the fire which caused the plaintiff's injury. It was something more than culpable negligence to start a fire on a bed of turf or peat, in a season of great drought, when for weeks no rain had fallen and the ground was parched and dry. The act of the defendant in setting out a fire at such a place and under such conditions was a positive wrong, for the law forbids that one person should put the property of another in jeopardy by such an act. In degree only is there a difference between such a case as this and one in which a person kindles a fire near a train of gunpowder leading to a magazine filled with explosive substances. In essence the case is the same as that of one who builds a fire upon materials that will ignite and continue burning in a place where all surrounding materials are of the same combustible character. If a person should kindle a fire in a great heap of inflammable paper surrounded on every side by other like heaps, with the line of communication between them direct and unbroken, no one, we venture to say, would hesitate to declare that he by whom the fire was kindled was guilty of a positive tort and not of mere passive negligence.

A railroad company has a right to remove combustible material from its right of way, and ordinarily it may not be negligence to employ fire for that purpose, but where the conditions are such as to put in great peril adjacent property fire cannot be rightfully used for such a purpose. Fire is a necessary agent in common use in life, and from its employment under ordinary conditions negligence or wrong is not necessarily inferable; but it may be so used as to make the person using it guilty of a tortious act. The doctrine we assert was declared in the early years of the common law. *Smith v. Frampton*, 2 Salk. 644; *Tuberril v. Stamp*, 1 Salk. 13; *Anonymous*, Cro. Eliz. 10.

The rule has continued in unbroken force through all the ages of the jurisprudence of the English speaking nations. *Catron v. Nichols*, 81 Mo. 80; *Miller v. Martin*, 16 Mo. 608; *Clark v. Foot*, 8 Johns. 21; *Barnard v. Poor*, 21 Pick. 878; *Hanton v. Ingram*, 8 Iowa, 81; *Fahn v. Reichart*, 8 Wis. 255; *Filliter v. Phippard*, 11 Q. B. 347; *McKenzie v. McLeod*, 10 Bing. 385; *Cleland v. Thornton*, 43 Cal. 437; *Collins v. Groseclose*, 40 Ind. 414.

A lawful act may be done in such a mode, or under such circumstances, as to make it wrongful, and where fire is used in an improper manner or under circumstances such as inexcusably imperil surrounding or adjacent property the person so using it is a wrong-doer. *Gagg v. Vetter*, 41 Ind. 228; *Freemantle v. London & N. W. R. Co.* 2 Fost. & F. 387; *Aldridge v. Great Western R. Co.* 8 Man. & G. 515; *Vaughan v. Menlove*, 8 Bing. N. C. 468; *Crogate v. Morris*, Brownl. 197; *Higgins v. Dewey*, 107 Mass. 494.

In a series of cases our court has held that railroad companies are not liable for setting out fire on their own right of way, but are liable for

negligently suffering it to escape and injure adjacent property. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111, and cases cited; *Pittsburgh, C. & St. L. R. Co. v. Jones*, 86 Ind. 496; *Brinkman v. Bender*, 92 Ind. 234; *Louisville, N. A. & C. R. Co. v. Ehler*, 87 Ind. 839; *Indiana, B. & W. R. Co. v. Adamson*, 90 Ind. 60; *Indiana, B. & W. R. Co. v. McBroom*, 91 Ind. 114; *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40; *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 110 Ind. 225, 8 West. Rep. 888.

Within the principles established by these authorities the person whose land was first reached by the fire would undoubtedly be entitled to recover, for the use of fire under the circumstances existing at the time the first was set out by the appellant was wrongful; and the conditions were such as to make it reasonably certain that it would leave the appellant's right of way and follow the continuous beds of peat or turf upon which the track was laid and which extended on every side of it, covering many acres. That the fire would escape from the right of way was so probable that the appellant must be held responsible for what did actually occur, for all persons are required to foresee and provide against the probable consequences of their acts. Unusual and improbable results are not to be anticipated, but usual or probable ones must be. *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544-556, 12 West. Rep. 303, and cases cited; *Glore v. McIntire*, 120 Ind. 262-265; *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, Id. 469-472; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 16, 7 L. R. A. 588; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251.

The only difficulty which this case presents grows out of the fact that the fire crossed the land of Hawkinson and of Schaffer before reaching that of the appellee; but the difficulty will be found, upon scrutiny and analysis, to be apparent rather than real. Its apparel of seeming strength drops when the tests of reason and authority are applied, for, neither upon principle nor authority, can it be justly concluded that the injury was so remote as to defeat a right of recovery. As has been shown, the act of setting out a fire at such a season and on an inflammable and continuous bed of peat was a positive wrong, and not mere passive negligence; so that the case falls within the rule declared in the famous *Squib Case*, which our own and other courts have so often and so strongly approved. *Scott v. Shepherd*, 2 W. Bl. 892; *Billman v. Indianapolis, C. & L. R. Co.* and *Dunlap v. Wagner*, *supra*; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 186; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 1 West. Rep. 868; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179-188, 7 West. Rep. 396; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443, and cases cited; *Louisville, N. A. & C. R. Co. v. Snider*, 117 Ind. 435, 3 L. R. A. 434; *Denver & R. G. R. Co. v. Harris*, 123 U. S. 597 [30 L. ed. 1146]; *Lake Shore & M. S. R. Co. v. Rosenzweig*, 118 Pa. 519, 4 Cent. Rep. 712; Addison, Torts, § 12; Cooley, Torts, 70; Bishop, Non-Contract Law, § 45; 3 Shearm. & Redf. Neg. 4th ed. § 742.

9 L. R. A.

The wrong of the appellant, put in another the destructive agency, and the result is directly attributable to that wrong. In this instance cause and effect are interlinked; there is no break; the chain is perfect and complete. The line of connection is as continuous and almost as closely woven into unity as the beds of peat which the railroad traverses and which lie in one vast body along the right of way. Firing one part of such a body of inflammable material when it was parched by the long drought was, in legal contemplation, firing it all, for the spread of the fire was so probable that it was the duty of the appellant to have foreseen the result and not set out the fire. If a man should set fire to a rope saturated with inflammable oil leading from house to house, and the fire following the rope should destroy a third house, we suppose it to be perfectly clear that he would be liable to the owner of that house; and what is true of the imaginary case is true of the actual one, for the line of causation is even more complete and perfect in the latter than in the former.

We discriminate this case from the case of *Pennsylvania R. Co. v. Whitlock*, 99 Ind. 16. There is solid reason for discriminating between the two cases. In the one there was mere passive negligence; in the other a positive wrong. There is also another element of difference, for the case referred to proceeds upon the theory that there was an intervening agency and a break in the line of causation, while here no such theory can be framed without violence to the facts, since the fire followed the continuous inflammable bed of peat upon which it was ignited by the appellant. It must, indeed, be owned that the case cited carries the doctrine to the utmost verge. The doctrine cannot, at all events, be extended, for, even limiting it to the facts of the particular instance then before the court, the decision is in conflict with the decisions of the Supreme Court of the United States, with those of almost all the state courts, and it is at variance with the views of the standard text-writers. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469 [24 L. ed. 256]; Shearm. & Redf. Neg. 4th ed. § 666, and *notes*; Cooley, Torts, 96, and *note*; Bishop, Non-Contract Law, § 45; 8 Am. & Eng. Encyclop. Law, 11, and cases cited.

It is difficult, if not impossible, to find a substantial reason for holding that an ordinary wind is an independent intervening agency, for what occurs in the usual course of nature, and is not abnormal or extraordinary, cannot be regarded as an independent agency. We think it very clear that, if a man should erect walls too weak to withstand the force of ordinary winds and they should fall upon and crush an adjoining building, he could not defeat the claim of the owner of the ruined building upon the ground that the walls fell before an ordinary wind. Between the supposed case and the real one before us no difference in principle can be discerned by the keenest vision. Extraordinary winds may justly be regarded as independent intervening agencies, but not so winds which are usual and prevail without disturbing the normal condition of nature. One who is himself without fault has, in justice and common fairness, a right to recover from one who has caused him loss by a tortious act, al-

though an ordinary natural occurrence entered into the chain of events which culminated in the loss. It is, in truth, impossible to conceive a case wherein loss from fire can happen wholly independent of natural causes. Fire will not burn without air, and yet no one will be bold enough to assert that, because this natural agency enters into every conflagration, therefore the wrong-doer is absolved from responsibility.

It is very seldom that any case arises in which some break between cause and effect is not discernible upon rigid scrutiny and by captious refinement, but the law is a practical science and repudiates subtle refinements and speculative inquiries. It will not sacrifice substantial rights to such impracticable processes, but will reject them to make way for practical justice. Recondite discussion of efficient cause, plurality of causes and kindred topics, are for the metaphysician and the speculative philosopher, not the practical lawyer or judge. In the ably reasoned opinion pronounced in the case of *Milwaukee & St. P. R. Co. v. Kellogg*, *supra*, the Supreme Court of the United States unanimously declared that "in a succession of dependent events an interval may always be seen by an acute mind between a cause and an effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first; yet, in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Discussing the same general principle in another case, that high tribunal said: "In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, Was it *causa sine qua non*, a cause which, if it had not existed, the injury would not have taken place? and this is a question of fact, unless the causal connection is evidently not proximate." *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228 [28 L. ed. 410.]

In the case of *Atina Ins. Co. v. Boon*, 95 U. S. 117 [24 L. ed. 395], the court said: "The question is not, What cause was nearest in time or place to the catastrophe? That is not the meaning of the maxim *causa proxima, non remota, spectatur*." In the same case the court quoted with approval from the case of *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, the following statement of the law: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided in motion, by which the loss is pro-

duced, is the cause to which the loss must be attributed."

In almost every branch of the law may be found cases, ancient and modern, asserting the general doctrine outlined in the decisions from which we have quoted. Many of the cases we have already cited assert this general doctrine, and to them may be added: *Omslaan v. Philadelphia Co.* 31 Fed. Rep. 854; *Lund v. Tyngsboro*, 11 Cush. 563; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44 [19 L. ed. 65]; *Butler v. Wildman*, 3 Barn. & Ald. 398; *Barton v. Home Ins. Co.* 42 Mo. 156; *Marcy v. Merchants Mut. Ins. Co.* 19 La. Ann. 868; *Ring v. Cohoes*, 77 N. Y. 83; *Ehrgott v. New York*, 96 N. Y. 264.

In speaking of the cases of *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, and *Pennsylvania R. Co. v. Korr*, 62 Pa. 353, which declare a doctrine antagonistic to that held by the Supreme Court of the United States, an able lawyer, John D. Lawson, says: "For they are not only opposed to all the English decisions, to every subsequent American case, but to the later cases in the very States in which they were decided." In support of his statement, Mr. Lawson cites a great number of cases. 4 Southern Law Rev. 700-761.

Very much the same statement was made by Judge Cooley in his work on Torts, to which we have already referred, and his statement is quoted in *Billman v. Indianapolis, O. & L. R. Co.*, *supra*.

Following maxims with rigid strictness is a perilous proceeding. They are scant covers for great principles, and are sometimes as misleading as the wise saws or musty proverbs of a village oracle. It is idle to expect a terse maxim to adequately express a great principle; the most it can ordinarily do is to suggest the principle, but even so much as that it can only do in shadowy outline. "Legal maxims," it has been said, "are convenient currency, but they require the test, from time to time, of a careful analysis." "It is hardly fair, by the way," said an eminent English lawyer, "to find fault with a maxim for its brevity, though brevity should make us beware." 5 London Quarterly Rev. 444.

Mr. Townshend says: "We believe that not a single law maxim can be pointed out which is not obnoxious to objection." Ram, Legal Judgment, 45.

These are echoes from the opinions of the judges who have frequently shown the folly of depending too much on maxims. *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 171; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Bonomi v. Backhaus*, 27 L. J. N. S. Q. B. 388.

It is certainly true that the court which follows strictly and without expansion the maxim *causa proxima, non remota, spectatur*, will go so far astray as to be unable to deal out justice to deserving suitors. But no court is bound to "stick in the bark" of a maxim; on the contrary, it is its duty to ascertain and give effect to the spirit of the principle which the maxim dimly indicates, but does not fully express. In this instance, the spirit of the principle of which the maxim quoted is a glimmering outline requires that it should be adjudged that the appellant shall make good to the appellee the loss sustained by him from its tortious act.

Judgment affirmed.

CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY CO., *App't.*,

Joseph A. CLOSSER *et al.*

(.....Ind.....)

1. Where a carrier agrees that he will carry goods at a certain rate and that after the shipment he will repay the shipper a rebate of part of such rate, this is only an agreement to carry the goods at a compensation ultimately agreed upon, and is not illegal.
2. Discrimination in the making of contracts by a carrier for the carriage of goods without partiality is inoffensive. Partiality exists only in cases where advantages are equal and one party is unduly favored at the expense of another, who stands upon an equal footing.
3. Common carriers may, within the limits of fairness and impartiality, consult their own interests in making contracts for the carriage of goods.
4. A contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition and providing means to accomplish that object, is illegal and against public policy.
5. No right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy.
6. Although the motion for the produc-

tion of books and papers is defective, or the order made upon it too broad, yet if such instruments of evidence are used in the mode required by law on the trial, there is no prejudicial error.

7. It is sufficient to entitle testimony to admission that there is some evidence of facts, direct or circumstantial, tending to make it competent.
8. Where corporate agents are intrusted with the transaction of business requiring continuous negotiations the authority of the agent to bind the principal by his statements does not terminate until the negotiations are at an end. But narrations of an agent of past transactions are not evidence.
9. If a common carrier makes a special contract to repay part of the sum received from the shipper, he must perform his part of the contract unless he overthrows the presumption of fairness and right by counter-acting facts.
10. A special finding must be considered as a whole, and cannot be assailed in parts; and if, taken as a whole, the finding legitimately supports the judgment, it will be upheld. A finding containing more facts than necessary is not objectionable, if such facts do not establish another cause of action.
11. A contract binding a carrier to transport as many carloads of grain as the shipper may desire transported is valid as to acts done in performance of it, and until revoked.

(December 17, 1890.)

A PPEAL by defendant from a judgment of the General Term of the Superior Court

NOTE.—State power to regulate freights and fares.

The Legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over these matters, subject to the limitation that the carriage is not required without reward or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 877; *Dow v. Beidelman*, 125 U. S. 690, 31 L. ed. 841.

The power of a State to limit railroad charges for transportation can only be bargained away, if at all, by words of positive grant or their equivalent. *Stone v. Farmers L. & T. Co.* ("R. R. Commission Cases") 116 U. S. 307, 39 L. ed. 636.

The power to regulate a carrier's rates is not a power to destroy, and limitation is not the equivalent of confiscation. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970.

General statutes fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not deny to the railroad companies the equal protection of the laws, or deprive them of their property without due process of law, within the meaning of the Fourteenth Amendment. *Stone v. Farmers L. & T. Co. supra*.

A power of government which actually exists is not lost by non-user. *Chicago, B. & Q. R. Co. v. Curtis*, 94 U. S. 155, 24 L. ed. 94.

The police power may protect business interests by prohibiting discriminations, by regulating tariffs, by enforcing facilities for the public. The Interstate Commerce Act of Congress illustrates this 9 L. R. A.

proposition. *Boston & M. R. Co. v. County Commrs.* 4 New Eng. Rep. 667, 79 Me. 866.

Because individuals may serve for hire, or may, without compensation, donate their services, it does not follow that common carriers by rail may do the same thing. *Samuels v. Louisville & N. R. Co.* 31 Fed. Rep. 57.

Although the company owns the property, it is also in the enjoyment of a public franchise; and in the control of the property it has not the same measure of power that persons have and exercise over property that is affected by no public use, and operated without the exercise of any public franchise. *Ibid.*

Charter rights of railroad company.

A railroad company is chartered solely for the purpose of performing the duties of a common carrier. The grant in this charter is nothing more than a right to be exercised within the same limitations that the common law, in behalf of justice and public policy, imposes upon the natural man. *Chicago & A. R. Co. v. People*, 67 Ill. 11.

A railway company acting as a common carrier, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods which in practice affects one individual only. *Crouch v. London & N.W. R. Co.* 14 C. B. 235; *Morgan v. Pike*, 25 Eng. L. & Eq. 237. See *Crouch v. Great Northern R. Co.* 34 Eng. L. & Eq. 573.

The grant of power by a charter, to the directors of a railroad company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, does not deprive the State of its general authority itself to regulate the rates of toll to be collected by the company. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970.

for Marion County, affirming a judgment of the Special Term in favor of plaintiffs in an action brought to recover freight rebates. *Affirmed.*

The suit was by Closser & Co., grain dealers, at Indianapolis, against the appellant, to recover what are called "rebates" or "drawbacks" on freights. There was a trial by the court at special term, resulting in a judgment against the appellant in the sum of \$6,277.97, which was affirmed without an opinion at general term.

The facts sufficiently appear in the opinion. *Messrs. Addison C. Harris, William H. Calkins and H. H. Poppleton*, for appellant:

A contract obtained by a shipper from a public railway, that if he will pay the regular rates the company will pay back, by way of rebate, a portion of the freight so paid, is void as against public policy, and the law will not aid him to collect the rebate.

Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 581, 18 Am. Rep. 754; *Indianapolis, D. & S. R. Co. v. Erwin*, 6 West. Rep. 101, 118 Ill. 250; *Scofield v. Railway Co.* 1 West. Rep. 812, 43 Ohio St. 571, 54 Am. Rep. 846; *Greenhood*, Pub. Pol. 629, *et seq.*; *Hutchinson*, Car. §§ 801, 802; *Pierce, Railroads*, 498; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 676, 23 L. ed. 395; *Lake Superior & M. R. Co. v. United States*, 93 U. S. 446, 23 L. ed. 968; *Morris v. Philpot*, 11 Ind. 447; *Judah v. Vincennes University*, 16 Ind. 56; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Craft v.*

McConoughy, 79 Ill. 846, 22 Am. Rep. 171; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Gregory v. Wendell*, 89 Mich. 337.

Messrs. B. Harrison, W. H. H. Miller and John B. Elam for appellee.

Elliott, J., delivered the opinion of the court:

The appellees were partners under the name of Closser & Co. and as such prosecute this action against the appellant. They base their right of action upon contracts made with the appellant, wherein it undertook to transport grain from Indianapolis to the seaboard; and they charge that the appellant agreed to receive at the time of the shipments a designated sum as compensation for the transportation of the grain and to refund to them a certain part of the sum received. They demand that the appellant be compelled to respond in damages for a breach of the agreement to refund part of the money paid to it as freight on the grain carried under the contracts.

In the first paragraph of the complaint it is alleged that on the 15th day of September, 1884, the appellant made a contract with Closser & Co. wherein it agreed to transport grain from Indianapolis to Philadelphia "at the price of 16½ cents per hundred weight, at the same time stipulating that Closser & Co. should pay the defendant at the rate of 21 cents per hundred weight, but should be entitled to a rebate of 4½ cents per hundred, to be repaid to Closser & Co. promptly after such shipments."

The contract described is valid. It is not

A charter provision of a railroad, granting the power to take "tolls from all persons, property, merchandise and other commodities transported on their road, provided only the net profits of the road shall never exceed 25 per cent per annum," does not relieve the company from the obligation imposed upon a common carrier under the common law, as applied to common carriers by rail. The charter does not give the carrier an option to discriminate at will, provided only the net profits of the road do not exceed a certain limit. *Samuels v. Louisville & N. R. Co.* 81 Fed. Rep. 57.

State railroad commission.

The provision for a railroad commission, in Cal. Const., art. 12, § 22, the control of which extends to "transportation companies," should be construed to extend the supervision of the commission to all persons engaged in the business of transportation, whether as corporations, joint-stock companies, partnerships or individuals. *Moran v. Ross*, 79 Cal. 549.

Where a tariff of freight and passenger rates has been established by the railroad commissioners, and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs, as fixed by the commissioners, must, in so far as the courts are concerned, be left to the test of experiment. *Pensacola & A. R. Co. v. State*, 3 L. R. A. 661, 25 Fla. 310.

The courts will not interfere or grant any relief to a railroad company against rates fixed by commissioners, upon a complaint made as to one or several rates only, or where the freight and pas-

senger rates established by the commissioners are not assailed as an entirety. *Ibid.*

The courts have no power to make freight or passenger tariffs. *Ibid.*

The enforcement of a tariff of freight and passenger rates which will not pay the expenses of operating a railroad was held, upon the pleadings, to show an abuse of the discretion given to railroad commissioners by the Statute authorizing them to prescribe reasonable and just rates of freight and passenger transportation, and to amount to a taking of the railroad company's property without just compensation. *Ibid.*

The Iowa Act of April 5, 1888, gives to the state board of railroad commissioners power to make a full schedule of maximum rates of transportation charges of railroad companies, after the investigation of any complaint; which schedule shall apply to all points within the State, and shall not be limited to the matter set out in the complaint. *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 666.

Where a schedule of rates for railroad charges, fixed by legislative authority, will not pay the cost of necessary service, appliances and the repair thereof, interest on bonds, and then leave something for dividends, its enforcement will be enjoined. *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 35 Fed. Rep. 806.

In a suit to restrain the enforcement of unreasonable rates, it is no defense that plaintiff is a foreign corporation and may retire when the business ceases to be profitable, or that it operates through other States, where no rates are fixed which will enable it to make profit. *Ibid.*

In a suit to restrain the enforcement of unreasonable rates it is no defense that the reduced rates may increase the volume of business and make it the more remunerative in the future. *Ibid.*

Where the actual cost for switching cars in

rectly to carry goods at a fixed rate, for the agreement to repay does not of itself change the legal effect of the undertaking to such an extent as to transform it into an illegal contract. It is, in contemplation of law, nothing more than an agreement to carry the grain at the compensation ultimately agreed upon, inasmuch as the provision binding the carrier to pay back part of the nominal compensation simply fixes the amount of the actual and final compensation, although it does provide for a peculiar mode of payment. There is no element of moral or legal wrong in an agreement to repay part of the compensation received; to give an illegal character to such an agreement more must be shown than the mere fact that the parties stipulated for a rebate. In simply making a rebate, or in providing for a drawback, parties violate no law and their contract must stand. It cannot be presumed that fraud was intended or practiced, nor can it be presumed that there was any wrongful combination to secure an undue advantage over other shippers; neither can it be presumed that in stipulating for a rebate the carrier intended to make in favor of the particular shipper a discrimination forbidden by law. It is by no means every favor shown a particular shipper, although it may constitute in some measure a discrimination favorable to him and unfavorable to other shippers, that impresses upon a contract for the carriage of goods the seal of condemnation. The common-law authorities (and by them the case is ruled) fully support

other elements enter into the contract; but when such elements are present in such force as to make the discrimination unjust or oppressive the contract will be illegal. It is not necessarily or *per se* a legal wrong for a carrier to give better rates to one who ships many carloads of grain than to one who ships a single carload or a single bushel. It is a matter of common knowledge, and therefore one of which judicial notice is taken, that an increase in the volume of business is desirable and advantageous, and in the rivalry of business competition it is lawful to favor those whose business is great rather than those whose business is small or inconsiderable. In the case of *Nicholson v. Great Western R. Co.*, 4 C. B. N. S. 886, 1 Nev. & McN. 121, Erle, *Ch. J.*, said: "I take the free power of making contracts to be essential for the purpose of making commercial profits. Railway companies have that power as free as any merchant, subject only (as to this court) to the duty of acting impartially, without respect of persons, and this duty is performed when the offer to contract is made, to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of some whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations."

It is obvious that whether the common carrier acts impartially or not depends upon the circumstances of the particular case, for regard

a city exceeds the compensation fixed therefor by a schedule of rates prepared by state railroad commissioners, the schedule cannot be enforced. *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. Rep. 683.

The charter of a company is not a contract the obligation of which is impaired by the Mississippi Statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination and enforce certain police regulations affecting railroad companies doing business in that State. *Stone v. Farmers L. & T. Co.* ("R. R. Commission Cases") 118 U. S. 307, 29 L. ed. 636.

Railroad companies subject to legislative control.

Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters, or unless what is done amounts to a regulation of foreign or interstate commerce. *Stone v. Farmers L. & T. Co.* ("R. R. Commission Cases") 118 U. S. 307, 29 L. ed. 636; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Ruggles v. Illinois*, 108 U. S. 523, 27 L. ed. 812; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. ed. 813.

The Legislature, in the exercise of its power of regulating freights and fares, may classify the railroads according to the length of their lines, if the same rule is applied to all roads of the same class. *Don v. Beidelman*, 125 U. S. 680, 31 L. ed. 841.

If the classification operates uniformly, the court cannot decide whether it was the best that could have been made. *Ibid.*

Rates of fares and freights must be uniform.

Charges for freights and passengers must be uniform. *L. R. A.*

form. Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460.

Transportation by a common carrier is open to the public upon equal and reasonable terms. An exclusive right granted to a common carrier only is inconsistent with the rights of all others. *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370.

If by reason of bribes or other improper motives, railway employes give preference to one person over another, the company may be held liable for damages thereby sustained. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 483.

Rule in various States.

In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination to individuals; that its charges must be reasonable. *Root v. Long Island R. Co.* 4 L. R. A. 381, 114 N. Y. 303; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Vincent v. Chicago & A. R. Co.* 49 Ill. 32.

If it shall in good faith, from a pressing cause, take grain from wagons or boats, while grain remains for shipment in private warehouses, it will not thereby incur liability. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 483.

In New Hampshire it has been held that a railroad is bound to carry, at reasonable rates, commodities for all persons who offer them as early as means will allow; that it cannot directly exercise unreasonable discrimination as to whom and what it will carry; that it cannot impose unreasonable and unequal terms, facilities or accommodations. *Root v. Long Island R. Co.*, *supra*; *McDuffee v. Portland & R. R. Co.* 53 N. H. 420.

To similar effect are cases in other States. *New England Exp. Co. v. Maine Cent. R. Co.* 37 Me. 138; *Shipper v. Pennsylvania R. Co.* 47 Pa. 336; *Fitchburg R. Co. v. Gage*, 13 Gray, 336; *Manacho v. Ward*, 27 Fed. Rep. 522.

must be had to such circumstances as quantity, distance and kindred considerations. The hinge of the question is not found in the single fact of discrimination, for discrimination without partiality is inoffensive and partiality exists only in cases where advantages are equal and one party is unduly favored at the expense of another who stands upon an equal footing. Many English cases support this general doctrine. *Garton v. Bristol & E. R. Co.* 1 Best & S. 112; *Hosier v. Caledonian R. Co.* 1 Nev. & McN. 29; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 288; *Ransome v. Eastern Counties R. Co.* 1 C. B. N. S. 487; *Jones v. Eastern Counties R. Co.* 1 Nev. & McN. 45; *Oxlade v. North Eastern R. Co.* Id. 72, 1 C. B. N. S. 454; *Bazendale v. Great Western R. Co.* 5 C. B. N. S. 386; *Belladyke v. North British R. Co.* 2 Nev. & McN. 105.

The current of judicial opinion in America flows in the general channel marked out and opened by the courts of England. *Bayles v. Kansas Pac. R. Co.* 18 Colo. 181, 5 L. R. A. 480; *Spofford v. Boston & Maine R. Co.* 128 Mass. 826; *Fitchburg R. Co. v. Gage*, 13 Gray, 898; *Johnson v. Pennsylvania & P. R. Co.* 16 Fla. 682, 26 Am. Rep. 781; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *McDuffee v. Portland & R. R. Co.* 53 N. H. 480, 18 Am. Rep. 72; *Hersh v. Northern Cent. R. Co.* 74 Pa. 181; *Christie v. Missouri Pac. R. Co.* 94 Mo. 453, 18 West. Rep. 688; *Chicago & A. R. Co. v. People*, 67 Ill. 1; *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67; *Erie & Pac. Desp. v. Cecil*, 112 Ill. 185; *Root v. Long Island R. Co.* 114 N. Y. 300, 4 L. R. A. 381; *Killmer v. New York Cent. & H. R.*

R. Co. 109 N. Y. 895; *Stewart v. Lehigh Valley R. Co.* 88 N. J. L. 505; *Union Pac. R. Co. v. United States*, 117 U. S. 855 [29 L. ed. 930]; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 809; *Interstate Commerce Com. v. Baltimore & O. R. Co.* 8 R. R. & Corp. L. J. 343, 8 Inters. Com. Rep. 192.

The cases of *State v. Cincinnati, W. & B. R. Co.*, 47 Ohio St. —, 7 L. R. A. 319; *Scotfield v. R. Co.*, 48 Ohio St. 571, 1 West. Rep. 812, and *Messenger v. Pennsylvania R. Co.*, 88 N. J. L. 407,—are not entirely out of line with the decisions to which we have referred, although fragmentary expressions found in some of the opinions seemingly pass the lines of principle. It is very doubtful whether the reasoning in the case of *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.*, 81 Fed. Rep. 652, can be regarded as sound, or be made to harmonize with the reasoning in the much more carefully considered case of *Interstate Commerce Com. v. Baltimore & O. R. Co.*, *supra*; but, granting the reasoning to be unimpeachable and the conclusion sound, the decision cannot be regarded as of controlling influence in such a case as the one at our bar. In the case upon which we are commenting the recovery was adjudged on the ground that the difference in the rate charged shippers of large quantities of goods and that charged shippers of small quantities was so gross as to be against public policy. We have no such question here. So far as concerns the question of the right to discriminate between shippers we concur with the general doctrine of the case cited, for we have no doubt that an unjust, unfair or oppressive discrimination is prohibited by the sound-

In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same condition for others is void as creating an illegal preference; that common carriers are public agents transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation of goods. *Root v. Long Island R. Co.* 4 L. R. A. 381, 114 N. Y. 304; *Messenger v. Pennsylvania R. Co.* 88 N. J. L. 407; *State v. Delaware, L. & W. R. Co.* 2 Cent. Rep. 766, 48 N. J. L. 55.

In Ohio it was held that, where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. *Root v. Long Island R. Co.*, *supra*; *Scotfield v. Lake Shore & M. S. R. Co.* 1 Cent. Rep. 812, 48 Ohio St. 571.

Discriminations by contract are unlawful.

Discrimination must consist in allowing one party what is denied another. *Crews v. Richmond & D. L. R. Co.* 1 Inters. Com. Rep. 703.

Common carriers cannot make unreasonable discriminations or give undue preferences between persons applying to them for carriage either of passengers or goods, either in granting carriage to some and not to others, or in carrying for some for less rates than for others. *McDuffee v. Portland & R. R. Co.* 53 N. H. 430; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind. 293; *Messenger v. Pennsylvania R. Co.* 88 N. J. L. 407; *Hays v. Pennsylvania Co.* 12

Fed. Rep. 811; *Com. v. Power*, 7 Met. 496, 41 Am. Dec. 484.

The difference in the quantity of shipments is an insufficient and unwarrantable reason for discrimination in rates. *Kinsley v. Buffalo, N. Y. & P. R. Co.* 37 Fed. Rep. 181.

At common law a carrier may contract to ship freight at a lower rate than the published tariff, but not to deny the same reduced rate to other shippers. *Christie v. Missouri Pac. R. Co.* 12 West. Rep. 682, 94 Mo. 453.

A contract of a railway company which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of goods is unjust and cannot be legally enforced. *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 381; *Union L. & Exp. Co. v. Erie R. Co.* Id. 23.

A corporation engaged in carrying goods for hire as a common carrier has no franchise, privilege or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper. *State v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 319, 47 Ohio St. —.

An agreement by a railroad company to carry goods for certain persons at a rate cheaper than they will carry under the same conditions for others is void, as creating an illegal preference. *Messenger v. Pennsylvania R. Co.* 88 N. J. L. 407, 87 N. J. L. 381; *Bayles v. Kansas Pac. R. Co.* 5 L. R. A. 480, 18 Colo. 180.

Nor can it discriminate against small shippers in favor of larger shippers of the same class of goods solely on the ground of the difference in quantity. *Hays v. Pennsylvania Co.* 12 Fed. Rep. 809; *Nicholson v. Great Western R. Co.* 4 C. B. N. S. 866; *Com. v. Power*, 7 Met. 500, 41 Am. Dec. 483.

est considerations of public policy, but, as we have already suggested, we do not believe that from the sole fact that there is a discrimination a conclusion can be inferred which invalidates the special contract between the carrier and the shipper; for, to warrant such a conclusion without defying principle, another element must be added to the premises, and that element is this: the discrimination is unjust or oppressive. In the later case of *Stewart v. Lehigh Valley R. Co.*, *supra*, the decision in *Messenger v. Pennsylvania R. Co.*, *supra*, is explained, and it was said: "The contract held invalid in the *Messenger Case* above cited was indeed one inuring to the benefit of the individual and against the corporation; but its terms were such that it could not possibly be effectuated without giving the plaintiff a preference over the public; it was, in effect, that whatever rate should be charged against anyone else, 20 per centum less should be charged against the plaintiff. Plainly, such a contract was not consistent with the company's duty of impartiality. As soon as the general rates were reduced to the standard of the plaintiff's he was entitled to have his rates reduced 20 per centum lower."

It is evident from this that the courts of New Jersey did not hold, or mean to hold, that a contract giving a special rate and providing for a drawback was, in itself, illegal and void. We do not regard the decision in the case of *Indianapolis, D. & S. R. Co. v. Ervin*, 6 West. Rep. 101, 118 Ill. 250, as relevant to the point under immediate consideration, and for this conclusion we assign these reasons. The decision is founded upon an express statute and

proceeds upon the assumption that the discrimination was an unjust one. Whether that case does or does not overrule the earlier cases decided by the same court we need not inquire, for, however this may be, the reasoning in the earlier cases harmonizes with the doctrine of the standard authorities and commands our assent. We believe those cases are right in asserting that a preferential rate, although made effective by a provision for a drawback, does not, of its own force, destroy the contract; but, in assenting to the conclusion stated, we do not mean to be understood as asserting that where a preferential rate is given, the fact that a drawback is provided for may not exert an important influence upon the decision of the question whether the discrimination is or is not an unjust one; on the contrary, we mean to do no more than affirm that the single fact will not justify a judicial declaration of illegality. Whether it may be considered in connection with other facts as tending to show an unjust discrimination is a different question from the one before us. The conclusion that common carriers may, within the limits of fairness and impartiality, consult their own interests, underlies the decisions which we have referred to as correct exponents of the law; and this general conclusion is affirmed in our own case of *Louisville, N. A. & O. R. Co. v. Flanagan*, 113 Ind. 488, 19 West. Rep. 190, and from the doctrine of that case we see no reason for departing. This principle has been given force in many other cases. *Chicago, B. & Q. R. Co. v. Outis*, 94 U. S. 155 [24 L. ed. 84]; *Easton v. Houston & T. C. R. Co.* 83 Fed. Rep. 898; *Glasgow v.*

As to classes of freight.

Less desirable freight must be accepted upon reasonable terms, as well as that which is more desirable. *Riddle v. New York, L. R. & W. R. Co.* 1 Inters. Com. Rep. 787.

Discrimination between local and through transportation.

An unreasonable adjustment of joint rates for through transportation may constitute an unreasonable discrimination against local traffic. *United States v. Tozer*, 2 Inters. Com. Rep. 597.

Unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, by a carrier, involves the question whether the service was rendered under substantially similar circumstances and conditions. More traffic furnished by one than by the other does not render them dissimilar; and it is for the jury to say whether a difference of 12 cents per 100 pounds between a local rate of a carrier and its proportion of a through rate, including another road, was unreasonable. *United States v. Tozer*, 2 Inters. Com. Rep. 540.

As to delivery stations.

Where a railroad company has fixed its rates for the transportation of grain, from any given station on the line of its road, to Chicago, it will not be permitted to charge one rate for delivery at the warehouse of one person, and a different rate for delivery at that of another, both houses being upon its line or side tracks. *Vincent v. Chicago & A. R. Co.* 49 Ill. 83. See *People v. Chicago & A. R. Co.* 55 Ill. 95.

Where two lines of steamboats on the Tennessee River are plying between the same points, carrying freight for hire, and bearing the same relation to the defendant railroad company, both seeking its service to carry their freight to the same point of destination, defendant has not the right to dis-

criminate against one and in favor of the other, systematically, in a course of dealing, in the transportation of their freight. *Samuels v. Louisville & N. R. Co.* 81 Fed. Rep. 67.

Where the conditions are equal, a common carrier has not the right to make discrimination between two steamboats in delivering freight to them, and the question of reasonableness or unreasonableness of the respective charges cannot be considered in an action brought for damages for an unjust discrimination. *Ibid.*

Agreement for rebate.

An agreement by a railroad company to transport coal at a specified rebate, in consideration of the coal dealer's erecting a dock on the company's land for use by both parties, is not, as a matter of law, void because of unjust discrimination against other shippers. It is a question of fact. *Root v. Long Island R. Co.* 4 L. R. A. 831, 114 N. Y. 300.

When the consideration paid for reduced rates by a favored shipper is obviously equal to the discount allowed him, there is in fact no discrimination, and the contract is not obnoxious to the law prohibiting discrimination between shippers. *Goodridge v. Union Pac. R. Co.* 87 Fed. Rep. 183.

Carrier may make special rates.

As a general proposition, where a railroad company is not restricted or inhibited by its charter or the law of the land, it is not unlawful for it to make an arrangement of rates for special purposes, on a sufficient consideration and for the legitimate increase of its business. *Missouri Pac. R. Co. v. Texas & P. R. Co.* 30 Fed. Rep. 2.

A contract to carry freight for a party at a specific rate, being less than its published schedule, is not void as being an unjust discrimination and against public policy, in the absence of evidence that such special rate is an exclusive privilege.

McKinnon, 27 Am. & Eng. R. R. Cas.—; *Mogul Steamship Co. v. McGregor*, 39 Alb. L. J. 50, L. R. 21 Q. B. Div. 544.

The second paragraph of the complaint alleges that the defendant is and long has been a common carrier of goods, and that its custom of long standing is to make contracts for carrying grain from Indianapolis to the eastern cities; that the plaintiffs have long been engaged in the business of buying, selling and shipping grain; that, on the 1st day of November, 1884, the plaintiffs, under the firm name of Closser & Co., entered into a contract with the defendant whereby it undertook to transport grain from a station on its road known as Union City to the City of New York; that at the time this contract was made "there was no open and established rate of freight charges for carrying such grain, except a certain rate agreed upon between the defendant and other railway companies owning competing lines; the rate so fixed by the competing companies was established by an agreement made by them for the purpose of preventing competition;" and was enforced and maintained, in so far as it was enforced and maintained by an agency of such companies established for that purpose, and called a "pool;" that the pool was managed by a person selected by the companies for that purpose and called a "pool commissioner;" that at the time mentioned all the railway companies that "were so located or situated as to

be competitors for such freight" were parties to said arrangement and pool; that the rate established by the combination of common carriers was 21½ cents per hundred weight; that the defendant, "notwithstanding such combination and pool, offered and gave to Closser & Co. an inducement for shipping freight over its line at a rate lower than that fixed by the combination and pool; . . . but in order to do this and be able to report to the pool commissioner that such pool rate had been charged," the defendant "requested Closser & Co. when shipping freight over its lines, to pay the pool rate, and agreed at the same time, with Closser & Co., to pay a certain portion of the pool rate so charged, as a rebate, in order that the shippers might in the end be only required to pay the rate fixed by the defendant;" that "in this manner and for this purpose the defendant did, on the same day, agree with Closser & Co., in respect to the shipment of grain, that Closser & Co. should pay the pool rate of 21½ cents per hundred weight and that the defendant would thereupon repay to them 4½ cents on every hundred weight of grain so shipped, as a rebate, so that they should, in the end, pay as freight upon such shipment but 17 cents per hundred weight, which was then, in fact, the rate of the defendant, for such freight, between such points as then agreed upon, which rebate the defendant agreed to pay promptly after such shipment."

Ragan v. Aiken, 9 Lea, 609; *Ex parte Benson*, 18 S. C. 39; *Avinger v. South Carolina R. Co.* 29 S. C. 265; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623; *Christie v. Missouri Pac. R. Co.* 13 West. Rep. 689, 94 Mo. 453; *Bayles v. Kansas Pac. R. Co.* 5 L. R. A. 490, 13 Colo. 151, 189.

A common carrier is bound to charge only reasonable rates for the carriage of goods. Such requirement does not compel the carrier to charge equal rates to all persons. And a contract to give a certain lumber company a reduced rate in preference to all others is not invalid, where the charges made to other parties are not unreasonable. *Johnson v. Pensacola & P. R. Co. supra*.

A railroad company is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates. *Fitchburg R. Co. v. Gage*, 12 Gray, 368.

The railway company may classify freights and passengers and charge different rates for the different classes, if there are reasonable grounds for such discrimination in the difference of the cost of service, risk of carriage or in the accommodations furnished, or the like; but the rates must be the same for all persons and goods of the same class. *Chicago, R. & Q. R. Co. v. Parks*, 18 Ill. 460; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 310; *Hersh v. Northern Cent. R. Co.* 74 Pa. 151; *Com. v. Power*, 7 Met. 536, 41 Am. Dec. 493.

Rates fixed must be reasonable.

Although at common law a common carrier may discriminate as to rates, provided no unreasonable charge is made, it is bound to carry for all persons. *Avinger v. South Carolina R. Co.* 29 S. C. 265.

As far as the common law is concerned, the question as to an alleged discrimination by a carrier in rates is whether the rate to the complaining party is reasonable or not. *Missouri Pac. R. Co. v. Texas & P. R. Co.* 80 Fed. Rep. 2.

In the absence of legislative regulation, the courts must decide for the company, when controversies arise, what is reasonable. *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841.

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The question of the reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970.

That at a certain time an article cannot be profitably shipped at an existing tariff rate is not conclusive evidence that that rate is unreasonable. *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787.

The question of relative injustice must be viewed upon broader grounds than a mere balancing of one rate against another. A reduction of rates which will throw into confusion an adjustment of rates over a large section of country, which are claimed to be unreasonable of themselves, should not be required unless a clear right thereto exists under some direct provision of the law. *Rend v. Chicago, & N. W. R. Co.* 2 Inters. Com. Rep. 313.

In determining what are reasonable rates, the fact that a road earns little more than operating expenses is not to be overlooked, but cannot be made to justify grossly excessive rates. Wherever there are more roads than the business at fair rates will remunerate, they must rely on future earnings for a return of investments and profits. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 239; *Rice v. Western New York & P. R. Co.* 2 Inters. Com. Rep. 236.

Recovery back of excess of freight paid.

A person, whether a shipper or consignee, who pays excessive rates to a carrier, is entitled to recover back the excess. *Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.* 106 N. C. 207.

In an action against a railroad company to recover back freight paid in excess of that charged to other shippers, in absence of evidence that defendant corporation was a party to discriminating arrangements, plaintiff cannot recover. *Bothschild v. Wabash, St. L. & P. R. Co.* 10 West. Rep. 73, 92 Mo. 91.

It is also alleged that grain was shipped by Closser & Co. under the contract, and that they paid the pool rate.

The third paragraph is essentially the same as the second so far as concerns the combination and pool, the agreement for rebate and the like; but it counts upon a contract, similar to that described in the second paragraph, made on the 10th day of November, 1884, and also alleges that the defendant refused to furnish forty-two cars demanded by the appellees and needed by them for the transportation of wheat which they had ready for shipment.

The fourth paragraph of the complaint contains substantially the same allegations respecting the combination and pool as those found in the two preceding paragraphs; but it is alleged that on the 80th day of September, 1884, and the 2d day of October of that year, the open and established rate was 12 cents per hundred weight. It is also alleged in this paragraph that Closser & Co. entered into a contract with the defendant on the days named, wherein it was agreed that it would transport all the grain that they might buy and tender for shipment at that rate, although the combination might increase the rate. It is further alleged that wheat was shipped under the contract; that rates were increased by the combination; that the appellees paid the increased rate and are entitled under their agreement to a rebate.

The central question presented for our decision is as to the validity of the contract between the rival railroad companies, described in the second, third and fourth paragraphs of the complaint, for if that contract was valid it established an open rate, and a shipper would have no right to unite with one of the competing companies to secure, by an undue preference, an advantage over other shippers, or by that means defraud or mislead other carriers who were parties to the agreement creating the pool. If the combination was a lawful one, then those who had notice of its existence were bound to refrain from assisting a party to it in defrauding or deceiving other members of the combination for the purpose of securing an advantage for himself over other shippers. If, to descend from a generalization to the particular instance, the combination of the competing carriers was a lawful one and was known to Closser & Co., and they contracted for a rebate in violation of the terms of the contract which bound the carriers together and established a rate to which all were under a duty to conform, they cannot recover back the sum paid in excess of the rate established by the combined companies. If, however, their agreement was illegal, the courts will turn them away with the answer that, in substance, at least, has been so often given suitors: "No polluted hand shall touch the pure fountains of justice." One whose road lies through a corrupt contract, a contract which violates the rules of public policy or of commercial honesty, cannot recover back money paid under it. The courts will leave the parties where it found them. But if the contract which bound the rival carriers together was illegal, then it was incapable of conveying any right to any person, since a void thing is as a thing without existence, or capacity for existence. If that contract was

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totally destitute of force, then no person was under an obligation to regard or respect it, for all were bound to know, as matter of law, that it was ineffective for any purpose. It further follows that if the contract creating the combination was not entitled to respect there was no obstacle barring the way to a contract between a carrier and a shipper stipulating for a special rate. It still further follows that if the contract between the associated carriers was utterly without force it is inconceivable that it should obstruct the otherwise unfettered power to make contracts for the transportation of goods where no element of partiality, oppression or improper favoritism entered into the transaction. Do but grant that the contract between the carriers was void, and it must inevitably follow that it neither obstructs the right to provide by special contract for a special rate, nor makes an act which ignores or disregards the attempt to form such a combination as that described in the complaint, wrongful or illegal. The line of thought we are pursuing naturally leads to the suggestion that where a contract is so corrupted by illegality as to be utterly void no one of the parties to it, nor anyone bearing a claim upon it, can successfully assert that a third person who disregards it has committed any wrong or violated any duty, for it seems perfectly clear that no right entitled to respect can arise out of a contract prohibited and condemned by law. It is evident that whatever path be chosen in this instance, it leads at last to the pivotal question whether the contract upon which rests the combination formed by the associated carriers possesses any vitality.

We preface our discussion of the central question by saying that we are not at this point dealing with a case where a combination is formed for the purpose of preventing ruinous competition and in which there is no design to stifle fair competition. We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design and formed solely to prevent the destruction of business by unregulated competition, may not be valid. There are, we know, cases sanctioning the doctrine that combinations may be formed where the purpose is lawful and the means employed not forbidden by positive law or high considerations of public policy. *Central Trust Co. v. Ohio etc. Co.* 28 Am. & Eng. R. R. Cas. 666; *Boston etc. Co. v. L. S. etc. Co.* 32 Am. & Eng. R. R. Cas. 633; *Leslie v. Lorillard*, 110 N. Y. 584, 1 L. R. A. 456; *Hare v. London & N. W. R. Co.* 2 Johns. & H. R. R. Cas. 80, 7 Jur. N. S. 1145; *Manchester etc. Co. v. Concord Co.* 8 R. R. & Corp. L. J. 443.

The doctrine of these cases we neither affirm nor deny; we do, however, declare that they are not relevant to the matter here in dispute. It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is at least *prima facie* illegal. The doubt is as to whether any ultimate purpose can save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination for such a purpose is condemned by public policy. If such a combination can in any event be admitted to be legal it can only be so where it is affirmatively shown that its object was to pre-

vent ruinous competition and that it does not establish unreasonable rates, unjust discriminations or oppressive regulations. If such a contract can stand it must be upon an affirmative showing, and one so full, complete and clear as to remove the presumption (to which its existence of itself gives rise) that it was formed to do mischief to the public by repressing fair competition. The burden is on the carrier to remove the presumption, and until it is removed the agreement providing for the combination gives way before this presumption and the agreement must be held to be within the condemnation directed against all contracts which violate public policy. Coming to the question which awaits our judgment, and to which we have cleared our path, we affirm that a contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition and providing means to accomplish that object, is illegal. The purpose to break down competition poisons the whole contract, and there is here no antidote which will rescue it from legal death. The element which destroys the contract is the purpose to stifle competition, for a combination of rival carriers moved and controlled by that purpose alone, is destructive of public interest and to the last degree antagonistic to sound public policy. The principle on which this rule rests is a very old one and its place in the law is very firm. The overshadowing element in this case and in kindred cases is the purpose which influences the parties in uniting themselves in a combination and concerting means to make its purpose effective; for the law abhors a combination which has for its principal object the suppression of competition in matters of commerce in which the public have an interest. Among the early cases establishing and enforcing the general principle which now occupies our attention are those wherein it is held that an agreement to prevent or hinder competition at public sales is void. For illustrations, although there are a vast number of cases, we need not look beyond our own Reports. Our court has again and again enforced the general principle we have stated. *Hunter v. Pfeiffer*, 108 Ind. 197; *Jennings County Comrs. v. Verburg*, 68 Ind. 107; *Maguire v. Smock*, 42 Ind. 1; *Gilbert v. Carter*, 10 Ind. 16; *Forelander v. Hicks*, 6 Ind. 449; *Plaster v. Burger*, 5 Ind. 282; *Buntz v. Cole*, 7 Blackf. 265.

"No one," said the court, in *Hunter v. Pfeiffer*, *supra*, "can predicate an enforceable right upon such an agreement."

In support of this statement the court cited *Atchison v. Hallon*, 43 N. Y. 147, 8 Am. Rep. 678; *Woodworth v. Bennett*, 48 N. Y. 278, 8 Am. Rep. 706; *Gibbs v. Smith*, 115 Mass. 592; *Hannah v. Fife*, 27 Mich. 173.

Relevant and striking illustrations of the scope and force of the general principle are supplied by what are known as "*The Sugar Trust Cases*," decided by the courts of New York—cases rich in argument and authority. *People v. North River Sugar Ref. Co.* 22 Abb. N. C. 164, 2 L. R. A. 83, 54 Hun. 855, *note*. See also Law Literature of Trust Combinations, etc. 28 Abb. N. C. 817; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 83, 9 L. R. A.

The authorities collected in those cases demonstrate the proposition that a trust or combination, having for its purpose the suppression of free competition, cannot live where the common law prevails. There are, however, cases which in their facts bear a closer resemblance to the present than *The Sugar Trust Cases*; but, after all, it may be said with propriety the important thing to be secured is a sound and salutary general principle, and not merely cases with closely resembling facts. There is no difficulty in securing the principle we seek, for cases almost without number assert and enforce it in an almost endless variety of forms and phases. One of the cases near akin to the one before us is that of *Hooker v. Vandewater*, 4 Denio, 349. In that case competing canal companies combined and agreed to fix an established rate of freight and to divide profits. The agreement was adjudged illegal, the court saying, among other things, that "it is a general proposition that an agreement to do an unlawful act cannot be supported at law—that no right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy." Still closer is the resemblance between this case and that of *Texas & P. R. Co. v. Southern Pac. R. Co.*, 41 La. Ann. 970. The court there held a "pooling contract" substantially the same as the one described in the appellee's complaint to be void; and in support of its ruling referred to the cases of *Gibbs v. Baltimore City Council Gas Co.*, 180 U. S. 408 [83 L. ed. 984]; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 644 [32 L. ed. 819]; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 848; *Morrill v. Boston & Maine R.*, 55 N. H. 587; *Jackson v. McLean*, 86 Fed. Rep. 218; *Santa Clara Valley M. & L. Co. v. Hayes*, 76 Cal. 387; *Firemen's Charitable Assn. v. Berghaus*, 13 La. Ann. 209; *Indiana Bagging Assn. v. Kock*, 14 La. Ann. 164; *Glasscock v. Wells*, 23 La. Ann. 517, and *Cummings v. Sauer*, 30 La. Ann. 207.

The authorities found on every hand not only fully support our conclusion that a contract between competing carriers, forming a combination for the purpose of stifling competition, is *prima facie* illegal; but many of them carry the principle to a much greater length. It is enough for us, however, that the law as it has long existed sustains the conclusion we here affirm, since it is neither necessary nor proper for us to go beyond the case before us for judgment.

Questions respecting rulings upon matters of evidence next require our attention. The first of these questions arises on the ruling sustaining the motion of the appellees requiring the production of books and papers. Counsel for the appellees respond to the argument of their opponents upon this question by asserting, as their primary proposition, that the appellant is not in a situation to avail itself of this ruling, inasmuch as it did not decline to obey the order and suffer the consequences. The counsel for appellees have assumed a position that cannot be successfully defended. The appellant was not bound to disregard the order of the trial court, suffer for its disobedience and

season, in a proper mode, and appropriately reserved an exception. This was sufficient; indeed, the appellant could not have appealed from the isolated order, for cases cannot be appealed before final judgment nor in fragments, except in rare instances, and this case is not a member of that rare class. *Western U. Teleg. Co. v. Locke*, 107 Ind. 9, 5 West. Rep. 217; *Montgomery County v. Fullen*, 118 Ind. 158.

One of the positions taken by the appellees is, however, impregnable and defeats the appellant upon the point under direct consideration. It does not appear that irrelevant or improper parts of the books or papers produced in obedience to the order were used; but, so far as the record discloses, the use made of those instruments of evidence was proper, and was made under the supervision of the court. If instruments of evidence are used in the mode required by law, it cannot be said that there was prejudicial error, although the motion for their production may have been defective, or the order made upon it too broad. As the court in this instance directed what use should be made of the books and papers, and as there is nothing showing that the direction was not an appropriate one or that the direction was not fully obeyed, we must, in accordance with the settled rule, presume that there was no irregularity or error in the ultimate action of the trial court. It is incumbent upon an appellant to show an erroneous ruling, and that he was prejudiced by it; failing in this, he cannot have a judgment in his favor. *Perkins v. Hayward* (Ind.) June 21, 1890.

The question presented upon the ruling admitting the testimony of the witness Closser, detailing statements made by Steiner, is perhaps not entirely free from difficulty; but in view of the character of the testimony, and the evidence tending to make it competent, we have concluded that there was no error in this ruling. It is sufficient to entitle testimony to admission that there is some evidence, direct or circumstantial, tending to make it competent, for it is not necessary that the connecting evidence should distinctly establish the facts which give the character of competency to the testimony, as the court, in admitting testimony, does not conclusively adjudge that the evidence establishing its competency is sufficient to fully prove the requisite fact or facts; it simply decides that there is some evidence tending to make the testimony competent. *Pedigo v. Grimes*, 118 Ind. 148, 11 West. Rep. 841; *Shugart v. Miles* (Ind.) 25 N. E. Rep. 551.

If, therefore, there was some evidence of such facts as rendered the testimony admissible, there was no error in admitting it; and our opinion is that such evidence was adduced. The evidence shows that Steiner was more than a special agent of the defendant, and that his authority respecting contracts for freight was of wide scope; and it shows, also, that the claim of Closser & Co. for the drawback or rebate was presented to Steiner as the representative of the appellant at Indianapolis and that communications concerning the claim were made to him, and that he conducted the gen-

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eral acceptance of the law, the proposition of the counsel for appellant, that the declarations of an agent made after the performance of a special duty delegated to him are not admissible against the principal. *Bellegfontains R. Co. v. Hunter*, 83 Ind. 855.

But, while we fully approve the statement of counsel as to the rule of law, we cannot sanction the application made by them of the rule, for the reason that we regard the case as belonging to a class radically different from the one which the rule governs. The case belongs to that class in which corporate agents are intrusted with the transaction of business requiring continuous negotiations, and in which the authority of the agent does not terminate until the negotiations are at an end. The principle which the adjudged cases establish is this: where authority is delegated to an agent to transact business, and that business requires continuous negotiations, or is a business not fully ended by a single act, but requires a series of acts to complete it according to the intention of the parties and commercial usage, the authority of the agent does not expire with the performance of one act, although that act may be of prime importance. *Pennsylvania Co. v. Nations*, 111 Ind. 208, 9 West. Rep. 640; *United States Exp. Co. v. Rawson*, 106 Ind. 215, 8 West. Rep. 664; *Wells v. Morrison*, 91 Ind. 51; *Louisville, N. A. & C. R. Co. v. Henly*, 88 Ind. 535; *Kirkstall Brewery Co. v. Furness R. Co.* L. R. 9 Q. B. Div. 468; *Morse v. Connecticut River R. Co.* 6 Gray, 450; *Lane v. Boston & A. R. Co.* 112 Mass. 455; *Gott v. Dinmore*, 111 Mass. 45.

Nor is the rule different where the agent is authorized to conduct a single transaction, for, as to that transaction, he is a general agent invested with authority to perform all acts necessary to fully consummate the transaction. *Cruzan v. Smith*, 41 Ind. 288; *Toledo, W. & W. R. Co. v. Owen*, 43 Ind. 405.

But it is proper to say, to avoid possible misconception, the rule does not permit the declarations of an agent narrating a past transaction to be given in evidence. *Boston & Maine R. Co. v. Ordway*, 140 Mass. 510, 1 New Eng. Rep. 721.

The facts stated in the special finding are, in most particulars, substantially the same as those stated in the complaint, but there are differences between the facts pleaded and those found by the court, and these differences will be indicated, but not expressly detailed, as we discuss the questions made upon the special findings. Many of the questions presented by the special findings are disposed of in the preceding discussion, and we shall not again consider them.

It was not necessary for the shippers to prove that the rate charged and paid by them under their contract was excessive or unjust, for the right to recover rests upon the contract providing for a drawback. If a common carrier makes a special contract to repay part of the sum received from the shipper he must perform his part of the contract unless he overthrows the presumption of fairness and right by countervailing facts.

If the contract made by Closser & Co. with the appellant was illegal then there can be no recovery, and the cases of *Morris v. Philpot*, 11 Ind. 447; *Judah v. Vincennes University*, 16 Ind. 56; *Oscanyan Co. v. Winchester Repeating Arms Co.*, 108 U. S. 261 [26 L. ed. 589]; *Craft v. McConoughy*, 79 Ill. 346, 23 Am. Rep. 171; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190, and *Gregory v. Wendell*, 39 Mich. 337,—would be of influential importance; but as the contract between the parties was not illegal a recovery is not defeated and those cases are not relevant.

It is true, as counsel contend, that a finding beyond the issues made by the pleadings is ill and will not support a judgment. *Buchanan v. Milligan*, 106 Ind. 433, 6 West. Rep. 915; *Boardman v. Griffin*, 52 Ind. 101.

If they have established their proposition that the special finding goes outside of the issues they must succeed, to the extent, at least, that the judgment rests upon facts not within the issues. Before giving consideration to the precise question argued by counsel, it is proper, and, indeed, necessary, to speak of a matter of procedure, since it is tacitly assumed, although not expressly asserted, that a special finding may be considered in detached parts. This position is not tenable. A pleading does not supply an analogue for guidance in construing and giving effect to a special finding, for a special finding, like a special verdict, a series of instructions or the like, must be considered as a whole, and it cannot be dissected into fragmentary parts and successfully assailed in detail. One part may be considered in connection with other connected parts, or parts referring to the same transaction, and if, taken as a whole, the finding legitimately supports the judgment, it will be upheld.

To determine whether the finding is beyond the issues it was necessary to analyze so much of it as is sought to be impeached, and this we have done with care; but we think it unnecessary to give the result of our analysis in detail. It may be said, generally, that the facts are essentially the same as those pleaded in the complaint, although it is, perhaps, true that the special finding makes a somewhat stronger case than the pleading does; but this does not take the foundation from under the judgment. It is sufficient if the substance of the issue is established, and a finding containing more facts than the plaintiff is required to prove is not ill, provided, of course, the facts are connected with the main issue, support it and do not establish a distinct and independent cause of action.

It is suggested that a contract binding a carrier to transport as many carloads of grain as the shipper may desire transported is ineffective for the reason that the shipper is under no obligation to ship any definite or designated quantity of grain. In our judgment the fact that there is no designation of quantity does not invalidate a contract unimpeachable in all other respects. Possibly such a contract may be revoked, but if acts are done in performance, it is valid at all events as to those acts,

for until there is an effective revocation the contract remains in force. A proposal, although revocable in its nature, becomes effective if accepted and acted upon before annulled by revocation. *Wellington v. Aphorp*, 145 Mass. 69, 4 New Eng. Rep. 883; *Louisville, N. & C. R. Co. v. Flanagan*, 113 Ind. 488, 13 West. Rep. 190.

A question made on the evidence requires a brief consideration. Some of the grain shipped by the appellees was intended for a firm known as Gill & Fisher, with whom it appears the appellant had entered into a contract in which it was agreed that they should be allowed a drawback or rebate on grain consigned to them. On the 25th of September, 1884, after the first contract described in the fourth paragraph of the complaint had been entered into, but before the second contract there described was made, the appellant, by one of its officers, forbade the allowance of drawbacks on grain shipped to Gill & Fisher, and the evidence shows that notice of the interdiction was given to Closser & Co. on the 26th day of the same month. If no more than this appeared we should be inclined to hold that there was a valid revocation and an effective interdiction upon contracts allowing Closser & Co. a drawback on grain consigned to Gill & Fisher; but more does appear, for it appears that a person representing the Company, one, too, who had acted for it in making former contracts with Closser & Co., solicited and obtained the contract entered into on the 2d of October, treated the order referred to as ineffective and induced Closser & Co. to believe that it had no force. It is probably true that the evidence is not so satisfactory upon the question of the authority of the agent who represented the appellant in making the contract of October 2, or as to whether the interdiction was abrogated or withdrawn, as might be desired; but there is evidence tending to prove that an agent superior to the one who gave the order forbidding drawbacks on grain shipped to Gill & Fisher authorized the contracts to be made, and that all agents of the Company concerned in the transactions declared that the interdiction was withdrawn and treated it as devoid of force. In this state of the evidence we must, in obedience to a long-settled rule, decline to disturb the decision of the trial court upon the controverted question of fact.

A cross-error assigned by the appellee challenges the correctness of the conclusion of law which denies a full recovery upon the cause of action stated in the third paragraph of the complaint; and we have carefully studied the finding upon that branch of the case. The result of our examination is that the facts stated are not so full and clear as to authorize us, as in favor of a party having the burden of proof, to overthrow the conclusion of law stated by the trial court, although the question is a very close one and our conclusion upon it is reached with some hesitation.

Judgment affirmed.

COOK & WHEELER
v.
CHICAGO, ROCK ISLAND & PACIFIC
R. CO.

(.....Iowa.....)

1. A ruling by a referee that the petition in a case be taken as true because of the defendant's failure to produce books and papers and answer interrogatories is not reversible error where plaintiff's evidence establishes the facts pleaded without conflict and defendant introduces no evidence whatever.
2. A common carrier cannot lawfully make unreasonable charges for his services nor unjust discrimination between his customers.
3. The allowance of a rebate by a common carrier to certain of his customers from the tariff rates charged other customers for precisely similar services is sufficient of itself to show that the rates charged the latter were unreasonable, and that there was unjust discrimination against them, illegal by the common law, which will give the latter a right to recover the amounts paid by them in excess of the rates charged the former after deducting the rebates.
4. Payments of freight charges made by shippers of goods in ignorance that services similar to those received by them were being secretly rendered by the carrier to other shippers for much less compensation, and after the positive assertion of the carrier that no lower rates were received by it, are not voluntary within the rule that voluntary payments cannot be recovered back.
5. The Statute of Limitations does not begin to run against the claim of a shipper to recover back excessive payments of freight charges so long as he has no knowledge of his rights, owing to the fraudulent concealment of the cause of action by the carrier.
6. A rule of court requiring a copy of each pleading to be filed with it, and allowing therefor a fee of 10 cents per hundred words, and directing the same to be taxed with the costs, does not apply to a petition which consists of many counts precisely alike with the exception of dates, etc., as to which a copy of one count with a reference to the others will suffice so as to allow the taxing of costs for a copy of the whole pleading.

(October 22, 1890.)

CROSS-APPEALS from a judgment of the District Court for Jasper County in favor of plaintiffs in an action brought to recover back certain alleged overpayments of freight charges. *Modified and affirmed.*

Statement by Rothrock, Ch. J.:

This is an action at law to recover of the defendant certain alleged overcharges for the shipment of a large number of carloads of live stock from Jasper County, in this State, to the Union Stock-Yards, near Chicago, Ill. The shipments were alleged to have been made between June, 1879, and April 22, 1888. The cause was referred to a referee to make up the

issues, and try and determine the case, and report to the court. A trial was had, and a report was filed recommending a judgment for the plaintiffs. The defendant filed exceptions to the report. The exceptions were overruled, and a judgment was entered upon the report. Defendant appeals.

Mr. Alanson Clark, for plaintiff:

Carriers cannot discriminate unjustly for the same service and under like conditions between their local patrons.

1 Wood, Railway Law, 565, 566.

The common law prohibits extortionate rates and unjust discriminations, and requires that the carrier shall demand only a reasonable compensation and treat competing shippers alike, and prevents their making unjust discriminations; and the fact that the high rate charged was not unreasonable does not affect the discriminations.

Samuels v. Louisville & N. R. Co. 31 Fed. Rep. 57.

Railways cannot discriminate in favor of or against the traffic, because of its ultimate use.

Denaby M. O. Co. v. Manchester, S. & L. R. Co. 8 Nev. & MacN. 426, L. R. 11 App. Cas. 97; *Ozlake v. North E. R. Co.* 1 Nev. & MacN. 72, 1 O. B. N. S. 454.

Nor can they discriminate against a local shipper by depriving him of any material advantages.

Ransome v. Eastern Counties R. Co. 1 Nev. & MacN. 109, 4 C. B. N. S. 185; *Denaby M. O. Co. v. Manchester S. & L. R. Co. supra.*

Nor can rates be given to one shipper and refused to another on capricious, arbitrary and unreasonable grounds.

Budd v. London & N. W. R. Co. 25 Week. Rep. 752.

Nor can it discriminate in favor of one local shipper and against his competitors, unless there be some substantial difference in the cost of the service.

Garton v. Bristol & E. R. Co. 1 Nev. & MacN. 218, 28 L. J. C. P. 806; *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245; *Ransome's Case*, 1 C. B. N. S. 487; *Nicholson v. Great Western R. Co.* 1 Nev. & MacN. 121, 5 C. B. N. S. 366.

The original charge may have been a reasonable toll, but it straightway became unreasonable and an extortionate one when a less rate was granted to the competitor for one and the like service under similar conditions.

Messenger v. Pennsylvania R. Co. 36 N. J. L. 407, 87 N. J. L. 531; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Oleott v. Bonfill*, 4 N. H. 587; *Story*, Bailm. § 508; *Holford v. Adams*, 2 Duer, 480; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Vincent v. Chicago & A. R. Co.* 49 Ill. 83; *Brown*, Car. 82; *Shipper v. Pennsylvania R. Co.* 47 Pa. 388; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Sandford v. Cattawissa, W. & E. R. Co.* 24 Pa. 378; *Cumberland Valley R. Co's App.* 63 Pa. 218; *Ragan v. Aiken*, 9 Lea, 609; *Houston & T. O. R. Co. v. Rust*, 58 Tex. 98; *Merriam v. Hartford & N. H. R. Co.* 20 Conn.

NOTE.—As to unlawful discrimination, see *Cleveland, C. C. & L. R. Co. v. Closser*, *ante*, 754.
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-353; *Jordan v. Fall River R. Co.* 5 Cush. 69; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 844, 12 L. ed. 465; *McDuffee v. Portland & R. R. Co.* 52 N. H. 445; *Sloan v. Pacific R. Co.* 61 Mo. 24; *Pierce, Railroads*, 498; *Cole v. Goodwin*, 19 Wend. 261; *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650, and note.

All special stipulations inserted in the charter of the common carrier for the purpose of securing equal rights to all shippers affirm nothing more than the common rights to equal justice, which exist independently of such provisions.

Sandford v. Catwissa, W. & E. R. Co. supra; *Sharpless v. Philadelphia*, 9 Pa. 169; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 882, 2 L. ed. 482; *Shipper v. Pennsylvania R. Co.*, *Houston & T. C. R. Co. v. Rust, New England Exp. Co. v. Maine Cent. R. Co.*, *McDuffee v. Portland & R. R. Co.* and *Messenger v. Pennsylvania R. Co. supra*.

The payment made by the plaintiffs was not voluntary and can be recovered back.

Heierman v. Burlington, C. R. & N. R. Co. 63 Iowa, 732.

Messrs. T. S. Wright, Robert Mather and Winslow & Varnum for defendants.

Rothrock, Ch. J., delivered the opinion of the court:

1. The action is not founded upon any statute, state or federal. The right to recover is based entirely upon the common law pertaining to the duties and obligations of common carriers. By an amended and substituted petition the plaintiffs claimed unlawful and unjust overcharges upon the shipment of 816 carloads. Each shipment was pleaded in a separate count as a separate cause of action. All of the counts were alike except in dates of shipment, cars and kinds of stock shipped, and stations from which the shipments were made. It is averred, in substance, in the amended petition, that the public tariff rates for shipment of live stock, from any point in Jasper County during the time the plaintiffs made such shipments, was \$66 for one carload. That the plaintiffs paid the full amount of said rates, and that certain other shippers (who are named in the petition) also paid the full tariff rates; but that said other shippers were allowed and defendant paid to them a rebate or drawback upon each carload shipped by them, which rebate or drawback was paid by defendant to said shippers, under a private and secret arrangement between the defendant Company and said shippers; and that the knowledge of the payment of such rebates was wrongfully and fraudulently concealed from the plaintiffs by the defendant, and said other favored shippers. That the agents of the defendant openly announced and declared to the plaintiffs that the public and announced tariff paid by the plaintiffs was correct, and that no cut, rebate or concession from the same was allowed to any shipper, and that the plaintiffs, by reason of said wrongful and fraudulent agreement, did not and could not have discovered it, and they shipped their stock in the belief that no unjust discrimination was made against them. It is charged that the shipments made by the

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plaintiffs, and those made by the said favored shippers, were for precisely the same service, from the same places, upon like conditions and under precisely the same circumstances, and that the rate charged by the defendant and paid by the plaintiffs was unreasonable, extortionate and unjust, and that it was an unjust discrimination between shippers for the same service under like circumstances.

Before proceeding to a determination of what we regard as the material question in the case, we will first dispose of a question pertaining to the power of the referee. The petition in the case was twice amended after the cause was referred. The reference was made by agreement of the parties before any issue was made or tendered in the case. The order of submission was as follows: "By agreement of parties this cause is referred to D. Ryan, with power to settle issues, and try and hear the cause, and report the facts and conclusions of law." After the reference was made, the parties appeared before the referee, and the issues were made up. The amendments to the petition were very voluminous, and there were certain interrogatories attached to the petition, which interrogatories the plaintiffs demanded should be answered by certain persons claimed to be general officers of the defendant, and a rule was asked that the defendant be required to produce certain books and papers. In other words, the plaintiffs sought, by about all the means known to the law, to compel the defendant to disclose the facts as to the alleged discrimination between shippers. All these movements were resisted by the filing of motions and demurrers attacking the pleadings, and by refusing to produce its books and papers, and by failing to make full answers to the special interrogatories; and for such failure the referee ordered that the petition be taken as true, except so far as its averments were modified by the evidence introduced on the trial. It is claimed in behalf of the defendant that, under our practice, a referee has no power to make the orders which the referee made with reference to the failure to produce books and papers, and the failure to answer the special interrogatories. We do not think it is proper to determine what power a referee may have in these respects, for the reason that there is really not a disputed question of fact in the case. The evidence of the witnesses introduced by the plaintiffs establishes the facts pleaded in the petition without conflict. The defendant did not introduce any evidence; and, if the facts pleaded entitle the plaintiffs to recover, it would have been clearly against the undisputed evidence to have made a finding for the defendant. We will now state, as briefly as may be, the substance of the evidence.

2. It appears that one E. R. Clapp was an employé of the defendant. He was located at Des Moines, and was known among shippers of live stock as the Iowa stock agent of the defendant. Clapp was frequently along the railroad in conference with shippers of live stock. He held this position during the time that the plaintiffs made the shipments set forth in their petition. There were a number of shippers of live stock in and about Newton, the principal station on the defendant's road in Jasper County. During nearly the whole time cov-

ered by this action, the tariff rate for shipment of live stock from Newton to Chicago was \$60 per carload. It was practically the same from the stations next east and west of Newton. There was at times a slight difference, but not enough to be a material fact in the case. The freight charges, as given by the defendant to its station agents, were for the most of the time \$60 per carload, and this rate was given out by station agents to shippers as the charge made by the defendant. All of the carloads sent forward by all the shippers were billed by the agents at the full rate given out by the Company. The stock was shipped in the usual manner. No part of the freight charges were in any case paid at the place of shipment. The cars were billed to commission houses at the Union Stock-Yards. The stock was sold by the commission men, and, after taking out their commission and paying the freight, the balance of the proceeds of the sales was remitted to the shipper. This was the uniform manner of transacting the business. All of the shippers were dealt with in exactly the same manner until the stock was sold and the regular freight charges paid. There was no difference in the manner of the service. All of the shippers were given the same kind of cars, and the stock shipped by the plaintiffs was conveyed in the same kind of trains, and on the same time, and with the same privileges as to the free transportation of one or more men to take care of the stock while in transit. In short, the plaintiffs had no preference over other shippers in any respect. It appears without conflict that at least three other firms or individuals engaged in the same business at the same place, and in competition with the plaintiffs, had private and secret agreements with Clapp, the said stock agent, by which they were paid a rebate of from \$3 to \$20 on each carload shipped. These agreements were not uniform at all times. The amount to be paid varied just as the parties were able to agree upon the terms. So far as appears, Clapp always performed the contracts. He paid the rebates sometimes in currency; at other times by sending the money to the shippers by express. There were short intervals during the time that no rebates were paid. But these intervals were the exception and not the rule. And Clapp always exacted a promise from the favored shippers that the fact of the payment of rebates must be kept secret. We have not made a careful estimate of the number of carloads shipped by the favored shippers. Indeed, no exact estimate could be made from the evidence. It is shown, however, beyond all question, that not less than 1,900 carloads, in the aggregate, were shipped by the favored shippers. The plaintiffs made application to Clapp for better terms, and were refused. He invariably stated in most positive terms that no rebates nor concessions were allowed to any of the plaintiffs' competitors. The referee found that the plaintiffs were entitled to recover on part of the shipments at the rate of \$3 per car, and on others at \$5, and on the remainder at the rate of \$10 per car. The aggregate amount found to be due, including interest, was \$2,783.98. If the plaintiffs are entitled to recover on the ground of unjust discrimination, the evidence shows beyond all controversy that the judgment is not excessive.

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counsel to claim that the judgment is excessive.

8. The real question in the case is, Do the facts above recited authorize a recovery on the part of the plaintiffs? It is well to keep in mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable.

In *Story on Bailments*, § 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood, *Railway Law*, 566, it is said: "A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination." In volume 2, p. 95, *Redfield on Railroads*, the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. Hence, it was held at an early day that all that could be required on the part of the owner of the goods, by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively."

In *Hutchinson on Carriers*, 243, after a review of the cases, it is said: "Hence we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty." An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates. It appears to be conceded that the defendant had no right to exact unreason-

able rates or to make unjust discriminations between shippers which in effect compels one shipper to pay an unreasonable rate. The above principles of law may be said to be fundamental, and it is only necessary to apply the facts to reach the conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is that some of the others shipped less than the plaintiffs. In short there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which shipments would ordinarily be made upon other railroads, but the evidence shows that the plaintiffs' field of operation was about the same as the other shippers'. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. Is it to be supposed that any court or jury under this state of facts would solemnly find, declare and adjudge that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding that can in any fairness be made is that, after deducting the rebate, the rate was reasonable; and that the exaction from the plaintiffs was unreasonable, and the discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair-minded men. We have been cited to a number of adjudged cases, by counsel for the respective parties, and we think we may safely say that not one of them is in conflict with the views we have herein expressed upon this question. On the contrary, and in support of our conclusion, see *Sharpless v. Philadelphia*, 21 Pa. 147; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *McDuffee v. Portland & R. R. Co.* 52 N. H. 480; *Messenger v. Pennsylvania R. Co.* 86 N. J. L. 407.

4. It is claimed in behalf of appellant that the payments by plaintiffs were voluntarily made, and cannot be recovered back. It is true, the money was paid without duress of person or goods, but it was paid, not only without knowledge that it was a wrongful exaction, but in the belief of the truth of the positive assertions of Clapp that no shipper was allowed any rebate. That such a payment is not voluntary, see 1 *Parsons*, Cont. 466, and *Heiserman v. Burlington, C. R. & N. R. Co.*, 68 Iowa, 782.

5. The defendant pleaded the Statute of Limitations, as to part of the claim. The same question was considered in the case of *Carrier v. Chicago, R. I. & P. R. Co.*, 70 Iowa, 80, 6 L. R. A. 799, where it was held that the Statute of Limitations was no bar to the action. Following that case we hold that the Statute did not commence to run while the plaintiffs had no knowledge of their rights in the premises, owing to the fraudulent concealment of the cause of action by the defendant.

6. The defendant also appeals from an order 9 L. R. A.

overruling a motion to retax costs in the case. It appears that the sum of \$582 was taxed, as costs for copies of the petition, and the several amendments thereto. It is shown by evidence taken on the hearing of the motion that the petitions and copies thereof were printed at an expense of not to exceed \$30. The action of the court in taxing this erroneous item of costs was founded upon Rule 1 of the Rules of Practice adopted by the convention of district judges, which went into effect July 4, 1887. The following is a copy of the rule: "Every party at the time of filing any petition, answer, reply, demurrer or motion, . . . shall file with the same one plain copy thereof for the use of the adverse party; and, on failure to do so, the same may be continued at the option of the adverse party, or the paper so filed stricken from the files. A fee of ten cents per hundred words shall be allowed for all copies, and taxed with the costs." Substantially the same rule was in force in some of the districts of this State for many years before it was adopted by the convention of judges. We are of opinion that such a rule of practice is valid, and that it was within the power of the judges to authorize costs to be taxed therefor, but it surely was not intended that the rule should be made an instrument of oppression. There is no requirement that a literal copy of all the pleadings should be made, when such pleadings are precisely alike, excepting, possibly, a date, an amount or the like. The purposes of the rule would have been fully subserved by a copy of one count, with a mere reference to the others. The court ought to have the discretion to prevent speculative and unnecessary costs. This item of costs will be reduced to \$15. The rule surely ought not to apply literally to petitions like this.

7. The plaintiffs also appealed from the judgment; but, if the judgment be affirmed on the defendant's appeal, they consent that it may be affirmed on their appeal.

The judgment will therefore be affirmed throughout, with the exception as to the item of costs, as above mentioned. And as the defendant was successful on that branch of the appeal, \$25 of the costs in this court will be taxed to the plaintiffs; and the plaintiffs will also be taxed \$25 by reason of the affirmance of their appeal. These assessments appear to us, from an examination of the abstracts and arguments, to be about correct.

Modified and affirmed.

J. A. BROWN

v.

Horace POOL, *App't.*

(....Iowa....).

1. No notice of the expiration of the time for redemption of land from a tax sale

NOTE.—Redemption from tax sale; statute to be strictly complied with.

Every provision of the Statute relating to notice to parties having the right to redeem must be strictly complied with. *Thompson v. Burhans*, 61 N. Y. 52; *Blackstone v. Sherwood*, 31 Kan. 35; *Jackson v. Eady*, 7 Wend. 143; *Comstock v. Beardsley*, 15 Wend. 348; *Westbrook v. Willey*, 47 N. Y. 457; *Jenks v.*

notice to be served on the person in possession and also on the person in whose name the land is taxed, if a resident of the county where the land is situated.

2. One who, without asserting any claim of right to do so, herds cattle over a range of uninclosed land extending from one to two miles in area, including a particular quarter-section, is not in possession of such quarter-section within the meaning of a statute requiring service of notice of the expiration of the time of redemption of land from a tax sale upon the person in possession thereof.

3. A statute requiring service of notice of the expiration of the time for redemption from a tax sale upon the person in whose name the land is assessed does not require the purchaser to serve such notice on himself where the land, after the sale, has been assessed in his name.

(October 27, 1890.)

A PPEAL by defendant from a judgment of the District Court for O'Brien County

Statement by Given, J.:

Plaintiff claims title under different tax deeds to the S. $\frac{1}{2}$, S. W. $\frac{1}{2}$, section 12, and the N. W. $\frac{1}{2}$ of section 13, township 97, range 59, O'Brien County, and asks to be quieted in his title thereto. Upon the hearing plaintiff's petition was dismissed as to the first-described tract, and a decree entered in his favor as to the second. The defendant alone appeals, and hence the case is before us only in so far as it relates to the N. W. $\frac{1}{2}$ of section 13.

Messrs. Hughes & Hastings and Cory & Bemis for appellant.

Messrs. T. M. Stuart and J. L. E. Peck for appellee.

Given, J., delivered the opinion of the court:

1. Plaintiff claims title under a tax deed from the treasurer of O'Brien County to him ex-

Wright, 61 Pa. 410; Wilson v. McKenna, 53 Ill. 43; Hendrix v. Boggs, 15 Neb. 469; Zohradniosk v. Selby, 15 Neb. 579; Seaman v. Thompson, 16 Neb. 546; Merrill v. Dearing, 32 Minn. 479; Cooley, Taxn. 587; 2 Desty, Taxn. 885.

If the Statute prescribes a form of notice, this must be exactly followed. Simonton v. Hays, 32 Hun, 236; Black, Tax Titles, 226.

A provision requiring the purchaser to give notice to the owner is mandatory, and must be strictly complied with; and the omission to give the prescribed notice, or the service of a notice not conforming to the Statute, will invalidate the subsequent tax deed. Thompson v. Burhans, *supra*; Doughty v. Hope, 3 Denio, 594; Neber v. Hatch, 10 Abb. N. C. 481; Blackstone v. Sherwood, *supra*; Holbrook v. Fellows, 38 Ill. 440; Long v. Smith, 62 Iowa, 329; Hendrix v. Boggs, 15 Neb. 469; Black, Tax Titles, 226.

In Missouri the Statute required the certificate of purchase to be recorded, and gave the owner two years after the sale in which to redeem. It was held that recording the certificate was essential. Reeds v. Morton, 9 Mo. 868; Cooley, Taxn. 538.

Where proof of notice of the expiration of the time to redeem is required to be filed ninety days before such expiration, a deed given before the ninety days had expired is void. Swope v. Prior, 58 Iowa, 412; Cummings v. Wilson, 59 Iowa, 14; Cooley, Taxn. 537.

Notice, when to be given by an officer, must be distinct and full, and the evidence of giving it should be preserved in the proper office. Broughton v. Journeay, 51 Pa. 81; Cooley, Taxn. 538; 2 Desty, Taxn. 885.

Redemption from tax sale, how effected. See note to Hintrager v. Mahony (Iowa) 6 L. R. A. 50.

Rights of owner to rely on receipt of notice.

The owner may rely on his right to notice and wait until he receives it before taking proceedings to redeem. Arthurs v. Smathers, 38 Pa. 40; Doughty v. Hope, 3 Denio, 594; Dentler v. State, 4 Blackf. 358; Cooley, Taxn. 538; 2 Desty, Taxn. 883; Black, Tax Titles, 227.

He may rely on the official entries, in the absence of anything to warn him of their incorrectness, for the date of the expiration of the ninety days. Ellsworth v. Green, 59 Iowa, 622.

As to the proof of notice, see American Mission-
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ary Asso. v. Smith, 59 Iowa, 704; Ellsworth v. Cordrey, 63 Iowa, 676; Cooley, Taxn. 587.

To whom to be given.

Notice to the owner or occupant, of the sale of the lands and of the expiration of the time for redemption is essential to the validity of the tax deed. Gage v. Bailey, 100 Ill. 530; 2 Desty, Taxn. 883.

In case of the death of the owner of real estate, notice of sale to the estate of decedent is insufficient; it should be given to some person having an adverse interest and capable of appearing and defending,—as an heir or personal representative. McGee v. Fleming, 32 Ala. 276.

It is not necessary that the notice should state in whose name the property is assessed, but it must be directed to the party to whom it is assessed when the notice is issued; but the fact that it also contains the name of the person to whom it was assessed when the tax was levied is not fatal to its validity. Sperry v. Goodwin (Minn.) July 25, 1890.

In order to acquire a tax deed, no notice to the person in possession of the land is required when the latter holds under the person owning the tax certificate. Lamoreux v. Huntley, 68 Wis. 24.

The Minnesota Law requiring notice of the expiration of the time of redemption by persons holding tax certificates applies to assignees of the interest of the State before forfeiture, but not an assignee or grantee acquiring such interest after forfeiture. State v. Smith, 36 Minn. 456.

Such notices are not required to be served on behalf of the State. *Ibid.*

For the purpose of giving notice to redeem the land will be regarded as taxed to the person in the assessor's book on file in the auditor's office, until such time as the tax duplicate is made out and placed in the hands of the treasurer; but after that time, and until another assessment is made, the land will be regarded as taxed to the person named in the tax duplicate. Fuller v. Butler, 73 Iowa, 729.

What to contain.

In a notice which appears to be issued by the county auditor, a correct description of the property as appearing on the tax records of the county, and according to the recorded plat of the town or city or a well-known subdivision thereof, is sufficient, though the county and State do not appear therein. Sperry v. Goodwin (Minn.) July 25, 1890.

cutted January 18, 1886, for the lands in question, based upon a sale held on the 4th day of October, 1880, for the taxes of 1876 to 1879, inclusive, and upon notice of the expiration of the time for redemption, served upon G. W. Pitts, James D. Wright and L. F. Maple, more than ninety days before the execution of the deed. Appellant contends that the deed is invalid because the notice was not served upon the person in possession, nor upon the person in whose name the land was taxed. Appellee contends that no notice was required, and, if required, that it was served upon the proper parties. Section 894 of the Code requires that, after the expiration of two years and nine months after the date of sale, notice may be served upon the person in possession, and also upon the person in whose name the land is

taxed, if such person reside in the county where the land is situated. It follows that if there is no person in possession of the land, and it is not taxed in the name of any person, no notice is required.

2. The two years and nine months expired July 4, 1888. It appears that, during the summer of 1888, one Webster, residing in the vicinity of the land, had a corral on the S. E. $\frac{1}{4}$ of said section 18, and in person, or by his hired man, without asserting any claim of right so to do, herded 500 head of cattle belonging to himself and others over a range of open and uncultivated land extending from one to two miles from the corral, the land in question being included in the range. It is contended that Webster was in possession of the land in question, and that notice should have been

Where property sold for taxes is bid in by the State and afterwards assigned to a purchaser, under the Minnesota laws, the sum paid by such purchaser is "the amount sold for," to be inserted in the notice of the expiration of the time of redemption. *Ibid.* See 2 *Desty, Taxn.* 888.

A sale of land for a term of years for nonpayment of taxes in New York City is not rendered void by the fact that the notice to redeem required the owner to pay the tax, with interest from the date of sale, whereas the purchaser did not pay his money upon such sale until some time thereafter. *People v. Cady*, 7 Cent. Rep. 286, 106 N. Y. 299.

Where the notice sets forth the matters required by statute, but mistakes the day and year of the sale, or any other material fact, so interwoven into the notice as to contradict its statutory requirements, it is misleading and fatal to the validity of the tax deed. *Long v. Wolf*, 26 Kan. 522; *Black, Tax Titles*, 226.

Service of notice.

The statutes commonly provide that the redemption notice shall be served upon the occupant of the land personally, or the owner, if he is known and a resident; and that service may be made by publication if the land is vacant or the owner is beyond the jurisdiction. *Black, Tax Titles*, 229.

In New York in case the land sold and conveyed by the comptroller was in the actual occupancy of any person, it must be served upon the person having the actual and open possession and control of it, or a portion of it, *e. g.*, the owner or a tenant, and not upon mere boarders, lodgers or servants. *National F. Ins. Co. v. McKay*, 8 Abb. Pr. N. S. 445.

Where the owner of land was served with the statutory notice within apt time, an omission to give notice to a mortgagee, or to show by the affidavit for the deed facts excusing such omission, will not render the deed invalid. *Smyth v. Neff*, 13 West. Rep. 500, 123 Ill. 810; *Hall v. Spencer*, 52 Iowa, 408.

Where notice is required to be served on the party in possession, if it is served on the owner, it will be presumed, in the absence of showing otherwise, that he has possession. *Hall v. Guthridge*, 52 Iowa, 408. See *Ellsworth v. Low*, 62 Iowa, 178; *Cooley, Taxn.* 537.

The service of the notice of the sale need not be made on one having merely a constructive possession or occupancy. *Taylor v. Wright*, 11 West. Rep. 428, 121 Ill. 455.

A tax deed issued without service of the notice to redeem, as required by statute, or without filing in the treasurer's office the statutory proof of such service, is not void, but it conveys the title to the land subject to the right to redeem when lawfully established. *Bowers v. Hallock*, 71 Iowa, 218.

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Copy of notice to be sent by mail.

Copy of the notice of sale must be sent by mail to the person who was the owner of the land at the time the assessment was made. *State v. Landis* Twp. 11 Cent. Rep. 755, 50 N. J. L. 874.

Where notice was directed to "C. C. Smeltzer and the unknown owners of the land," but the persons in whose names the lands were taxed, were J. Graham and J. W. Van Myers, the notice was insufficient, and the owners had a right to redeem. *Slyfield v. Barnum*, 71 Iowa, 245.

Constructive notice; service by publication.

Where notice is to be given within a certain period before the time for redemption, it is invalid unless its service is effected, or its publication completed, within the time prescribed. *Bennett v. New York*, 1 Sandf. 485; *Lucas v. McEterna*, 19 Hun, 14; *Black, Tax Titles*, 237.

Where by law notice to redeem was required to be served on the person who was assessed, notice published in a newspaper three months before the time to redeem had expired, describing the land, stating his purchase, and also when the redemption would expire, was held insufficient. *Barnard v. Hoyt*, 63 Ill. 341; *Cooley, Taxn.* 538.

In Illinois a notice is fatally defective which states a wrong date of the expiration of the time, and when it may be by publication not more than five nor less than three months before the expiration of such time if there is no occupant, the property must appear to be unoccupied at the time of publication, *i. e.*, up to within five months of such expiration of time. *Gage v. Bailey*, 100 Ill. 530; *Cooley, Taxn.* 538.

The fact that the premises were unoccupied five months before the expiration of such time does not lay a foundation for notice by publication. *Gage v. Bailey, supra*; 2 *Desty, Taxn.* 885.

Where an affidavit of publication of notice of expiration of the time of redemption from a tax sale states that the list was published in a paper named, which is a daily paper printed and published in the county where the lands are situated, the clear inference is that the list was properly published in that paper. *Sperry v. Goodwin* (Minn.) July 2^d, 1890.

The published list of lands sold for taxes, which discloses the names of the owners and the year for which the taxes were claimed to be delinquent, the year being designated at the head of the list and the names inserted opposite each tract, and which also appears to be published in a daily paper of general circulation in the county,—is sufficient. *Ibid.* See *Clark v. Lindsey* (Ohio) *ante*, 740; *Cramer v. Clow* (Iowa) *post*, 772; *Alexander v. Wilcox* (Neb.) *ante*, 735.

served upon him. Where one is in fact in possession, notice must be served upon him without regard to whether he be rightfully in possession or not; but, in determining whether a party is in possession, we may inquire whether he makes any claim to possession. Webster's use of the land was not made with reference to boundary lines, and was in no sense a possession different from what he had of any other open land upon which his cattle ranged. These facts are different from any of the Iowa cases cited by counsel for appellant.

In *Ellsworth v. Low*, 62 Iowa, 178, the owner was held to be in possession because he had used the land for taking timber and wood therefrom.

In *Sapp v. Walker*, 66 Iowa, 497, the owner had authorized the removal of dirt from his vacant lot, and had cut the weeds from year to year, wherefore he was held to be in possession.

In *Whitice v. Farsons*, 78 Iowa, 137, R had surrendered possession under his lease to plaintiff, before service of notice. A portion of plaintiff's corn remained on the land, and anything belonging to R that remained was with plaintiff's consent. Held, that plaintiff was in possession.

In *Callanan v. Raymond*, 75 Iowa, 307, B had a crop of corn growing on a small portion of the land, the balance being unimproved. Held, that B was in possession.

8. It appears that the land was assessed in the name of L. P. Sams upon the assessment

book of 1877. Appellant contends that the presumption is that the land continued to be taxed in the name of Sams, and notice was therefore necessary to him. That presumption, however, is overcome by the evidence, which shows that Sams conveyed the land to James D. Wright, upon whom notice was served six years prior to the time of serving the notice. The testimony of the treasurer and auditor shows that the tax lists for 1882 and 1883 were blank, with a very few exceptions, as to the names of owners in the column so headed, and that the treasurer entered names in that column at the time taxes were paid to him. The name J. A. Brown appears in that column in the list for 1882 and 1883, and was evidently put there after the tax list passed into the hands of the treasurer, as the auditor testifies that he had no clerk, and that the name was not written by him. If the tax list fails to show in whose name the land was taxed at the time for giving notice, and no one was in possession, no notice was required. It fairly appears that J. A. Brown, whose name appeared on the tax list, is the same J. A. Brown who purchased at the tax sale, and who brings this action. That being the case, it is not required that Brown should serve notice upon himself. See *Knight v. Campbell*, 76 Iowa, 780.

This discussion leads us to the conclusion that the decrees of the District Court should be affirmed.

MICHIGAN SUPREME COURT.

SENECA MINING CO., *Relator*,
v.
SECRETARY OF STATE of Michigan.

(....Mich.....)

1. If the law-making power goes through the form of enacting a law which it is prohibited by the Constitution from enacting, its action is wholly void and cannot be validated by the subsequent amendment of the Constitution so as to confer authority upon the Legislature to pass such a law.
2. Under article 20, § 1, of the Constitution, providing for constitutional amendments, which, after providing for a submission of a proposed amendment to popular vote, concludes by stating that if ratified by the requisite majority "the amendment shall become part of the Constitution," amendments take effect from the time of their ratification notwithstanding the fact that the next section relating to constitutional revision concludes by stating that all "amendments shall take effect at the commencement of the year after their adoption."
3. Public Acts 1889, No. 129, authorizing the extension of the corporate existence of a mining corporation which was originally organized for a period of thirty years, having been passed after the ratification of the constitutional amendment authorizing it, is valid although passed before the beginning of the year after the adoption of such amendment.

(October 31, 1890.)

APPPLICATION for a writ of mandamus to compel respondent to receive and file certificate 19 L. R. A.

tain articles of association intended to give relator an extended term of existence. *Granted.*

The facts are fully stated in the opinion.

Mr. Thomas L. Chadbourne for relator.
Mr. E. W. Huston for respondent.

Long, J., delivered the opinion of the court:

The relator is a mining corporation organized under the laws of Michigan. Its original articles of association bear date March 23, 1860, were filed in the office of the County Clerk of Keweenaw County May 11, 1860, and in the office of the Secretary of State April 10, 1860, and it was therein provided that its term of existence should be thirty years, and it has ever since been a mining corporation under the laws of Michigan. On the 19th of March, 1890, there was filed for record with the clerk of said County of Keweenaw, that being the county where the corporation carried on its business, duplicate articles of association of the Seneca Mining Company, bearing date the 24th day of January, 1890, signed by the president and secretary of the Company, and acknowledged before a proper acknowledging officer. The 8th article reads as follows: "Art. 8. The term of the existence of this corporation shall be thirty years from the expiration of its former term, which former term will expire, as is believed, on the 23d day of March, 1890." These articles of association were executed under the provisions of Act No. 129 of the Public Acts of

See also 19 L. R. A. 134; 31 L. R. A. 815; 34 L. R. A. 97.

the State of Michigan for the year 1889. This Act is an amendment to the Act passed in 1882, entitled "An Act to Provide for Renewing the Incorporation of Companies Organized for Mining and Manufacturing Purposes," as amended in 1887. These Acts received a construction by this court in the case of *Taggart v. Perkins*, 73 Mich. 808. We there held that these Acts did not apply to corporations whose periods of existence were, in the articles of association, limited to thirty years. On March 17, 1890, another of the duplicate articles of association of the Seneca Mining Company, executed under Act No. 129, Pub. Acts 1889, was presented to the Secretary of State, with the request that he file and record the same, which he refused to do, for the reason that the original articles of association of the Mining Company provided for a corporate existence of thirty years, and that the Amendment of 1889, authorizing an extension of the period of corporate existence of such corporation, is invalid. The Seneca Mining Company asks for a mandamus to compel the Secretary of State to file and record their articles of association, whereby the corporate term of its existence is extended thirty years from March 28, 1890. A constitutional amendment was submitted to the electors at the April election of 1889, and was adopted by them as follows: "Art. 15, § 10. No corporation, except for municipal purposes, or for the construction of railroads, plank-roads and canals, shall be created for a longer time than thirty years; but the Legislature may provide, by general laws applicable to any corporation, for one or more extensions of the term of such corporation while such term is running, not exceeding thirty years, for such extension, on consent of not less than a two-thirds majority of the capital of the corporation, and by like general laws for the corporate reorganization, for the further period not exceeding thirty years, of such corporations whose terms have expired by limitations, on consent of not less than four-fifths of the capital: Provided, that in cases of corporations where there is no capital stock, the Legislature may provide the manner in which such corporation may be organized." Without the authority conferred upon the Legislature by this Amendment to the Constitution, the Legislature would have no authority to authorize the extension of corporate existence of corporations such as this, as was held in *Taggart v. Perkins*, *supra*. The important question which is therefore presented is, When did the Amendment adopted by the electors in April, 1889, take effect as a part of the Constitution? We must look to that instrument for a reply. Article 20 reads as follows: "Section 1. Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives. If the same shall be agreed to by two thirds of the members elected to each House, such amendment or amendments shall be entered on the journals respectively with the yeas and nays taken thereon, and the same shall be submitted to the electors at the next spring or autumn election thereafter, as the Legislature shall

direct, and if a majority of the electors, qualified to vote for members of the Legislature, voting thereon, shall ratify and approve such amendment or amendments, the same shall become part of the Constitution. Sec. 2. At the general election to be held in the year 1866, and each sixteenth year thereafter, and also at such other times as the Legislature may by law provide, the question of the general revision of the Constitution shall be submitted to the electors qualified to vote for members of the Legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the Legislature, at the next session, shall provide by law for the election of such delegates to such convention. All the amendments shall take effect at the commencement of the year after their adoption."

This is all there is in the Constitution about amendments, and when they shall take effect. It is contended on the part of the respondent that the clause, "All the amendments shall take effect at the commencement of the year after their adoption,"—added to section 2, has reference solely to the amendments specified in section 1, and that section 2 has no reference to amendment or amendments of the Constitution, but to the revision each sixteenth year, or to such as the Legislature may by law provide; and from this it is contended that the Amendment passed at the April election in 1889 only took effect on the 1st of January, 1890. If this is the construction to be given to the last clause of section 2, art. 20, of the Constitution, as it now stands, and that clause is still in force, since the Amendment of 1876, and hereinafter referred to, then the Act of 1889, under which relator claims the right to file articles of association, is wholly void; for, if the law-making power is prohibited from enacting a law, and in disregard of such prohibition it goes through the forms of enacting a law, such enactment is of no more force or validity than a piece of blank paper, and is utterly void, and power subsequently conferred upon the Legislature by an amendment of the Constitution does not have a retroactive effect, and give validity to such void law. *Dewar v. People*, 40 Mich. 401; *McPleasant v. Vansice*, 48 Mich. 361; *Cooley*, Const. Lim. p. 227.

The history of this article of the Constitution in the convention of 1850 is as follows: First, there was a committee appointed upon the subject of amendments to the Constitution. This committee reported substantially the article found in the Constitution of 1835, and this was referred to the committee of the whole. Afterwards, a substitute was offered substantially as article 20 now is, except the change made in section 1, in 1876, and the last clause of section 2, which was adopted in committee, and referred back to the convention, and placed upon the order of third reading. On third reading, amendments were made in section 2 so as to require the question of revision to be submitted every sixteenth year after 1866. The article, as amended, was passed by the convention, and referred to the committee on arrangement

words added to section 2: "All the amendments shall take effect at the commencement of the political year after their adoption." The amendment was concurred in by the convention, and referred to the committee on enrollment, and the article was passed as a part of the Constitution by the convention. It does not appear, from the convention debates of 1850, that question was raised or debate had upon the subject of the amendment made by the committee on phraseology. This article of the Constitution remained unchanged until the Legislature, by joint resolution No. 17, in 1861, proposed an amendment to section 2 by omitting the word "political" before the word "year," where it last occurs, so that this clause would read, "All amendments shall take effect at the commencement of the year after their adoption." This Amendment was ratified and adopted by the electors at the general election held in 1862. Just what the effect of this Amendment was, is not very apparent, as, by section 1 of the article, amendments were still required to be submitted to the electors at the general election, which occurred only biennially, and the commencement of the year next after their adoption would still place the time of the taking effect of the amendments beyond the time when the Legislature would have adjourned its session, so that no legislation could be had thereunder until the meeting of the Legislature two years thereafter, unless an extra session was called. Up to 1876, a period of twenty-five years from the adoption of the Constitution of 1850, no one ever contended that an amendment to the Constitution took effect until at the commencement of the year after its adoption, the last clause of section 2 undoubtedly being construed as having referred solely to the amendments specified in section 1 of that article. During this time twenty-one amendments were submitted to the people, of which eight were rejected and thirteen adopted. No legislation was attempted under such amendment, however, during this time, until after the amendment took effect after the commencement of the year following. Amendments were proposed and adopted by the Legislatures of 1865,

ennial elections following these years, and those adopted were not regarded as taking effect until the 1st of January following. By joint resolution No. 29 of 1875, the Legislature, however, adopted an amendment to section 1 by striking out the word "general" before the word "election," and substituting therefor the words, "next spring or autumn election thereafter, as the Legislature shall direct." At the general election held in 1876, this Amendment was ratified and approved by the voters, and this is the present condition of the article, and it stands as above quoted. Whatever interpretation may have been given this article by the Legislature, or others acting under it, prior to the Amendment of 1875, which was ratified by the electors, so that the vote of the electors upon amendments could be taken at the spring election, or in the autumn, it is very evident that it was the intention of the Legislature of 1875 to so change the time when the amendments should take effect that legislation could at once be had under the change so made in the Constitution. If the time of the taking effect of these amendments was still postponed until the commencement of the year following, then the submission of such amendments to the electors for their approval might as well have been at the general election as in the spring, and nothing would have been gained by a submission at an earlier period. It is quite apparent that the very purpose, and the only object, to be accomplished by this change in section 1, was to enable the Legislature, during its sitting, to enact laws to meet the object sought to be accomplished by a change in the fundamental law; that the Legislature might submit an amendment or amendments to the Constitution at the spring election, and, if ratified by the electors, the Legislature being then in session could, by appropriate legislation, carry out the object sought in the change.

It must be held that the Amendment took effect from the time of the ratification by the popular vote. It follows that Act No. 129, Pub. Acts 1889, is valid, and the writ of mandamus must issue as prayed.

The other Justices concurred.

IOWA SUPREME COURT.

Laura CRAMER, *Appl.*,

v.

W. F. CLOW *et al.*

(....Iowa....)

1. In determining the truth of an allegation that a person claiming real estate by

adverse possession obtained the title under color of which he took possession by fraud, the fact may be considered that the one claiming to be the true owner made no claim to the land, directly or indirectly, for a period of sixteen years, during all of which time the adverse claimant paid the taxes thereon.

2. A deed to land may constitute suffi-

NOTE.—Tax title; adverse possession under color of title.

An "adverse possession" is defined to be the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued
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under a assertion or color of right on the part of the possessor. Wallace v. Duffield, 2 Serg. & R. 527; French v. Pearce, 8 Conn. 440; Smith v. Burtis, 9 Johns. 174; Omaha & G. Smelting & Ref. Co. v. Tabor, 5 L. R. A. 226, 13 Colo. 53.

The older a tax title is without any claim to the

See also 9 L. R. A. 735.

cient color of title to found a claim by adverse possession, although it is not properly acknowledged.

3. An action to quiet title may be maintained although founded simply on a title by prescription, arising from ten years' adverse possession of the land.

(October 23, 1890.)

A PPEAL by plaintiff from a decree of the District Court for Wright County in favor of defendants in an action brought to quiet title to a certain piece of real estate. *Affirmed.*

Statement by **Rothrock, Ch. J.:**

This action was commenced on the 10th day of December, 1887. The plaintiff claimed to be the owner of a farm which is in the possession of the defendants, and the prayer of the petition was that the title be quieted in the

plaintiff. The defendants answered claiming that Harriet E. Clow was the owner of the land. A cross-petition was also filed, in which it was claimed that Harriet E. Clow was the owner of the land by a title acquired by adverse possession thereof for more than ten years, and also by a tax deed. This cross-petition was answered, and the answer was also made a cross-petition, and affirmative relief by quieting title in plaintiff was prayed by the plaintiff. When the cause was called for trial, the plaintiff withdrew, and dismissed her original petition. The cause was tried upon the cross-petition and answer thereto. A decree was entered quieting the title in Harriet E. Clow, and the plaintiff appeals.

Messrs. Nagle & Birdsall, for appellant: The *quo animo* which will found a title by prescription is not an intent to take possession

land being made under it the weaker it is, and the weaker are all presumptions in its favor; but it is otherwise where the purchaser has possession. *Alexander v. Bush*, 46 Pa. 62.

Lapse of time strengthens a title founded on a tax sale. *Read v. Goodyear*, 17 Serg. & E. 350.

But presumption will not arise in favor of the validity of the tax deed merely from proof of adverse possession short of the period prescribed by the statute. *Townsend v. Downer*, 32 Vt. 183.

The holder of a tax deed will be deemed to be in possession of unoccupied land, and if such possession is uninterrupted during five years from the date of the execution and recording of the tax deed, the title acquired thereby becomes perfect and complete. *Moinzoga Coal Co. v. Blair*, 51 Iowa, 449; *Barrett v. Love*, 48 Iowa, 103; *Dean v. Early*, 15 Wis. 100; 2 *Desty*, Taxn. 933.

Where one who, having entered upon and occupied land as a mere intruder, records a tax deed, it is equivalent to a new entry under claim of title, and from thence his claim is adverse and the statute runs in his favor. *Link v. Doerfer*, 43 Wis. 396; *Pepper v. O'Dowd*, 59 Wis. 538; *Woodward v. McReynolds*, 2 Pin. 268; *Edgerton v. Bird*, 6 Wis. 127; *Smith v. Lewis*, 20 Wis. 350; *Sturdevant v. Mather*, Id. 576; *Bassett v. Welch*, 23 Wis. 176; *Jones v. Davis*, 24 Wis. 229; *McMahon v. McGraw*, 26 Wis. 614; *Quinn v. Quinn*, 27 Wis. 168; *Trentz v. Klotsch*, 28 Wis. 312; *Whitney v. Gunderson*, 31 Wis. 350. See *Blackwood v. Van Vleet*, 30 Mich. 118; *Blakeley v. Bestor*, 18 Ill. 708; *Moss v. Shear*, 25 Cal. 38; *Bowman v. Cockrill*, 6 Kan. 311.

The occupancy extends to the boundaries of the paper title, and is not limited to lands under cultivation or inclosure (*Bush v. Davison*, 16 Wend. 550; *Leland v. Bennett*, 5 Hill, 288); but the possession of an intruder is confined to the land actually occupied by him. *McCall v. Neely*, 3 Watts, 72.

One who holds a tax title to the share of a tenant in common cannot survey off the quantity called for by his certificate out of the whole tract, nor by an entry thereon and actual possession of a part only claim by constructive possession to the boundaries of his survey. *Jackson v. Woodruff*, 1 Cow. 276; *Little v. Downing*, 37 N. H. 855; *Gudger v. Barnes*, 4 Helsk. 570.

Where lands remained unoccupied for five years after the execution of a tax deed thereto, or are unoccupied at the expiration of that time, the possession is constructively in the holder of the tax title, who may maintain action to protect such possession. *Goelcke v. Tearney*, 53 Iowa, 456; *Moinzoga Coal Co. v. Blair*, 51 Iowa, 447; *Hintrager v. Hennessy*, 46 Iowa, 600; *Myers v. Coonradt*, 28 Kan. 224; *Hill v. Krieka*, 11 Wis. 442; *Knox v. Cleveland*, 9 L. R. A.

13 Wis. 245; *Dean v. Early*, 15 Wis. 100; *Parish v. Stevens*, 8 Serg. & R. 208; *Ash v. Ashton*, 3 Watts & S. 515; *Robb v. Bowen*, 9 Pa. 71; *Bullis v. Marsh*, 59 Iowa, 747; *Lewis v. Soule*, 53 Iowa, 11. See *Alexander v. Wilcox* (Neb.) ante, 735, and note to *Gage v. Hampton* (Ill.) 2 L. R. A. 512.

Rule in the various States.

In Alabama.

Possession taken under a collector's deed is adverse possession. *Rivers v. Thompson*, 43 Ala. 641; *Dillingham v. Brown*, 38 Ala. 311.

In Arkansas.

Mere payment of taxes on land, even after deadening the timber on a part of it, without residence thereon or other act of ownership, does not constitute adverse possession under color of title, which the Arkansas statute provides shall prevent ejectment after seven years. *Scott v. Mills*, 49 Ark. 268.

In California.

Under Cal. Civ. Code, § 323, prior to the Amendment of 1873, one who in good faith entered into possession of real estate, claiming title under a void tax deed, and openly, notoriously and visibly maintained the possession for a sufficient length of time adversely, as against the whole world, including the owner of the paper title, acquired title by adverse possession. *Reynolds v. Lincoln*, 73 Cal. 191.

A party who enters under color of title upon an open, uncultivated piece of grazing land situated in a grazing country, and pastures sheep upon it under the care of herders during the pasturing season of each year, the tract being unoccupied during the rest of the year, has sufficient possession, under the Statute of Limitations. *Webber v. Clarke*, 74 Cal. 11.

But a person who goes upon land belonging to a firm, under an arrangement to take some of their sheep on shares, and to make some improvements and pay taxes, is not in adverse possession. *Smith v. Smith*, 80 Cal. 324.

An entry in good faith under a sheriff's deed which is not void upon its face, made in pursuance of a judgment of a district court, regular in form, is an entry under color of title, within the meaning of the Statute of Limitations. *Webber v. Clarke*, *supra*.

The five years' adverse possession necessary to give title in California need not be next preceding the commencement of the action; and hence, non-payment of taxes subsequent to five years of sufficient possession is not material. *Ibid.*

that you have no right to it, and make it your own by ten years' possession. Such an entry and possession would be a mere trespass and no length of possession would make it adverse or give the occupant any right to the land.

Grube v. Wells, 34 Iowa, 148; *Jones v. Hockman*, 12 Iowa, 101; *Livingston v. Peru Iron Co.* 9 Wend. 511.

The animus or intent with which the possession is taken and held must be in good faith under an honest belief that he is the owner of the land.

Livingston v. Peru Iron Co. supra; *Watts v. Owens*, 62 Wis. 512; *Jones v. Hockman, supra*; *Teabout v. Daniels*, 38 Iowa, 158; *Booth v. Small*, 25 Iowa, 177; *Gregg v. Sayer*, 33 U. S. 8 Pet. 245, 8 L. ed. 932; *Paine v. Skinner*, 8 Ohio, 159.

In Florida.

In Florida, adverse possession, in order to bar a recovery by the true owner, must have continued without interruption during the statutory period of seven years. *Townsend v. Edwards*, 25 Fla. 532.

In Illinois.

Title acquired by taking actual possession of vacant land after having paid taxes thereon for seven years under color of title made in good faith is, by force of the Illinois Statute of Limitations, such a fixed title as will enable one, not only to defend his possession, but to recover possession from another who has subsequently taken it. *Gage v. Hampton*, 2 L. R. A. 512, 127 Ill. 87; *Dalton v. Lucas*, 63 Ill. 337.

One who has paid taxes for five years before and two years after acquiring color of title, and who is not shown to have been in possession during such years, is not within Ill. Rev. Stat., chap. 38, § 6, establishing a seven years' period of limitation. *Robbins v. Moore*, 129 Ill. 30.

Where a tax deed is prima facie evidence of title, possession under it will be sufficient with such a conveyance. *Morrison v. Norman*, 47 Ill. 477; *Wetzig v. Bowmar*, 1d. 17; *Webster v. Webster*, 55 Ill. 325; *Dickenson v. Breeden*, 30 Ill. 325; *Hardin v. Crate*, 60 Ill. 215; *Holloway v. Clark*, 27 Ill. 433; *Fell v. Ce-stord*, 26 Ill. 325; *Dawley v. Van Court*, 21 Ill. 460; 2 Dety, Taxn. 363.

A party in possession under color of title may lie by until his title is attacked. *Orthwein v. Thomas* (Ill.) 11 West. Rep. 399.

In Indiana.

Title acquired by possession is as high as any title known to the law. *McWhorter v. Hetzel* (Ind.) May 23, 1890.

In Iowa.

Under the statutes, the occupant who has been in possession under claim of title for the requisite period, with or without a deed, is protected. *Hamilton v. Wright*, 30 Iowa, 436; 2 Dety, Taxn. 363.

One holding under a tax deed must within five years either himself take actual possession of the property, or bring a suit to recover possession, or his action upon his deed will be barred. It makes no difference whether the former owner remains in adverse possession during the whole of the five years, or only enters when the period has nearly expired. *Barrett v. Holmes*, 102 U. S. 651, 26 L. ed. 291.

Adverse possession under a void tax deed commences to run from the date of possession thereunder, and not from the date of sale. *Burke v. Cutler*, 73 Iowa, 299.

In Kansas.

When two grantees of a tax-title holder are in 9 L. R. A.

brings his action in equity against the owner, to quiet his title thereto, he cannot rely simply upon the presumption afforded by the statute.

Morey v. Farmers L. & T. Co. 14 N. Y. 302; *Lawrence v. Ball*, 1d. 477; *Allen v. Eearly*, 24 Ohio St. 97; *Austin v. Wilson*, 46 Iowa, 362.

The recording of Clow's deed from Main was not sufficient to set the Statute in motion as against appellant in that it did not impart constructive notice to her because not properly acknowledged.

Willard v. Cramer, 86 Iowa, 22; *Newman v. Samuels*, 17 Iowa, 528.

The Curative Acts passed after the execution and recording of the deeds from Main to Clow, and Main to Laura Cramer, did not affect or change the rights or relations of the parties under their respective deeds, nor make the instru-

the actual possession, each of the one undivided half of the land sold for taxes, before the tax deed has been of record five years, the Statute of Limitations does not operate in favor of either in an action between them for partition. *Hamilton v. Redden* (Kan.) June 7, 1890.

In Michigan.

If no one holds actual possession the owner of the tax title has constructive possession. *Ruggles v. Sands*, 40 Mich. 559.

In Minnesota.

One in possession of real estate under an instrument which, on its face, does not give any title or right to possession, is not holding under color of title. *O'Mulcahy v. Florer*, 27 Minn. 449.

Proof of entry under color of title by one not the owner, upon platted village lots covered with underbrush, and of the cutting and burning thereof, the grubbing and complete clearing of the land, and of the payment of taxes,—is sufficient to sustain a finding of disseisin and adverse possession. *Costello v. Edson* (Minn.) July 8, 1890.

In Missouri.

If a party claims under a tax deed, his possession will be under color of title from the date of the deed. *Degraw v. Taylor*, 37 Mo. 310.

A possession, to be adverse, must be under a claim of title hostile to the right of the true owner. *Pease v. Lawson*, 38 Mo. 35.

Where one claiming under a tax deed enters the lands and clears, fences and cultivates a portion thereof, whereupon the title of a holder of another tax deed is by arbitration adjudged to be the best, and the latter immediately takes and continues in possession, with a transfer of the other's paper title, the two possessions are actual, continuous, adverse and under color of title, and if continued for more than ten years are sufficient to give title by adverse possession. *Bakewell v. McKee* (Mo.) June 30, 1890.

The Statute of Limitations will not run in favor of a possession under a tax deed void on its face. *Kinney v. Forsythe*, 36 Mo. 414. Compare, however, *Peck v. Lockridge*, 37 Mo. 549.

In Nebraska.

A party claiming under tax deeds holds adversely and must rely on his title. *Sessions v. Irwin*, 3 Neb. 5.

One who is in the adverse possession of land does not impair his right to rely on the Statute of Limitations by purchasing the land at a tax sale, and receiving and recording a tax deed therefor; nor does such purchase or recording, or both together,

ment as to her rights had previously attached constructive notice which before was no notice.

Newman v. Samuels, supra; Brinton v. Seovers, 12 Iowa, 889.

Messrs. Allbrook & Hardin for appellees.

Rothrock, Ch. J., delivered the opinion of the court:

1. It appears from the evidence that one John W. Main, a resident of the State of New York, was formerly the owner of the land the title to which is in dispute. On the 1st day of November, 1871, said Main conveyed the land by a deed with covenants of general warranty to the defendant William Clow. This deed was filed for record in the office of the recorder of deeds in Wright County on the 8th day of De-

cember, 1871, the said Main executed and delivered to the plaintiff another warranty deed for the land, which was filed for record on the 14th day of the same month. It will be observed that the deed to the plaintiff was first filed for record. The land in controversy was at that time wild and uncultivated prairie, and not in the actual possession of anyone. The defendant W. F. Clow took actual possession of the land in the month of May, 1877, and commenced breaking the prairie, and making other improvements. Soon afterwards he erected a dwelling-house and other buildings. He and his said wife took up their residence on the land in the spring of 1878, and have ever since occupied the same as a home. The improvements made upon the land by the defendants amounted in value to from \$3,000 to \$4,000. In the year 1878, said

cause a break in the running of the Statute of Limitations. *Griffith v. Smith (Neb.) June 13, 1889.*

In New York.

Constructive possession under a void comptroller's deed applies only to a claim of a proper size, to be managed and used in a body. *Thompson v. Burhans, 61 N. Y. 52.*

It does not include part of an adjoining tract, although inclosed with land occupied. *Smith v. Sanger, 4 N. Y. 577; 2 Dexty, Taxn. 965.*

In Ohio.

An occupant in possession under an invalid tax title is precluded from relying upon a second title which accrued while he was in the occupancy of the land. *Douglas v. Dangerfield, 10 Ohio, 152.*

In Texas.

The deed of an assessor, under the statutes, will support the plea of limitation of five years under it without proof of his authority to sell. *Wofford v. McKinna, 23 Tex. 86.*

A deed void for want of certainty of description will not support the plea of five years' limitation. *Ibid.*

A person who takes possession of land without knowing who owns it, and who inquires for the owner for the purpose of buying it, and afterwards does buy it of one who purchased it on a tax sale, cannot claim it by adverse possession. *Mhoon v. Cain, 77 Tex. 814.*

If a man has paid all taxes which are due and payable for a period of five years after a cause of action accrued against him, the fact that the taxes for the current year had not accrued at the expiration of the time for bringing suit will not prevent a bar, under Tex. Rev. Stat., art. 3193, relating to five years' adverse possession, with payment of taxes. *Juck v. Fewell, 43 Fed. Rep. 517.*

In Vermont.

The Vermont Act of 1866, No. 85, providing that the payment of taxes by the grantee in a collector's deed, or his grantees, to whom they have been listed for twenty years, gives a valid title against intruders or trespassers, has no application to a bona fide claimant of the land who is in possession. *Downer v. Tarbell, 61 Vt. 530.*

Possession and cultivation of a few acres is not a constructive possession of a whole township. *Chandler v. Spear, 22 Vt. 383.*

A party may gain title to premises by adverse possession under a tax deed fair on its face, though illegally issued. *Cowly v. Monson, 10 Elm. 183.*

In Wisconsin.

To constitute adverse possession, entry must be
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made with defined claim of title and of possession, and after entry such claim cannot be enlarged except by acts equivalent to a new entry, and new claim of adverse possession. *Pepper v. O'Dowd, 39 Wis. 533.*

Entry upon a part under claim of title to the whole, while the other part is held adversely, cannot found adverse possession of the whole, though afterwards the other part is abandoned. *Ibid.*

Taking and recording a tax deed by a mere intruder is equivalent to a new entry. *Link v. Doerfer, 42 Wis. 391.*

Possession of land for ten years under a tax deed void on its face constitutes adverse possession under Wis. Rev. Stat., § 4311. *Whittlesey v. Hoppenyan, 72 Wis. 140.*

Where defendant had possession of land in 1874, erected a fence around it which remained in 1877 but in 1880 had disappeared, and had no other or further possession of the land until 1884, this is not a continual adverse occupancy for ten years. *Ibid.*

Color of title, what constitutes.

Color of title is a writing professing to pass title upon its face, but which, either from want of title in the person making it, or from defects in the instrument, does not convey a perfect title, but not so obviously imperfect as to be apparent to one not skilled in the law. *Beverly v. Burke, 9 Ga. 443; Shoat v. Walker, 6 Kan. 65; Carithers v. Weaver, 7 Kan. 110; Sapp v. Morrill, 8 Kan. 677; Cain v. Liunt, 41 Ind. 466; Kilpatrick v. Sinneros, 23 Tex. 114; Wofford v. McKinna, Id. 86; 3 Dexty, Taxn. 963.*

It is that which in appearance is title, but which in reality is no title. No exclusive importance is to be attached to the invalidity of a colorable or apparent title if the entry or claim has been made under it in good faith. *Wright v. Mattison, 59 U. S. 18 How. 50, 15 L. ed. 280; Beaver v. Taylor, 68 U. S. 1 Wall. 637, 17 L. ed. 601; Edgerton v. Bird, 6 Wis. 527; Pugh v. Youngblood, 69 Ala. 296; Swift v. Mulkey, 17 Or. 532; Winstanley v. Meacham, 58 Ill. 97; Dalton v. Lucas, 63 Ill. 337; Holloway v. Clark, 27 Ill. 436; Seigneuret v. Fahey, 27 Minn. 60.*

Claim and color of title must be based upon the paper title, and cannot be extended beyond the same. *United States v. Cameron (Ariz.) April 6, 1889.*

There can be no color of title in an occupant of land who does not hold under an instrument or proceeding or law purporting to transfer the title or to give the right of possession. *Deffenback v. Hawke, 115 U. S. 392, 29 L. ed. 423.*

Nor can good faith be affirmed of a party in holding adversely, where he knows that he has no title,

the defendants were therefore in the actual possession of the land for more than ten years prior to the commencement of this suit. They claim that their possession was actual, open, visible and notorious, and continuous, and that it was under color of title and claim of right. There is no question but that the possession was sufficient to launch the Statute of Limita-

plaintiff, that the possession was not in good faith; that it was founded in fraud; that the conveyance from Main to Clow was procured by fraud. The facts upon which it is claimed the fraud was founded are fully set out, and evidence upon that feature of the case was introduced by both parties. It would unduly extend this opinion to set out the evidence here.

and that under the law he can acquire none. So held, where, in an action of ejectment for known mineral land by a holder of the patent of the United States, the occupant set up a claim to improvements made thereon under a statute of Dakota. *Ibid*.

A tax deed which shows on its face that the officer executing it had not complied with the legal requirements is not admissible in evidence as a basis of title under which proof of seven years' possession would bring the party offering it within the Illinois Statute of Limitations. *Moore v. Brown*, 52 U. S. 11 How. 414, 13 L. ed. 751.

Under the Texas Statute of Limitations there can be no color of title unless there is a consecutive chain of transfer from or under the sovereignty of the soil to the one in possession. Color of title cannot exist where there is a complete hiatus in the chain. *Osterman v. Baldwin*, 73 U. S. 6 Wall. 116, 18 L. ed. 734; *League v. Atchison*, 73 U. S. 6 Wall. 112, 18 L. ed. 764.

Whether the facts in a particular case constitute color of title is a question of law; but what is good faith in the party claiming under such color is a question of fact. *Wright v. Mattison*, 59 U. S. 18 How. 50, 15 L. ed. 280.

It is a mistake of law to decide that one in possession of lands permitting them to be sold for taxes cannot, by purchasing at the tax sale, obtain a title in good faith. *Ibid*.

Whenever an instrument, by apt words of transfer from grantor to grantee, whether such grantor act under the authority of judicial proceedings or otherwise, in form passes what purports to be the title, it gives color of title. *Hall v. Law*, 102 U. S. 461, 26 L. ed. 217.

In Louisiana, a deed from a person who has authority to sell property is a just title for the purpose of prescription. *Pike v. Evans*, 94 U. S. 6, 24 L. ed. 40.

A tax deed is color of title if regular on its face; it is only necessary that it purports to convey the title and has been received in good faith. 2 *Desty*, *Taxn.* 961.

It is color of title even if informal and defective. *Leffingwell v. Warren*, 97 U. S. 2 Black, 599, 17 L. ed. 261; *Hall v. Law*, 102 U. S. 461, 26 L. ed. 217.

The only exceptions to this rule by the Wisconsin statute are where the taxes are paid before the sale, and where the land is redeemed within the time prescribed by law after the sale. *Leffingwell v. Warren*, *supra*.

The informality of deeds will not prevent them from being regarded as "written instruments" upon which to base a claim of title and adverse possession. *Hacker v. Horlemus*, 74 Wis. 21.

A defect in the description in the deed does not deprive the purchaser of color of title under the sale. *Childs v. Shower*, 18 Iowa, 261; *Stevens v. Johnson*, 55 N. H. 405.

A conveyance of land under a sale for taxes or a deed purporting to convey the land is color of title. *Phillips v. People*, 11 Ill. App. 340; *Buckley v. Taggart*, 62 Ind. 238; *Foster v. Letz*, 86 Ill. 415; *Busch v. Huston*, 75 Ill. 848; 2 *Desty*, *Taxn.* 962.

A sheriff's deed for land sold for taxes is color of title, but a contract for such sale is not. *Hardin v. Crate*, 73 Ill. 533.

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So an instrument which merely purports to contain an agreement to convey a title at a future time cannot constitute color of title. *Osterman v. Baldwin*, 73 U. S. 6 Wall. 116, 18 L. ed. 730.

A tax collector's deed, without proof of his authority to sell, may constitute a claim and color of title, the element of an adverse possession. *Ladd v. Dubroca*, 61 Ala. 23.

A deed, though invalid as being under the private seal of the commissioners, may be used as a basis of defense of adverse possession under the statute. *M'Coy v. Dickenson College*, 5 Serg. & R. 254.

Although the acknowledgment of a deed is defective, it confers color of title on the grantee, and the ten years' Statute of Limitation of Alabama commences to run from the date of taking possession under it. *Hall v. Caperton*, 87 Ala. 235.

A decree and execution sale of land thereunder, although irregular, may constitute the basis of an exclusive adverse claim of title. *Davis v. Burroughs* (Sup. Ct.), 28 N. Y. S. R. 901; *Nichols v. McGlathery*, 43 Iowa, 189.

A claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass title to the subject thereof, is strictly a claim under color of title. *Swift v. Mulkey*, 17 Or. 532; *Wright v. Mattison* and *Beaver v. Taylor*, *supra*.

According to the rulings of the Supreme Court of Wisconsin, it is immaterial whether the sale and the deed be void or valid. *Leffingwell v. Warren*, 97 U. S. 2 Black, 599, 17 L. ed. 261.

It is sufficient that a sale has been made and the deed recorded, to bring the statute into activity, and to entitle the purchaser to its protection. *Ibid*.

A void deed may establish color of title so as to enable the party in possession, claiming under it, to hold by limitation to the extent of the boundaries described in it. *Wofford v. McKinna*, 23 Tex. 35.

A tax deed regular on its face, though void, is color of title. *Stubblefield v. Borders*, 92 Ill. 279; *McMillan v. Weble*, 55 Wis. 688; *Wofford v. McKinna*, 23 Tex. 35; *O'Mulcahy v. Florer*, 27 Minn. 449.

Any writing purporting to convey title to land by appropriate words of transfer, and describing the land, is color of title, although actually void. *Hickman v. Link* (Mo.) 18 West. Rep. 215.

A tax deed which is void on its face because of a recital that the taxes were assessed to unknown owners, but which contains all the other requisites of a good and valid deed, constitutes color of title in favor of the one who holds possession in good faith, believing it to be a conveyance of the property. *Wilson v. Atkinson*, 77 Cal. 485.

A void tax deed may constitute color of title, under the general Statute of Limitations, though, if void on its face, it will not set in operation the three years' special Statute of Limitations. *Mo. Rev. Stat.* § 221, p. 1207; *Bartlett v. Kauder*, 97 Mo. 356.

Executors' deeds, valid or not, are admissible to show color of title and the extent thereof. *King v. Merritt*, 11 West. Rep. 231, 67 Mich. 194.

A bond for title, which is forged, if received in good faith, constitutes good color of title, under which possession for seven years will constitute a prescriptive title. *Millen v. Stines*, 61 Ga. 955.

A careful examination of the whole record leads us to the conclusion that the averment of fraud is not sustained. In determining this question, we have taken into account the fact that no action was commenced to recover this land for sixteen years, during all of which time the defendants paid all of the taxes on the land. In short, for sixteen years the plaintiff made no claim to the land directly or indirectly; and there can be no question that the possession was taken and held by the defendants under color of title. The deed made by Main to Clow was sufficient color of title, even though it was not properly acknowledged, as claimed by appellant's counsel. We need cite no authorities in support of the above views. They have been so often announced by this court that they have become fundamental rules of law in this State.

2. It is urged by counsel for appellant that when the petition of the plaintiff was withdrawn and dismissed, the cause stood upon the cross-petition and answer thereto, and that the defendant is in the position of asserting a claim to land founded upon adverse possession and the Statute of Limitations. It is claimed that, while a defendant in possession may plead the bar of the Statute in defense, he has no right to make it the basis of an action to quiet title. The cases cited by counsel to sustain this claim do not, in our opinion, support this position. Actual adverse possession of real estate for ten years creates a title by prescription, and it is well settled that the right is not merely defensive, but is for all practical purposes a title, and that an action to quiet title founded upon such possession may be maintained. *Tiedeman, Real Prop.* §§ 716, 740; *Tourtelotte v. Pearce* (Neb.) 42 N. W. Rep. 915; *Quinn v. Quinn*, 76 Iowa, 565; *Bunce v. Bidwell*, 48 Mich. 542.

3. The foregoing considerations dispose of all material questions in the case. The defendant Harriet E. Clow also claims title to the land under a tax deed. As we hold that her title by adverse possession is complete, we need not consider the claim made under the tax deed. *The decree of the District Court will be affirmed.*

George SWEESEY, *Appt.*,
v.
Lyman SPARLING.

(.....Iowa.....)

Where before a government survey of the public lands two persons made

NOTE—*Homestead upon public lands; theory and policy of the law.*

The theory and policy of the Homestead Law is that the homestead shall be for the exclusive benefit of the homesteader. The homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by him. *Anderson v. Carkins*, 136 U. S. 436, 34 L. ed. 272.

Discharged soldiers and sailors.

Additional homesteads allowed to honorably discharged soldiers and sailors, under U. S. Rev. Stat., § 2306, are not governed by the provisions of U. S. Rev. Stat., chap. 5, requiring a homestead claimant of public lands to be an occupant thereof, and re-
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See also 11 L. R. A. 632.

homestead entries on different portions of what afterwards proved to be one homestead claim, designating their respective claims as between themselves by claim lines, and each recognizing the other's rights, an agreement made by them upon attempting to enter their claims and finding that the land must all be entered by one person, that one of them should enter the land and upon obtaining title convey to the other his share thereof, is enforceable against the one who obtains the title.

(October 27, 1890.)

A PPEAL by plaintiff from a judgment of the District Court for Monona County in favor of defendant in an action brought to recover possession of a certain tract of land to which plaintiff claimed title. *Affirmed.*

Statement by **Rothrock, Ch. J.**:

This action involves the title to a tract of land in Monona County. The plaintiff claims to be the owner of the property by virtue of a homestead entry made on the 15th day of November, 1887. The defendant, by an answer and cross-bill, claims that, although the land in controversy was entered as a homestead by plaintiff, yet that it was under an agreement between the parties that, if the defendant would not attempt to homestead the land occupied and claimed by him, and would permit the plaintiff to homestead all land claimed by both, he (plaintiff) would convey to the defendant that part of the tract claimed by him when he (the plaintiff) procured title from the United States. There was a trial upon the merits, and a decree for defendant. Plaintiff appeals.

Messrs. S. H. Cochran and Charles E. Underhill, for appellant:

An occupier of land under the Homestead Act of 1862 cannot make a valid contract to convey his homestead when he shall have acquired the legal title.

Oaks v. Heaton, 44 Iowa, 116; *Dawson v. Merrill*, 2 Neb. 119.

Mr. Pendleton Hubbard for appellee.

Rothrock, Ch. J., delivered the opinion of the court:

The land in controversy is situated on the east bank of the Missouri River. It appears from the evidence that the plaintiff homesteaded the whole tract on the 15th day of November, 1887. He took possession of the land in September, 1884, and made improvements thereon by building a house, stable, sheds and

stricting his right to alienate the same prior to the issuance of a patent; and such additional homesteads may be located and entered by an agent or assignee of the claimant, and may be alienated by him prior to the issuance of the patent. *Rose v. Nevada & G. V. Wood & Lumber Co.* 73 Cal. 886.

Homestead right.

A right under a homestead entry and certificate cannot be arbitrarily set aside, canceled and avoided by the land department, in a proceeding self-instituted, on mere hearsay, although the claimant had notice of the proceeding and took part in it. *Wilson v. Fine*, 5 L. R. A. 141, 40 Fed. Rep. 62.

cribs, and fencing and clearing up the land. One John Kennedy afterwards made a claim on part of the land, and lived upon it. The plaintiff advised the defendant that Kennedy desired to sell his claim, and, at the instance of plaintiff, the defendant bought Kennedy's claim, and moved on the land. The plaintiff assisted him in moving. Sparling has been in possession since that time. He built a house, and made other improvements. The evidence is quite clear that the plaintiff recognized the right of the defendant to the part of the land occupied by him to be the same as the right of the plaintiff to that part of which he had possession. The status of affairs so remained until the time of the entry. Both of the parties went to the United States land office at Des Moines to enter their land, when it was discovered that, under the statutes of the United States, all the land had to be homesteaded by one person, or in a different shape from the way in which the parties themselves occupied it. The defendant claims that, to avoid the difficulty, it was agreed that Sweesey should enter the whole tract, and that, as soon as he procured the title, he would convey that part

now in controversy to the defendant. The plaintiff denies that any such agreement was made. There is a conflict in the evidence on this question. We are satisfied that it is shown by a fair preponderance of the evidence that the agreement was made as claimed by defendant. There is a preponderance so far as the testimony of the witnesses is involved, and defendant and his witnesses are strongly corroborated by the fact that it is undisputed that the plaintiff procured the defendant to purchase whatever right Kennedy had, and recognized the right of defendant to be equal to his own until after it was homesteaded in his name. The question to be determined is, Can the defendant enforce the agreement made at Des Moines? Or is he precluded from setting it up and claiming under it by the statutes of the United States? It is claimed that the case is within the rule announced by this court in *Oaks v. Heaton*, 44 Iowa, 116, and that the agreement made at the land office was absolutely null and void. The rule in that case, as stated in the head notes, is as follows: "O had pre-empted a quarter section of government land, and had made valuable improvements

A person acquires no prior right to homestead land by reason of his purchase of the improvements thereon from one who has forfeited all claim upon the improvements prior to the former's purchase. *Porter v. Bishop*, 25 Fla. 749.

Where one person is in the actual possession of a parcel of public land, another person cannot forcibly or surreptitiously intrude upon his possession, and thereby acquire a right to the land by filing a pre-emption or homestead claim. *Bullock v. Rouse*, 51 Cal. 590.

A plaintiff in ejectment whose title is derived from a person holding the duplicate receipt of the receiver of the land office is entitled to recover the possession of a part of the land described in the receiver's receipt from one in possession who claims it by virtue of a contract made with a homesteader prior to the time when the title was acquired from the government. *Weeks v. White*, 41 Kan. 599.

If a settler was not entitled to make the entry, for the reason that he had already had the benefit of the Homestead Act, the certificate may be set aside on that ground, but, when issued, it can be impeached only in a judicial proceeding. *Wilson v. Fine*, *supra*.

Officers of the land office cannot cancel an entry and certificate of land issued under the Homestead Law, on the ground that he was not entitled to the same, on information received by them that the entry and certificate were illegal. *Ibid*.

Fences and natural barriers may constitute a sufficient inclosure to give actual possession of public land. *Bullock v. Rouse*, *supra*.

A homestead claimant does not acquire any ownership in public lands by the mere act of filing his claim. *Schofield v. Houle*, 13 Colo. 394.

A settler upon public land subject to homestead entry, who neither made nor offered to make any entry or filing therein until it was legally withdrawn from the market, has no homestead claim or other equity as against the title thereafter conveyed by the government. *Burnham v. Starkey*, 41 Kan. 804.

His failure to appeal from the refusal of the land officer to allow him to enter land as a homestead forbids him from asserting or maintaining a homestead claim to invalidate a patent granted to another. *Ibid*.

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Right to mortgage under Homestead Law.

A settler who has made a homestead entry on lands of the United States, and has made final proof, and is simply waiting for the patent to be issued in its regular order, is not prevented by U. S. Rev. Stat., § 2296, from making a valid mortgage of the land. *Borgan v. Reid* (Wash. Terr.) Jan. 22, 1899; *Lang v. Morey*, 40 Minn. 396.

Homestead entry on public land.

An entry may be made upon public lands notwithstanding the possession of a greater portion of the claim by another person who has a house and barn thereon, but who occupies the position of a naked trespasser upon the public domain. *Whitaker v. Pendola*, 78 Cal. 296.

In entries under the Homestead Law, where only questions of fact or mixed questions of law and fact are involved, the decision of the secretary of the interior is final. *Porter v. Bishop*, 25 Fla. 749.

Homestead-entry proceedings upon land in the actual possession of another are invalid, although the person making the entry uses no force to gain possession; but this is not the case where the other's possession is merely constructive. *Goodwin v. McCabe*, 75 Cal. 584.

A valid homestead entry, with payment of the required amount, will defeat ejectment brought upon prior possession, although the final certificate of entry has not yet been issued. *Ibid*.

Under U. S. Rev. Stat., § 2292, a homestead entry in case of the death of both father and mother entitled thereto inures to the benefit of the minor children alone. *Bernier v. Bernier*, 72 Mich. 43.

Protection of claimant in case of grant of right of way to railroad.

After settlement on public lands and properly filing a homestead claim, it ceases to be public land through which a railroad can acquire the right of way by complying with the Act of Congress of March 3, 1875. *Larsen v. Oregon R. & Nav. Co. (Or.)* May 16, 1890.

Under a grant to a railroad company of land "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," a homestead entry regular in

thereon, when he agreed with H that, if the latter would take possession and perfect a title under the Homestead Act, he would relinquish his rights already acquired, and should receive, in consideration therefor, a deed to half of the land, when the title should be perfected. Held, that the agreement was in violation of the provisions of the Homestead Act of the United States, and could not be enforced."

The case at bar, however, is more nearly like *Snow v. Flannery*, 10 Iowa, 818. In that case, as in this, the parties settled upon the land before a survey was made by the government, and their respective claims were designated by themselves by claim lines, and both parties had equal claims when they appeared at the land office to homestead the land, and it was discovered that, under the Pre-emption Laws, the land could not be entered in parts but must be entered as a whole; one of the parties must give way or both must abandon their claims. In both cases substantially the same agreement was made, and in the cited case the agreement was enforced. It is claimed, however, that *Snow's Case* arose under the Federal Statute of

1841, while the entry in the case at bar was made under the Homestead Act of 1862. We have examined these Statutes. The Act of 1841 provided that "all assignments and transfers of the rights hereby secured prior to the issuing of the patent shall be null and void." It is true that the Act of 1862 is more explicit in requiring the entry to be made for the exclusive use of the person in whose name the entry is made, but both Acts provide that transfers or assignments made before the patent issues shall be void. In our opinion, the case at bar is, in substance, the same as the case last above cited. The facts are so nearly alike that the same rules of law should be held to apply. Counsel for appellee also cite us to the case of *Dawson v. Merrill*, 2 Neb. 119, but that case has been overruled in several subsequent cases. See *Simmons v. Yurann*, 11 Neb. 516; *Hateman v. Robinson*, 12 Neb. 511; *Blanchard v. Jamison*, 14 Neb. 246, and *Carkins v. Anderson*, 21 Neb. 364. The last-named case strongly supports the views we have herein expressed.

We think the decree of the District Court is right, and it is affirmed.

form and apparently valid, made before the date of definitely fixing the line of the road, but by a person unauthorized to make such an entry, and without the purpose of complying with the requisite conditions, and which is afterwards set aside, is sufficient to take the land out of the operation of the grant. *McIntyre v. Roeschlaub*, 37 Fed. Rep. 556.

A railroad company which fails to comply with the provisions of the Act of Congress granting the right of way to railroads through the public lands of the United States has no right to run its road through the land of a homesteader who has complied with the terms of the Homestead Law, although he has not at the time received his patent, as, in such case, his claim is superior to that of the company. *Savannah, F. & W. R. Co. v. Davis*, 25 Fla. 917.

On a trial upon an appeal from an award of damages by a homesteader, it is error for the court to give the jury the same rule of measure of damages as would be proper to give provided the homesteader had a perfect title to the land. *Ellsworth, M. N. & S. E. R. Co. v. Gates*, 41 Kan. 574.

A settler who has made a valid homestead entry, and is in possession perfecting his title, is entitled to full value for all injury done to his possession, where a part of such homestead has been condemned for right of way for a railroad, and the measure of his damage differs only in degree from that sustained by one for the same cause who has a perfect title. *Ibid.*

Effect of abandonment.

A homestead entry made before the definite location of a railroad, but voluntarily abandoned before such location, although the filing was not
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canceled until after the location, will not except the land from the grant to the company, under the Act of Congress of March 3, 1863, donating to Kansas lands to aid in the construction of railroads. *Young v. Goes*, 42 Kan. 502.

Exemption from forced sale.

In case of an execution upon a judgment in a civil action, the United States is subject to the same exemptions, including homestead exemptions, as apply to private persons by the law of the State where the property is found. *Fink v. O'Neil*, 103 U. S. 272, 27 L. ed. 196.

Where, by the Constitution of the State in force when a mortgage was given, the homestead of the family was not subject to forced sale for debts, such provision prohibits any species of compulsory dispossession of the homestead, whether denominated a sale or otherwise. Such mortgage, being invalid by the statute law, and unable to be enforced by the state remedy, cannot be enforced in federal courts by an action of ejectment on the ground that the mortgage conveyed the legal title. *Lanahan v. Sears*, 102 U. S. 318, 26 L. ed. 180.

Protection from trespasser.

Lands subject to homestead, pre-emption and cash entries are not reserved for any purpose, within the meaning of U. S. Rev. Stat., § 5338, as amended by Act of June 4, 1888, prohibiting unlawful cutting or wanton destruction of timber on public lands which may be reserved or purchased "for military or other purposes." *United States v. Garretson*, 42 Fed. Rep. 23.

MARYLAND COURT OF APPEALS.

John Adam TRAGESSER, *Plf. in Err.*,
v.

John T. GRAY, Clerk of the Court of
Common Pleas for Baltimore City.

(....Md.....)

1. The Legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors; if he sells at all it must be on such terms as the Legislature sees fit to impose.
2. A State's denial to persons not citizens of the United States of the right to obtain licenses to sell spirituous liquors within its borders is not a discrimination against them, or an abridgement of their rights within the prohibition of the 14th Amendment of the Constitution of the United States.
3. The validity of an exercise by a State of its police power in regulating the sale of spirituous liquors does not in the least degree depend on any question as to the presence or absence of discrimination for or against particular persons or classes of persons. The Legislature may lawfully grant the right to sell to a certain class or classes of persons and withhold it from all others.
4. No citizen of the United States can complain because a state police regulation denies him the privilege of selling spirituous

liquors, even if the privilege is granted to other citizens.

5. When a statute makes the granting of a license to sell liquors dependent upon the approval of the applicant by a board of commissioners, no one can demand such license without first obtaining the required approval from the commissioners.

(December 5, 1890.)

ERROR to the Baltimore City Court to review a judgment refusing a writ of mandamus to compel defendant to issue a retail liquor license. *Affirmed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Miller, Bryan, McSherry, Fowler and Briscoe, *JJ.*

Messrs. Joseph S. Henisler and Frederick C. Cook, for plaintiff in error:

By reason of the exclusion of the resident alien from the privilege of trade in the retail liquor business, an unjust denial of the equal protection of the laws occurs.

The resident alien is a person within the jurisdiction of the State and the United States, and owes a temporary allegiance to them in all matters not immediately relating to citizenship during the period of his residence.

Carlisle v. United States, 83 U. S. 16 Wall. 147, 21 L. ed. 428.

He is accordingly conceded the privileges,

NORM.—Intoxicating liquors, police power of State.

A State has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits, to prohibit all sale and traffic in them in the State, to inflict penalties for their manufacture and sale, and to provide regulations for the abatement, as a common nuisance, of property used for such forbidden purposes. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 344.

The Legislature may compel the seller of intoxicating liquors to expose the interior of his building, where sales are made, at all times when the law forbids such sales; and such provision does not conflict with the state and federal constitutional provisions as to property rights. *Robison v. Haug*, 14 West. Rep. 878, 71 Mich. 38.

Where a bill to declare a place for the sale of intoxicating liquors as a beverage a nuisance, and abate it, was removed to the circuit court, on the ground that the statutes under which the proceedings were had, although declared valid by the highest court of the State, were in violation of the Civil Rights Law and the Constitution of the United States, a decree remanding the cause, as presenting no federal question, was affirmed by a divided court. *Schmidt v. Cobb*, 119 U. S. 236, 30 L. ed. 321.

State power to regulate the sale of liquors.

The usual and ordinary legislation of the States, regulating or prohibiting the sale of intoxicating liquors, raises no question under the Constitution of the United States. *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 123, 21 L. ed. 323.

The right to sell intoxicating liquors is not one of the privileges and immunities of the citizens of the United States, which, by the Fourteenth Amendment to the United States Constitution, the States were forbidden to abridge. *Idid.*

An Act to regulate the sale, giving away or otherwise disposing of spirituous liquors, does not

confer the power to prohibit the sale thereof, and such an Act, which also provides for its prohibition, is violative of the constitutional requirement that "each law shall contain but one subject, which shall be clearly expressed in its title." *Miller v. Jones*, 30 Ala. 89; *Morgan v. State*, 31 Ala. 71.

Power to restrict sale.

A state law restricting the sale of intoxicating liquors at retail is not unconstitutional when it does not interfere with the sale of imported liquor in the cask or vessel in which it was imported. *Thurlow v. Massachusetts ("License Cases")* 46 U. S. 5 How. 504, 12 L. ed. 264.

The application of the Iowa Code, § 1550, allowing purchasers of intoxicating liquor illegally sold to recover the purchase money by action, to a case where the vendor is a resident of another State, is not a violation of the Constitution of the United States as regulating or restricting commerce between the States. *Connolly v. Scarr*, 72 Iowa, 223.

The Maine Statute providing that no action shall lie for the price of intoxicating liquor purchased out of the State for sale within the State in violation of law, is constitutional. *Barrett v. Delano (Me.)* 6 New Eng. Rep. 561.

License Laws constitutional.

The Legislature has plenary power over the matter of licensing the traffic in liquors, and may in its discretion fix the terms on which the license shall be granted. *Schulherr v. Bordeaux*, 64 Miss. 59.

An Act to provide for licensing the sale of intoxicating liquors is not a bill to raise revenue, but an exercise of the police power of the State, and may originate in either House. *State v. Wright*, 14 Or. 365.

A special license tax imposed by a city for the privilege of selling beer is not obnoxious to the Constitution. *Downham v. Alexandria*, 77 U. S. 18 Wall. 173, 19 L. ed. 323.

other than political, that are enjoyed by citizens as persons.

Morse, *Citizenship*, § 41, pp. 58, 59; *Whelan v. Cook*, 29 Md. 10, 11.

From the time of *Magna Charta* to the present day it has been the law that all merchants might have their safe and sure conduct to depart out of England, to come into England, to tarry in and go through England, as well by land as water, to buy and sell without any manner of evil *tolts* by the old and rightful customs, except in time of war.

See *Mala Tolta*, 2 Burrill, Law Dict.; Barrington, Statutes, 25-27; 1 Stat. at L. p. 8, 9 Hen. III. chap. 30.

And even the rigorous policy of the land tenure of the common law was relaxed in favor of alien merchants who were allowed to have leases of houses and stores in the interest of trade.

2 Kent, Com. *61, 62.

By gradual advances, the illiberality of exclusive and discriminating legislation has retreated before the ever advancing and increasing freedom of intercourse among the various peoples of the world, until now that relic of feudalism, which prevented the alien becoming a landed proprietor, has ceased to exist in Maryland, and generally elsewhere.

1 Code Pub. Gen. Laws, art. 3, p. 9; 2 Kent, Com. *70, note 4.

The privilege of pursuing an ordinary calling or trade upon terms of equality with all others in similar circumstances, is an essential part of the rights of liberty and property guaranteed by the 14th Amendment.

The Mississippi Act of March 18, 1886, imposing a tax on licenses or privileges for retailing liquor or other occupations, is not a violation of the Constitution giving to the support of schools money received for licenses to sell liquors, the money derived from a tax on such license or privilege not being money received for the license. *Portwood v. Backett*, 64 Miss. 218.

Under its police power, the State may prohibit the sale of intoxicating liquors without a license. *State v. Pond*, 12 West. Rep. 374, 93 Mo. 606.

The section of the schedule to the Ohio Constitution which provides that no license to traffic in intoxicating liquors shall hereafter be granted in the State, but the General Assembly may provide against the evils resulting therefrom, applies to the wholesale as well as the retail traffic. *Senior v. Batterman*, 9 West. Rep. 419, 44 Ohio St. 661.

The Ohio Act taxing the traffic in intoxicating liquors is not in conflict with the Constitution, which provides that laws shall be passed taxing by uniform rule, or with the provision that all laws of a general nature shall have a uniform operation. *Ibid.*

Wholesale dealers not manufacturers are within the terms of the Act, and are liable to a tax therein imposed. *Ibid.*

The fact that the Constitution of Mississippi recognizes the policy of general laws for granting licenses to sell liquors by devoting revenues derived from such sources to the support of common schools cannot be held to prevent change of the conditions recognized, and does not establish any policy in respect to such licenses. *Lemon v. Peyton*, 64 Miss. 161.

Local legislation not unconstitutional.

The Legislature possesses, under the general power to enact laws relating to public police, power to 9 L. R. A.

Powell v. Pennsylvania, 127 U. S. 684, 82 L. ed. 256.

No one questions the right of every person in this country to follow any legitimate business or occupation he may see fit. This is a privilege open alike to everyone.

Singer v. State (Md.) 8 L. R. A. 551.

In order to the protection of the public health, public morals and the public safety, the State may legislate in such matters as fall within its jurisdiction in whatever way its best judgment may indicate, unless the legislation is so plainly unfair and unreasonable that the court cannot fail but perceive it to be so. Then the restriction must fail.

Powell v. Pennsylvania, *supra*; *Minnesota v. Barber*, 186 U. S. 819, 820, 84 L. ed. 458; *Singer v. State*, *supra*.

The business of selling liquor, whether by wholesale or retail, is a legitimate business, and so recognized by the Revenue System of the United States, the License System of Maryland, the usages of the commercial world and the experience of mankind.

Letey v. Hardin, 185 U. S. 110, 84 L. ed. 182; opinion of Taney, *Ch. J.*, *License Cases*, 48 U. S. 5 How. 577, 12 L. ed. 289; *Lyng v. Michigan*, 185 U. S. 167, 84 L. ed. 84.

Any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others.

Cooley, Const. Lim. 6th ed. pp. 744, 745.

To allow such an arbitrary law necessarily concedes the right of the State to proscribe every business and occupation as far as the alien is concerned. This carries with it the

pass laws regulating the liquor traffic by retail whether applied to the entire State, to particular counties or districts, or even to arbitrary geographical divisions of counties. *Creekmore v. Com.* 11 Ky. L. Rep. 566.

Such laws are not in conflict with art. 1, § 6, which declares that "all laws of a general nature shall have a uniform operation." *Martin v. Blattner*, 68 Iowa, 286.

The Local Option Law of 1876, chap. 188, and the Local Act of 1880, chap. 107, entitled, "An Act to Lay Out and Establish a New Election District . . . out of the Third Election District," although local, are public laws; and courts are bound to notice them. *Higgins v. State*, 1 Cent. Rep. 704, 64 Md. 419.

Local Option Laws.

Laws 1874, chap. 453, § 1, providing for an election to be held in certain counties to determine whether intoxicating liquors should be publicly sold therein, is constitutional. *Fell v. State*, 42 Md. 71.

The Missouri Local Option Law of 1887, applying to all counties as a class, and to all incorporated cities or towns of 2,500 inhabitants or over, is not a local law. *State v. Pond*, 12 West. Rep. 368, 93 Mo. 606.

The Act is not invalid because it may go into operation in one county and not in another, or because a person can be punished in one county for selling liquor and not in another. *Ibid.*

Discrimination as to locality.

A state statute providing that no liquor license shall be granted except in incorporated cities or towns, unless with the consent of a certain number of freeholders, is not unconstitutional as denying liquor dealers in counties equal protection of the laws, under the Federal Constitution. *United States v. Ronan*, 33 Fed. Rep. 117.

necessary power to do by indirection what it cannot do directly, namely, restrict immigration by closing the avenues of labor and trade to the immigrant, and thus drive him out of the country and defeat thereby the naturalization policy of the government.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543.

The States cannot keep out the entire class of foreign immigrants, and deprive them of the right to hold social and commercial intercourse with the people of the United States.

Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550.

If the court is able to affirm that the legislation has no real or substantial relation to the objects in view, viz., the protection of the health, morals or safety of the public, it is its duty to declare it void.

Powell v. Pennsylvania, 127 U. S. 678, 32 L.

ed. 208; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210.

"The equal protection of the laws" is the pledge of the protection of equal laws, and this provision of the 14th Amendment applies to aliens resident among us.

Yick Wo v. Hopkins, 118 U. S. 363, 369, 30 L. ed. 225, 226; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586. See *Re Parrott*, 6 Sawy. 349; *Re Ah Chong*, 6 Sawy. 451; *Chapman v. Toy Long*, 4 Sawy. 36; *Baker v. Portland*, 5 Sawy. 570.

It has been contended that the liquor traffic is an odious business—an unusual trade—and one that being *sui generis* is not governed by the same rules and principles applicable to other trades and occupations, and that as to this particular business no restrictions can be interposed to the police power of the State.

The provision that a decision of county commissioners in granting or refusing a license shall be conclusive does not violate the 14th Amendment of the Federal Constitution. *Ibid*.

Discrimination as to persons.

Iowa Code, §§ 1523, 1526, which limit the giving of licenses to sell and buy intoxicating liquors to certain classes of citizens for certain purposes, do not violate the Federal Constitution, as depriving the citizens of the several States of the privileges and immunities given to the citizens of Iowa. *Kohn v. Melcher*, 29 Fed. Rep. 433.

State may make, manufacture and traffic in a criminal offense.

A state may declare that any place maintained for the illegal manufacture and sale of liquors shall be deemed a common nuisance, and abated, and at the same time provide for the indictment and trial of the offender. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

Proceedings in equity for the purposes indicated in Kan. Act 1855, § 13, as to abatement of liquor nuisances, are not inconsistent with due process of law. *Ibid*.

A provision that in prosecution for maintaining a liquor nuisance, by indictment or otherwise, the State need not, in the first instance, prove that defendant has not a permit required by the State, does not deprive him of the presumption of innocence. *Ibid*.

Act May 27, 1836, § 15, prohibiting sales of intoxicating liquors, is not repugnant to State Const., art. 1, § 10, which declares that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation. *State v. Kane*, 3 New Eng. Rep. 143, 15 R. I. 394.

Prohibitory Laws are constitutional.

A state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to the Constitution of the United States. *Foster v. Kansas*, 112 U. S. 205, 23 L. ed. 696; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 969.

Such laws, whether enacted by Congress for operation in the Territories, or by the States, are police regulations established by the law-making power for the abatement and prevention of intemperance. *United States v. Nelson*, 20 Fed. Rep. 202.

A state law prohibiting the manufacture of intoxicating liquors within its limits, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

9 L. R. A.

The Kansas Prohibition Law is not unconstitutional as abridging the privileges or immunities of citizens, or as depriving any person of life, liberty or property without due process of law. *Ibid*.

The mode of prohibiting, under penalties, the sale and keeping for sale of intoxicating liquors without license, is wholly within the discretion of State Legislatures. *Carney v. Iowa* ("License Tax Cases"), 73 U. S. 5 Wall. 490, 18 L. ed. 675.

The laws of Massachusetts on this subject are not in conflict with the Constitution of the United States. *Ibid*.

Sale of home-made liquors, or liquors in second hands, within a State, is subject exclusively to state control. *Ibid*.

The General Assembly had power before the amendment, not only to prohibit the sale of intoxicating liquors for a beverage, but also to restrict and regulate their sale for other purposes. *State v. Kane*, 3 New Eng. Rep. 143, 15 R. I. 394.

A statute prohibiting the manufacture of intoxicating liquors is not invalid as a regulation of commerce because it does not except from its operation liquors manufactured for export. *Kidd v. Pearson*, 123 U. S. 1, 32 L. ed. 343.

A statute which prohibits the manufacture of intoxicating liquor for exportation from the State is not invalid as being in conflict with the exclusive constitutional right of Congress to regulate commerce among the States. *Pearson v. International Distillery*, 73 Iowa, 343. See notes to *State v. Fulker* (Kan.) 7 L. R. A. 133; *State v. Creeden* (Iowa) 7 L. R. A. 236.

Special taxation of traffic not unconstitutional.

A State Act imposing a tax of fifty cents per gallon on all spirituous liquors brought into a State is constitutional, where the same tax is imposed on liquors manufactured in the State. *Hinson v. Lott*, 75 U. S. 8 Wall. 143, 19 L. ed. 337.

A state law which imposes a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors, to be shipped into the State from places out of the State, not having their principal place of business in the State, without imposing a like tax on persons engaged in the like business in reference to liquors manufactured in the State, is unconstitutional and void. *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691.

A law subsequently passed, imposing a greater tax upon all persons engaged in the business of manufacturing or selling liquors in the State, does not have the effect of divesting the first law of its objectionable character. *Ibid*. See generally note to *State v. Creeden* (Iowa) 7 L. R. A. 236.

But in *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, and *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150,—all cases involving the regulation of the liquor traffic, no intimation of this description is thrown out.

Messrs. William S. Bryan, Jr., and Peter J. Campbell, for appellee:

Whenever an occupation is of such a nature that it will be dangerous or deleterious unless brought under the control and supervision of the government, the case falls within the police power; and no one can be prejudiced by the grant of an exclusive privilege, because everyone may be debarred.

2 Hare, Const. L. 779.

That the liquor traffic is the one of those callings which are pre-eminently within the control of the police power is settled beyond all reasonable controversy.

Metropolitan Board of Excise v. Barrie, 84 N. Y. 657; *Mugler v. Kansas*, 123 U. S. 637, 31 L. ed. 209; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 38, 24 L. ed. 989, 992; *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256.

What can be denied to all may be granted exclusively to a few.

Slaughter-House Cases, 83 U. S. 16 Wall. 86, 21 L. ed. 894; *Le Clair v. Davenport*, 18 Iowa, 210; *New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Bridge Proprietors v. Hoboken L. & I. Co.* 68 U. S. 1 Wall. 116, 17 L. ed. 571; *The Binghamton Bridge*, 70 U. S. 3 Wall. 57, 18 L. ed. 187; *Orescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 138.

Laws restricting the right of dealing in intoxicating liquor to certain classes of persons have been frequently upheld.

Intoxicating Liquor Cases, 25 Kan. 760; *Blair v. Kilpatrick*, 40 Ind. 815; *Re Ruth*, 32 Iowa, 253; *Devin v. Belt*, 70 Md. 352.

There are many cases in the courts which illustrate the power of the Legislature to restrict callings which are of a quasi public nature, and which, if not restricted, might, in the judgment of the Legislature, injuriously affect the public health, the public morals or the public safety.

Re Application of Taylor, 48 Md. 28; *Bradwell v. Illinois*, 83 U. S. 16 Wall. 130, 21 L. ed. 442; *Powell v. Pennsylvania*, 127 U. S. 686, 32 L. ed. 257; 1 Hare, Const. L. 618.

The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which, by the Fourteenth Amendment, the States are forbidden to abridge.

Bartemeyer v. Iowa, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Corfield v. Coryell*, 4 Wash. C. Ct. 371; *Mr. Justice Curtis*, in the *Dred Scott Case*, 60 U. S. 19 How. 580, 15 L. ed. 778.

Bryan, J., delivered the opinion of the court:

The Act of 1890, chap. 848, prescribed a new system for the regulation of the sale of intoxicating liquors in the City of Baltimore L. R. A.

more. A board was established consisting of three commissioners, invested with the power of granting license to sell these liquors by retail. Everyone applying for such license was obliged to file his petition with the board, setting forth a number of statements tending to show that he was a fit person to be licensed.

It was required to be verified by his own affidavit, and also to be sustained by a certificate of at least ten respectable persons, declaring that they were acquainted with the petitioner, and they had good reason to believe that all the statements of the petition were true, and that they therefore prayed that the license should be issued to him. Provision was also made for giving extended notification of the petition, by advertisement in two newspapers of general circulation in the city; and also for the public hearing of the petition of other persons in favor of granting the license, and also remonstrances against granting it. It was further provided that licenses to sell by retail should be granted only to citizens of the United States of temperate habits and good moral character. A number of other regulations were made which it is not now necessary to state; but they all show extreme and anxious solicitude on the part of the Legislature to diminish the evils arising from the excessive use of ardent spirits. If the commissioners should grant the license, the applicant was required to pay to the Clerk of the Court of Common Pleas \$250; and thereupon it became the duty of the said Clerk to issue it.

Tragesser, a native of Prussia, and not a naturalized citizen of the United States, instituted this proceeding for the purpose of testing the validity of this law. He contends that the law is null and void, and that he has a right to obtain a license under the law, which was in full force before this Statute was passed. He accordingly applied to John T. Gray, the Clerk of the Court of Common Pleas, for a license to sell spirituous liquors by retail; and offered to pay him the sum of \$50, which was the license fee under the former law. The Clerk refused to issue the license, and thereupon Tragesser filed a petition in Baltimore City Court, for a writ of mandamus to compel the issue. After answer and demurrer thereto, the City Court dismissed his petition. The case is brought to this court by petition in the nature of a writ of error, and the sole question presented is, whether the Statute is a valid and constitutional enactment. Under every system of government, there must be power in some of its departments to provide for the regulation of the internal affairs of the State. Public morals, public health, public order, peace and tranquillity are objects of cardinal importance to the well-being of society. Without the power to protect and preserve these interests, civilized government could not exist. The limit and extent of this power are somewhat vague and undefined.

Private interests are frequently found in opposition to the public good, and cases may doubtless occur in which it will be a matter of great difficulty and delicacy to

settle with justice their conflicting pretensions. But it is not necessary to decide such questions until they arise. The merits of the present controversy will be ascertained by the application of sound principles under the guidance of authoritative adjudications. The habit of drunkenness, and the evils attendant upon it, have always received a considerable degree of attention from the law-making power. And when we consider the poverty, misery, ruin and wretchedness which intoxication entails upon its unhappy victims; and the unspeakable woes which must be endured by helpless and innocent beings dependent upon them; and also the frequent crimes and disorders produced by the same cause,—we may measure, in some degree, the necessity for a legislative remedy, if one can be found. Every consideration connected with the public welfare imperatively demands it. It is a duty which the Legislature cannot evade. Their power over the whole subject under the Constitution of this State cannot at this day be questioned. They may prohibit the sale of spirituous liquors entirely if they see fit to do so; or they may restrict it in any manner which their discretion may dictate. No one can claim as a right the power to sell, either at any time, or at any place, or in any quantity.

If he is allowed to sell under any circumstances it is simply by the free permission of the Legislature, and on such terms as it sees fit to impose. In the law which we are now considering the Legislature hedged around this traffic with such safeguards as were deemed advisable for the purpose of protecting the public interest. It was an effort to restrict the licenses to such persons as would not abuse the privilege conferred. To this end the applicant was required to establish his fitness for the privilege by abundant testimony, and to promise under oath that he would not permit on his premises certain violations of the law, which have frequently been associated with the traffic, and which have caused great scandal, immorality and disorder. And by section 653 J it was enacted that the license should be refused in all cases, "whenever, in the opinion of the said board, such license is not necessary for the accommodation of the public, or the petitioner or petitioners is or are not fit persons to whom such license should be granted; and if sufficient cause shall at any time be shown or proof be made to the said board that the party licensed was guilty of any fraud in procuring such license, or has violated any law of the State relating to the sales of intoxicating liquor, the said board shall, after giving notice to the person so licensed, revoke said license; and the criminal court of the city may in like manner revoke said license if the party should be convicted before it of any such violation."

It was thought proper to confine the licenses to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who,

being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the Naturalization Law, proven by creditable testimony before a court of justice that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticize its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this State.

We regard it as included "in that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government." *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 203 [6 L. ed 71].

It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the States to promote and protect the public health, peace, morals and good order within their respective limits.

In *Kidd v. Pearson*, 128 U. S. 1 [32 L. ed. 846], the Supreme Court decided that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits, to prohibit all sale and traffic in them, and to inflict penalties for such manufacture and sale. We quote a passage relating to the manufacture, and necessarily it is equally applicable in sales: "We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court." And it was further said that this power of local administration, usually called the police power, was as broad and plenary as the taxing power.

It is, however, maintained by the appellant that although this Statute was passed apparently for the purpose of exercising this power, yet it is in conflict with the 14th Amendment, because it denies to persons, not citizens of the United States, the right to obtain licenses to retail liquor, and thereby makes an unconstitutional discrimination against them. The section of the Amendment, supposed to be involved, is in these words: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It cannot be said that any man, alien or citizen, has a natural right to retail intoxicating liquor. According to *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129 [21 L. ed. 929], it is not one of the privileges and immunities of citizens of the United States.

In *Mugler v. Kansas*, 123 U. S. 623 [31 L. ed. 205], it was said that "such a right did not inhere in citizenship," and that it could not be said that government interfered with,

or impaired anyone's constitutional rights of liberty or property, when it prohibited the manufacture and sale of intoxicating drinks. And it was held that this prohibition might be made although it would destroy, or greatly diminish, the value of manufactories, which had been erected when it was lawful to engage in such business.

In *Kidd v. Pearson*, *supra*, a statute of Iowa prohibited the manufacture or sale of intoxicating liquors except for mechanical, medical, culinary and sacramental purposes; but any citizen of the State was permitted to manufacture or buy and sell for these purposes, except hotel-keepers, keepers of saloons and eating-houses, grocery keepers and confectioners.

The Supreme Court decided that the Statute did not in any way contravene any provision of the 14th Amendment. We see that the privilege granted was confined to citizens of the State, and that there was a discrimination against five classes of these citizens. But in truth the valid exercise of the police power does not depend on any question of discrimination for or against particular persons or classes of persons. It is confided to the wisdom of the Legislature to make such application of it as the public welfare may require. In the case of occupations which may become injurious to the community, they may prohibit them altogether; or they may permit them only in certain localities, and on certain terms and under certain restrictions; or they may grant the privilege of pursuing them to some persons and deny it to others. Individual interests are not at all considered in the exercise of this power. They must yield when they are in opposition to the public good. And the Legislature is to determine what measure will best promote the public good in dealing with these matters. In *Mugler v. Kansas* it was said that it was not to be supposed that the Fourteenth Amendment was intended to impose restraints on the exercise of the police power by the States.

It was also said that a State could not by any contract limit its exercise of this power where the public health and the public morals would be prejudiced; and a case was cited with approval (*Stone v. Mississippi*, 101 U. S. 814 [25 L. ed. 1079]), where a charter to conduct a lottery had been granted to a private corporation for a large moneyed consideration, and was afterwards repealed, and the repeal was sustained as within the police power of the State. And in the same case the court stated with great emphasis the necessity of upholding state police regulations, which were enacted in good faith, and which had appropriate and direct connection with the protection to life, health and property which each State owes to its citizens. And in this case, and subsequently in *Powell v. Pennsylvania*, 127 U. S. 684 [32 L. ed. 256], it was shown that a statute enacted in good faith for the exercise of the police power could not be regarded as repugnant to the 14th Amendment, unless it had no real or substantial relation to the objects of such power. In the *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21 L. ed. 394], it was held 9 L. R. A.

that in the exercise of the police power, the State of Louisiana could lawfully grant to a single corporation for twenty-five years the exclusive privilege of maintaining slaughter-houses in a district of country containing more than 1,100 square miles, and including the City of New Orleans. The trade of a butcher, though of great utility and necessity, is liable under some circumstances to injure the public health and was therefore subject to this sort of legislation.

There are cases, unquestionably, in which discriminations against particular persons, or classes of persons, would be unlawful. They are indicated in *Powell v. Pennsylvania*, and in many other cases, especially in the cases affecting the legislation of California on the subject of the Chinese. It is held that everyone has a right to pursue an ordinary calling on terms of equality with all other persons in similar circumstances; that is, a calling not in any way injurious to the community, or likely to become so. The court did not, in *Powell v. Pennsylvania*, regard the making of oleomargarine as an ordinary business; nor in *McGuhey v. Virginia*, 135 U. S. 712 [84 L. ed. 819], was the traffic in ardent spirits so regarded.

In the Chinese cases, *Re Parrott*, 6 Sawy. 849; *Re Ah Chong*, 6 Sawy. 451; *Yick Wo v. Hopkins*, 118 U. S. 856 [30 L. ed. 220],—the legislation in question was directed against the Chinese, and was intended to prevent them from earning a livelihood by their own labor; or, at least, to impede and embarrass them as much as possible in their efforts to do so. This was most clearly evident, not only from the Statute and ordinances themselves, but from the article in the Constitution of California under which they were framed.

This article (19th) was entitled "Chinese," and it provided that no corporation should employ, directly or indirectly, in any capacity, any Chinese or Mongolians; that no Chinese should be employed on any state, county, municipal or other work, except in punishment for crime; it declared that the presence of foreigners ineligible to become citizens (meaning the Chinese) was dangerous to the well-being of the State; and the Legislature were directed to discourage their immigration by all means within their power; and were also directed to delegate all necessary power to the incorporated cities and towns of the State, for the removal of Chinese beyond their limits, or for their location within prescribed portions of those limits; and were also directed to provide the necessary legislation to prohibit the introduction of Chinese into the State. One of the judges in *Parrott's Case* said of this article: "It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is, in fact, but one, and the latest, of a series of enactments designed to accomplish the same end." 6 Sawy. 835.

It was apparent to the courts which decided these cases, that although the Statutes and ordinances in question were in the form and

fashion of police regulations, yet in reality, in substance and in effect they were enactments to take away from the Chinese the right to labor for a living.

They struck at those inalienable rights which belong to human beings at all times and in all places. They denied them the equal protection of the laws, in particulars essential to their means of existence. Their evident effect and purpose were to accomplish an unconstitutional result; and therefore they were necessarily declared to be void. The Statute now before us oppresses no one and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity. It subjects no one to penalties for its violation, which are not imposed equally on all offenders. It does not, it is true, make an equal partition of the privilege of liquor selling among all classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests, and embraces all means which are necessary and proper to protect the public from evils connected with the subject. Assuredly the Supreme Court did not consider this control as limited by the necessity of making an equal distribution of favors, when it said in speaking of the trade in liquor and its consequence:

"The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority." *Mugler v. Kansas*, 123 U. S. 659 [31 L. ed. 209].

Nor is any such limitation consistent with the decisions in *Stone v. Mississippi*, 101 U. S. 814 [25 L. ed. 1079]; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 [24 L. ed. 989], and *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [24 L. ed. 1036].

In one of these cases a franchise which had been purchased from the State was taken away from the purchaser without compensa-

tion to him, because it was considered by the Legislature to be hurtful to the public morals. In the other two cases, by the exertion of the police power, property of vast amount was rendered valueless, although it had been acquired under the express sanction of the Legislature. It is needless to refer again to the *Slaughter-House Cases*, where there was a severe discrimination in favor of a single corporation, and against everyone else, solely because the protection of the public health was involved.

It has been maintained that the appellant (Tragesser) has rights under existing treaties which have been infringed by the denial of licenses to aliens. Our opinion on this question has been sufficiently indicated, but a few more words may be added. If we assume, for the sake of the argument, that Tragesser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that anyone, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a State. Such power is original, inherent and exclusive; it has never been surrendered to the general government, and never can be surrendered, without imperiling the existence of civil society.

The Act of Assembly involved in this controversy being in our opinion, in all respects, a valid law, it is perhaps unnecessary to say anything more; but we will observe that, even if the clause relating to aliens were unconstitutional, the other portions of the Statute would not be affected. Aliens could not, even in that event, obtain licenses to retail liquor without the approval of the board of commissioners.

The order refusing the mandamus must be affirmed.

Alvey and McSherry, JJ., concur in affirming the judgment, but for different reasons than those stated in the opinion.

NEBRASKA SUPREME COURT.

MAGENAU & BRUNNER *et al.*, *Appts.*,
v.
CITY OF FREMONT *et al.*

(.....Neb.)

*1. The acts of a de facto officer are valid and binding, so far as the interests of the public or third persons are involved.

*Head notes by NORVAL, J.

NOTE.—Municipal taxation.

Taxation may be either general or local, but whether general or local it must be for the public interests and welfare of the community on whom the burden is laid; it cannot be laid for a private use or purpose. 1 Deasy, *Taxn.* 14, § 8.

The legislative department cannot arbitrarily

2. A meeting of a city council, held at a time other than that fixed by ordinance for a regular meeting, is valid if the mayor and all the councilmen are present, and act as a body, notwithstanding the meeting was not called by the mayor or two councilmen.

3. Where such a meeting is adjourned to a specified date, and at such date a quorum of the council meet, they may transact any business within the powers conferred by statute.

4. In cities of the second class, having

take the property of one citizen and give it to another, nor can it authorize others to do so. *People v. Townsend*, 56 Cal. 636; *Morford v. Unger*, 8 Iowa, 82; *Arbogast v. Louisville*, 2 Bush, 271; *Covington v. Southgate*, 15 B. Mon. 491; *Wells v. Weston*, 23 Mo. 388.

Such legislation would be a judicial decree beyond the power of the Legislature. *Citizens Sav.*

more than 5,000 inhabitants, the council, when in lawful session, may pass any ordinance by the concurring vote of a majority of all the members elected to the council, or by the affirmative vote of one half of the whole number of councilmen, with the concurrence of the mayor.

5. **The City Council of the City of Fremont** is composed of eight members. The mayor and four councilmen voted in favor of the passage of a certain ordinance, three members voted nay, and one was absent. *Held*, that the ordinance was legally passed.
6. **The provision of subdivision 8, § 52, art. 2, chap. 14, Comp. Stat.,** authorizing cities to levy and collect occupation taxes, is not repugnant to sections 1 and 6 of art. 9 of the Constitution.
7. **Where a city ordinance imposes a fixed sum upon each of the various avocations** therein named, and makes no exceptions in favor of or against any person who may desire to pursue the business taxed,—*Held*, not to violate the rule respecting uniformity prescribed by the Constitution and statute.
8. **While the penal provision** for the enforcement of an ordinance imposing an occupation tax is void, it does not invalidate the remainder of the ordinance.

(November 26, 1890.)

& L. Asso. v. Topeka, 37 U. S. 20 Wall. 663, 23 L. ed. 461.

Tax on occupations and business.

A State may levy a tax on persons and business within its limits. *Nathan v. Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 993; 1 *Desty, Taxn.* 304.

But residents are not subject to taxation in respect to business or interests beyond the territory and jurisdiction of the State. *Fisher v. Rush County*, 19 Kan. 414; 1 *Desty, Taxn.* 303. See *note* to *Richmond & D. R. Co. v. Reidsville (N. C.)* 2 L. R. A. 284.

Under the Arkansas Statutes municipal corporations have power to regulate drumming or soliciting persons arriving on trains or otherwise for hotels, boarding houses, etc.; but the license cannot be made large enough to become a source of revenue to the city. *Fayetteville v. Carter*, 6 L. R. A. 509, 52 Ark. 301.

A village may prohibit running for or soliciting passengers for conveyances or hotels. *Niagara Falls v. Salt*, 45 Hun. 41. See *Griswold v. Webb*, 7 L. R. A. 302, 16 R. I.—.

The right of municipal corporations to impose taxes on occupations, construed. See *note* to *Richmond & D. R. Co. v. Reidsville (N. C.)* 2 L. R. A. 284.

Licenses in general.

A license is a tax. It is a license' tax, and not a property tax. A license could not be held a property tax without making it unconstitutional, where it is, together with the *ad valorem* tax, permitted by the Constitution in excess of its limitation. *Morehouse Parish v. Brigham*, 41 La. Ann. 665.

A statute which provides that all land and other taxable property situated within the limits of a corporation shall be exempt from the payment of parish taxes does not exempt citizens of that corporation from paying parish licenses. *Ibid*.

An order of the county commissioners imposing a license tax need not specify the particular purposes for which the taxes are levied, the provision of N. C. Const., art. 6, § 7, being applicable to taxes levied by the General Assembly, and not to such as are levied by the county authorities for county purposes. *Parker v. Wayne County*, 104 N. C. 166, 9 L. R. A.

A PPEAL by plaintiffs from a judgment of the District Court for Dodge County in favor of defendants in an action brought to enjoin the collection of certain occupation taxes and to have the ordinance under which they were imposed declared void. *Affirmed*.

The facts are fully stated in the opinion.

Messrs. N. H. Bell and C. Hollenbeck, for appellant:

Nowhere in the Constitution is found a suggestion that the Legislature has power to delegate to a city or village council, under the guise of taxation, the power to take private property for public use, otherwise than by a regular assessment and levy of taxes by valuation. Power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority.

Cooley, Const. Lim. 2d ed. p. 116.

The Legislature cannot vest in municipalities power to tax the individual outside of and without regard to the provisions of the Constitution. Nor can it vest in municipalities power to raise their revenues by special taxation and otherwise than by a taxation by valuation.

Cooley, Const. Lim. 2d ed. p. 116; *Mays v. Cincinnati*, 1 Ohio St. 268; *Cincinnati, W. etc. R. Co. v. Clinton Co.* 1 Ohio St. 77; *State v.*

The Alabama Statute imposing a license tax on "dealers in pistols, or pistol cartridges," includes dealers not only in cartridges manufactured exclusively for use in pistols, but those made to be used either in pistols or rifles; but it does not include cartridges which are used only in rifles, although capable of use in pistols of a larger size than those now made. *Union M. C. Co. v. Teague*, 53 Ala. 475.

A State may impose a license fee, either directly or through a municipal corporation, upon keepers of ferries living in the State, for boats owned by them and used in ferrying passengers and goods from a landing in the State, across a navigable river, to a landing in another State. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 385, 27 L. ed. 419.

A license for a ferry granted by a municipal corporation need not be by an ordinance unless the municipal charter requires it. *Fanning v. Gregoire*, 37 U. S. 16 How. 524, 14 L. ed. 1043.

Under the Pennsylvania Act of April 16, 1845 (*Pub. Laws*, 533), providing for licenses for theatrical exhibitions, etc., a license must be had for the exhibition of an opera. *Bell v. Mahn*, 1 L. R. A. 364, 125 Pa. 225.

The Missouri Law of 1875 requires a person acting as a private detective to have a license. *State v. Bennett (Mo.)* March 18, 1889.

A real-estate broker, without the license required by Tenn. Acts 1885, chap. 1, § 46, cannot recover compensation for effecting a sale. *Stevenson v. Ewing*, 37 Tenn. 46.

The Arkansas Act imposing a state tax on stove-range agents who are not hawkers or peddlers is repugnant to the State Constitution which prohibits a tax, for the purpose of raising the state revenue, on callings and pursuits, although allowing counties and towns, under legislative franchise, to lay such tax. *Hynes v. Briggs*, 41 Fed. Rep. 468.

The Legislature of Louisiana has exclusive power, under the Constitution, to determine the method to be adopted in effecting the graduation of licenses; and, in the absence of any rule to guide its investigation or scrutiny, the judiciary has no authority to interfere. *State v. Traders Bank*, 41 La. Ann. 320.

Wilcoa, 45 Mo. 458; *Lock*, Civil Government, § 142.

This ordinance is void because it does not operate equally upon any class of persons attempted to be taxed by it.

A failure to pay such tax is a high penal offense punishable by fine and imprisonment if the defendant is unable to pay his tax or the penalty imposed. The council far exceeded its powers in the passage of this ordinance. If an ordinance is void in part, it is wholly void.

State v. Hoboken, 88 N. J. L. 110; *State v. Green*, 27 Neb. —.

The defendant City itself is the beneficiary of this ordinance. Upon what theory of law can it be heard to say that its own officers or agents were usurpers and acting without lawful right and still reap the benefit of their wrong-doing?

1 *Waterman*, Corp. p. 847; *Hildreth v. McIntire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61, and note. 68; *Green v. Burke*, 23 Wend. 490; *People v. Hupson*, 1 Denio, 574.

No contingency had arisen authorizing the

mayor to vote upon the adoption of this ordinance.

State v. Gray, 23 Neb. 865.

A meeting of councilmen, if a special one, can only act upon matters of which notice has been given the members, and an adjourned meeting is limited equally with the first meeting to the specified matters.

1 *Dillon*, Mun. Corp. 8d ed. § 287, p. 801, and cases there cited; *Ex parte Wolf*, 14 Neb. 24.

Messrs. Frank Dolesal, City Atty., and *W. H. Munger*, for appellees:

Waiving the question as to whether, upon the election and qualification of their successors, Peterson and Lowry ceased to be *de jure* members of the council, they were *de facto* members, and their votes legal.

Carl v. Rhener, 27 Minn. 292; *Morton v. Lee*, 28 Kan. 286; *Brady v. Theritt*, 17 Kan. 468; *State v. Farrier*, 47 N. J. L. 75; *Ex parte Johnson*, 15 Neb. 512; *Leach v. People*, 10 West. Rep. 617, 122 Ill. 420; *State v. Gray*, 23 Neb. 865.

Municipal licenses.

An authority conferred on municipal corporations to license certain occupations, and to prohibit persons not licensed from engaging in them, will warrant the imposition of a pecuniary penalty on those engaging in them without license. *Haynes v. Cape May*, 52 N. J. L. 180.

The offense is complete upon refusal to pay at any time during the year; and continuing business after filing an information for such offense constitutes a new offense. *Re Jager*, 29 S. C. 438.

An ordinance prohibiting certain pursuits without first being licensed is invalid unless it names a fixed and definite license fee which all persons engaged in like business shall pay. *Bills v. Goshen*, 8 L. R. A. 281, 117 Ind. 221.

The South Carolina Constitution does not prohibit the Legislature from giving city councils power to raise revenue by a tax upon citizens engaged in a business, calling or profession. *Re Jager*, *supra*.

A license tax for the privilege of publishing a newspaper does not violate S. C. Const., art. 1, § 7, as being an abridgement of the liberty of the press. *Ibid*.

The power conferred by the Legislature on the City of New Orleans in an Act to impose a license tax, united to the power conferred in another to enforce the collection of taxes due to any political corporation, carries with it the power to impose such a penalty as may be imposed by state laws and authorizes the city council to adopt the State License Law as its own. *New Orleans v. Firemen's Ins. Co.* 41 La. Ann. 1143.

A penalty of 2 per cent per month imposed by a city on delinquent licensees, being the same as that imposed by the State, is legal. *Ibid*.

License taxes must be graduated, and therefore need not be equal and uniform. *Ibid*.

Such taxes are not within the provision of the Constitution requiring uniformity of taxation. *Ex parte Miranda*, 78 Cal. 865. See note to *Chaddock v. Day* (Mich.) 4 L. R. A. 809.

A license tax levied by a city, which does not exceed that levied on the same occupations in the city by the State, is valid even if the state tax is invalidated by discriminations. *New Orleans v. Pontchartrain B. Co.* 41 La. Ann. 519.

Railroad companies which pay a bonus for their franchises have not thereby an immunity from payment of a license tax on their business. *New Orleans v. Orleans R. Co. (La.)* Jan. 6, 1890.

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A village in Nebraska has authority to levy a reasonable occupation tax which conforms to the requirements of the Constitution and statute; but such tax is a mere civil liability, to be collected by levy and sale of property, and not by arrest and imprisonment. *State v. Green* (Neb.) June 27, 1899.

A municipal corporation is not liable for losses consequent on its having misconstrued the extent of its powers in granting a license which it had no authority to grant without taking security of the person obtaining the license. *Fowle v. Alexandria*, 28 U. S. 8 Pet. 393, 7 L. ed. 719.

Ordinances construed.

An ordinance passed by the supervisors of Mono County requiring all persons engaged in raising, grazing, herding or pasturing sheep in that county to annually procure a license, and making nonpayment of the fee a misdemeanor, is not in violation of the Federal Constitution, whether the license is imposed for purposes of revenue or regulation, or for both. *Ex parte Miranda*, 78 Cal. 865.

The imposition of a license upon a particular business is not in violation of the constitutional provision requiring uniformity of taxation, although the property used in that business is subject to, and has paid, an *ad valorem* property tax. *Ibid*.

An ordinance charging license fees to an amount much greater than the cost of controlling and supervising the licensee cannot be sustained on the ground that demands might be made against the municipality on account of the licensee. *Philadelphia v. Western U. Teleg. Co.* 40 Fed. Rep. 615.

The Nebraska Statutes as amended exempt insurance companies from the payment of a license tax on their occupation or business within the limits of cities of the second class and villages, when imposed by ordinance. *Columbus v. Hartford Ins. Co.* 25 Neb. 83.

An ordinance of a city of a second class in Kansas, providing for the levy and collection of a license tax on lumber dealers, is authorized by the Act incorporating such cities, as lumber dealers are included within the general designation of "merchants and retailers." *Campbell v. Anthony*, 40 Kan. 652.

One acting as agent of a nonresident lumber company is liable to prosecution and punishment as prescribed by the ordinance. *Ibid*.

If all the members were present and voting, then one half with the mayor would be sufficient to legally pass the ordinance.

Small v. Orna, 8 New Eng. Rep. 620, 79 Me. 78.

The Legislature is not prohibited from conferring authority to levy an occupation tax upon municipalities.

State v. Bennett, 19 Neb. 191; *Columbus v. Hartford F. Ins. Co.* 25 Neb. 88; *State v. Lancaster County*, 4 Neb. 587; *State v. Dodge County*, 8 Neb. 124; *Shaw v. State*, 17 Neb. 884; *Wiggins v. Chicago*, 68 Ill. 878; *Boone, Corp.* § 299.

Any meeting at which all the members are present may transact any corporate business.

State v. Smith, 23 Minn. 218; *Green's Brice, Ultra Vires*, 850-855; *Boone, Corp.* § 68.

In the absence of evidence to the contrary, the presumption is that the proper notice of the meeting was given all the members of the council.

Sargent v. Webster, 18 Met. 497; *Lane v. Brainerd*, 80 Conn. 565; *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601.

The Statute (§ 14) does not require the notice to state the object and purposes of the meeting, and the statement to transact any lawful business was sufficient.

Granger v. Original Empire Mill & Min. Co. 59 Cal. 678.

We concede that the portion of the ordinance providing a penalty for its violation is void, but the other provisions of the enactment are in no respect connected with or dependent upon the penal provisions, and hence the part which is invalid may fall, and the other portion stand.

State v. Hardy, 7 Neb. 377.

Norval, J., delivered the opinion of the court:

This suit was brought in the District Court of Dodge County to enjoin the collection of certain occupation taxes imposed upon various occupations within the City by Ordinance No. 281, and to have said ordinance declared void. The district court found the issue in favor of the defendants, and dismissed the action. The plaintiffs appeal. The City of Fremont is a city of the second class, having over 5,000 inhabitants. It is divided into four wards, and, under the Act or charter which governs cities of that class, is entitled to eight councilmen, two from each ward. At the general election, held in said City on the 1st day of April, 1890, E. N. Morse was elected councilman from the second ward as the successor to J. J. Lowry, and D. Hein was elected from the third ward as the successor to C. A. Peterson. At a session of the city council held on April 3, 1890, the votes cast at the last city election were canvassed, and Morse and Hein were declared elected. This meeting was adjourned to April 4, when the ordinance in question was introduced and read the first time. An adjourned session was held on April 5, when the ordinance was read a second time, and the meeting was adjourned to April 9. On that date the council met, pursuant to adjournment, when the ordinance was read a third time, and passed. There

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were present and participated at this session, besides the mayor, councilmen Biles, Eamay, Plambeck, Harnes, Wilcox, Peterson and Lowry. On April 7, prior to the passage of this ordinance, the councilmen-elect Morse and Hein qualified. It is contended by the appellants that the ordinance was never legally passed, for the following reasons: *first*, that there was not present at its passage a quorum of the legal members of the city council; *second*, that a sufficient number of the legal members of the body did not vote in favor of the passage of the ordinance; *third*, because the mayor had no legal right to vote upon its passage; *fourth*, because the ordinance was passed at a meeting at which the council had no authority to pass an ordinance.

The first two objections will be considered together. It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council except Peterson and Lowry, whose right to act is questioned on the ground that their successors had previously qualified on April 7. The Statute requires that two thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowry could not lawfully act with the council at that meeting, no quorum was present, and the ordinance is invalid. Section 12, art. 2, chap. 14, Comp. Stat., provides that in cities of the second class having more than 5,000 inhabitants, there shall be elected, annually, in each ward, one councilman, who shall hold his office for the term of two years, and until his successor shall be elected and qualified. There being no statutory provision fixing a particular date when the term of office of a councilman shall begin, it is believed that the provisions of said section 12 control, and that the term of such officer commences immediately after the person elected has qualified. While Morse and Hein had qualified, they had not, as yet, taken their seats in the council, or participated in the proceedings of that body. The names of Lowry and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9 without objection from anyone, although Morse and Hein were, at the time, in the council chamber. We conclude, therefore, that Morse and Hein were *de jure* officers, and that Lowry and Peterson were *de facto* members of the city council. The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public, or third persons, are as valid and binding as though he was an officer *de jure*. In *Ex parte Johnson*, 15 Neb. 512, the petitioner had been tried upon a criminal complaint before a justice of the peace, convicted and fined, and ordered committed to jail until the fine and costs were paid. He applied to this court for a writ of *habeas corpus*, alleging that the justice of the peace before whom he was convicted usurped said office without authority of law. It was held that, as the

valid, and the writ was denied.

In *State v. Gray*, 23 Neb. 365, it was held that "the acts of councilmen *de facto*, within the power of the Statute, will be recognized and upheld."

In *Braidy v. Theritt*, 17 Kan. 468, the defendant exercised the duties of councilman of the City of Watena after his successor had been elected and qualified. It was held that Theritt was a *de facto* officer. The case of *Morton v. Lee*, 28 Kan. 286, was a suit brought by Lee to enjoin the collection of a judgment rendered by one A. J. Buckland, as justice of the peace, after his term of office had expired, and after the election and qualification of his successor. It was held that Buckland was a justice of the peace *de facto*, and his acts, as such, were valid. The following cases support the same doctrine: *Norton v. Shelby County*, 118 U. S. 449 [80 L. ed. 189]; *Carli v. Rhener*, 27 Minn. 292; *Leach v. People*, 123 Ill. 420, 10 West. Rep. 617; *People v. Bangs*, 24 Ill. 184; *Trumbo v. People*, 75 Ill. 561.

It follows from the reason of these cases that the acts of Lowry and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted. The authorities cited in the brief of plaintiffs do not in any manner conflict with the rule for which we contend in this case, but sustain the proposition that the acts of officers *de facto* are invalid as to the person performing the duties of the office, and are no protection to him.

It appears from the record that four members of the council and the mayor voted in favor of the passage of this ordinance, three voted against it, and one was absent. Whether a sufficient number voted in the affirmative depends upon whether the provisions of section 18 or those of section 30 of article 2 of chapter 14, Comp. Stat., control and govern cities of the class of Fremont, in the passage of ordinances. Section 18 provides that "the mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, except as otherwise herein provided, and none other, and shall have the superintending control of all the officers and affairs of the City, and shall take care that the ordinances of the City and of this Act are complied with." Section 30 provides that "on the passage or adoption of every resolution or order to enter into a contract by the mayor and council, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance or any such resolution or order, a concurrence of a majority of the whole number of members elected to the council shall be required: provided, that the concurrence of the mayor and one half of the whole number of members elected to the council shall be sufficient to pass any such ordinance, by-law, resolution or order." Section 18, standing alone, sustains the construction, contended for by the plaintiffs and appellants, that the mayor can only vote when the council is equally divided. The language used in section 30 is plain and explicit "that the concurrence of the mayor

bers elected to the council shall be sufficient to pass any such ordinance." In construing statutes, effect, if possible, must be given to every part of the law. Effect can be given to all the provisions of both sections by holding that the section first above quoted does not apply to the passage of ordinances, by-laws or resolutions, but relates to the other proceedings of the council. Holding, as we do, that section 30 authorizes, when a quorum of the council is present, the passage of ordinances by the affirmative vote of one half of all the members of the council, with the concurrence of the mayor, the ordinance under consideration received a sufficient affirmative vote to adopt the same. The appellants claim that the case of *State v. Gray*, 23 Neb. 365, conclusively settles the present case in their favor. We do not think so. The court, in that case, had under consideration sections 10, 76 and 79 of the Act which governs and controls cities of the second class containing a population of less than 5,000, being art. 1, chap. 14, Comp. Stat. The only difference between section 10, construed in that case, and section 18, involved in this, is that the former section does not contain the words, "except as otherwise herein provided." Sections 76 and 79 each provides that, to pass an ordinance, it requires the concurrence of a majority of all the members elected to the council. Neither of said sections provides "that the concurrence of the mayor and one half of the whole number of members shall be sufficient to pass any such ordinance." In that respect, the provisions of said sections are different from those contained in section 30, which we have been considering. The court, in *State v. Gray*, *supra*, held, and we think correctly, that section 10, therein construed, did not apply to the passage of ordinances, and that it required the concurrent vote of the majority of the whole number of members of the council to adopt an ordinance. It is obvious that the provisions of section 30, and those of sections 76 and 79, are so different that the decision reported in 28 Nebraska does not in any manner conflict with the views expressed in this opinion, but, on the other hand, sustains us in holding that section 18, copied above, does not refer to the passage of ordinances.

It is also claimed that the city council had no authority to pass ordinance 231 at the meeting at which it was adopted. Ordinance No. 3, of the City of Fremont, provides that the regular meetings of the council shall be held on the last Tuesday of each month. It is conceded that the ordinance under consideration was not acted upon at such a meeting, nor at any adjourned session thereof. It is provided by ordinance No. 79 that the mayor and council shall meet on the Thursday following each city election, and canvass the returns of the votes cast at such election. A meeting was held April 3, when the votes cast at the city election, held on April 1, were canvassed. Prior to this meeting, a call was issued by the mayor for a meeting of the council on April 3, to canvass the votes of the city election, and to transact

any business that might lawfully come before the council. At the meeting held on April 8, the mayor and all the members of the council were present, except Archer. This meeting was adjourned to the following day, at which time, the mayor and all the councilmen being present, the ordinance was introduced, read the first time and the meeting adjourned to April 5. On that date, there were present the mayor and all the councilmen, except Plambeck. The ordinance was then read a second time, and an adjournment taken to April 9. On the last-named date, all the members of the council being present, except Archer, the ordinance was read a third time, and passed. The meeting held on April 8 was for the special purpose of canvassing the returns of the city election. Had it been a regular meeting, then any corporate business could have been lawfully transacted at any adjourned session thereof. The Statute authorizes the mayor or any two councilmen to call special meetings. Whether the call must specify the object of such a meeting, the Statute is silent, and the decisions of the courts are conflicting upon that question. At any rate, the purpose and object of the call is to apprise the members of the proposed meetings so that they may attend. So it seems clear to us that, when all the members of the council and the mayor meet and act as a body, they may, at such meeting, or at any adjourned session thereof, transact any business within the powers conferred by law, notwithstanding no written call for the meeting was made by the mayor or two councilmen, or in case one was made which failed to specify the purpose of the meeting. At the session held on April 4, at which the ordinance was introduced and read, the mayor and all the members of the council were present and acted. All the members were notified of the meeting at which the ordinance was read the second time by the adjournment of the previous meeting, when all were present, and all had notice of the meeting at which the ordinance was passed by the adjournment of the meeting held on April 5 except Plambeck, and he was present and participated at the meeting when the ordinance was finally passed. In view of these facts, we must hold that the council was in lawful session when each step was taken when passing this ordinance. It is urged that subdivision 8 of section 52 of the Act governing cities of the second class having over 5,000 inhabitants, which authorizes a city to levy and collect a license tax on any occupation or business carried on within the corporate limits, violates sections 1 and 6 of art. 9 of the Constitution. Section 1 of said article provides that "the Legislature shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll-bridges, ferries, insurance, telegraph and

express interests or business, vendors of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." Section 6 provides that "the Legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It has been the uniform holding of this court that the Constitution is not a grant but a restriction of legislative power, and that the Legislature may legislate upon any subject not inhibited by the Constitution. *State v. Lancaster County*, 4 Neb. 587; *State v. Dodge County*, 8 Neb. 124; *Hanscom v. Omaha*, 11 Neb. 44; *State v. Ream*, 16 Neb. 685; *Shaw v. State*, 17 Neb. 884.

In *State v. Bennett*, 19 Neb. 191, this court had under consideration section 1, art. 9, of the Constitution, and subdivision 8, § 69, of "An Act to Provide for the Organization, Government and Powers of Cities and Villages," passed in 1879, which empowers cities containing less than 5,000 inhabitants to impose an occupation tax. It was held that the Constitution and Statute both conferred the power to levy and collect such a tax. While the Legislature has authority to enforce a tax upon occupations, it is evident that section 1 of the Constitution above referred to does not prohibit the Legislature from conferring, by general law, power upon cities and villages to impose occupation taxes for municipal purposes. The only restriction imposed is that the taxes shall be uniform as to class.

The above-quoted section (6) of the Constitution was not referred to or considered by the court in *State v. Bennett*, *supra*. It therefore only remains to be determined whether the provision of that section prohibits the Legislature from conferring upon municipal corporations the power to levy occupation taxes. It is claimed by appellants that this section of the Constitution has reference to taxation by valuation. We do not think so. The language used is: "Such taxes shall be uniform in respect to persons and property." If it was the intention of the framers of the Constitution to limit municipal corporations to the imposing of taxes on property, why was the word "persons" specified in the section? It was evidently inserted for the purpose of authorizing the levy and collection of occupation taxes. Sections 1 and 6 of art. 9 of our Constitution are identically the same as sections 1 and 9 of the 9th article of the Constitution of Illinois, which were construed by the Supreme Court of that State in 1873, before the adoption of the Constitution of this State, in *Wiggins v. Chicago*, 68 Ill. 878. Mr. Justice Walker, in delivering the opinion of the court, observes: "The 9th section, art. 9, of the Constitution, declares that the General Assembly may vest the municipal authorities of cities, towns and villages

with the primary corporate purposes; 'but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.' To give full effect to this provision, we must hold that it embraces more than the mere assessment and imposition of a uniform tax on property. It evidently was designed to include the various modes of collecting taxes of persons pursuing various avocations. And in the first section of the same article the Legislature is authorized to tax peddlers, auctioneers, etc. The tax here provided for is manifestly the sum of money which shall be paid to enable them to pursue their calling. Their property was required to be assessed by the first clause of the section, as it falls within the language employed; hence it follows that the tax last referred to, as applied to the classes of persons enumerated, is a personal tax, imposed upon the person exercising the calling, and has no reference whatever to his property." We are clearly of the opinion that the provision of subd. 8, § 53, art. 2, chap. 14, Comp. Stat., is not repugnant to the Constitution. It is, however, urged that the ordinance is void, because the taxes imposed by it are not uniform in respect to the classes upon which they are levied. The ordinance imposes a fixed sum upon each of the various

does not classify each business, and graduate the amount that shall be paid by the person pursuing an avocation according to the amount of business he shall do, is not a violation of the rule of uniformity prescribed by both the Constitution and Statute. It is not an income tax, but a license fee or tax for the privilege of carrying on business in the city. The ordinance makes no exceptions in favor of or against anyone carrying on the business taxed, but operates uniformly on the class to which it applies. Section 7 of the ordinance provides that any person violating any of its provisions shall, on conviction thereof, be fined not less than \$5 nor more than \$50, and be committed until the fine and costs be paid. Under the decision of this court in *State v. Green*, 27 Neb.—, the penal provision for the enforcement of the ordinance is void. But that does not invalidate its other provisions, as the valid part is a complete act, and is not dependent upon the void portion. *State v. Lancaster County*, 6 Neb. 474; *State v. Hardy*, 7 Neb. 877; *State v. Lancaster County*, 17 Neb. 85; *State v. Hurdis*, 19 Neb. 823; *Muldoon v. Levi*, 25 Neb. 457; *Messenger v. State*, 25 Neb. 674.

The judgment of the District Court is affirmed. The other Judges concur.

INDIANA SUPREME COURT.

James L. WILSON *et al.*, *Appts.*,

v.

Elijah V. BROOKSHIRE, Receiver, etc.

(....Ind.....)

1. One who undertakes, on behalf of subscribers to the stock of a corporation, to collect the subscriptions and apply the money to the cancellation of corporate debts, cannot ac-

quire an interest in a judgment against the corporation, for the payment of which he has sufficient money in his hands, realized from stock subscriptions, which shall be hostile to those on whose behalf he was acting, without their consent.

2. To avoid a purchase by a trustee of property involved in the trust, it is sufficient for the beneficiaries to show his relation to the property and to them.

NOTE.—Trustee cannot purchase the trust property.

The trustee has a duty to perform in regard to the trust property which is entirely inconsistent with his assuming the character of a purchaser. *Iddings v. Bruen*, 4 Sandf. Ch. 263, 7 N. Y. Ch. L. ed. 1088.

The law esteems it a fraud in a trustee of an estate to take, for his own benefit, a position in which his interests will conflict with his duty. *Sheldon v. Rice*, 30 Mich. 301, 13 Am. Rep. 130; *Davoue v. Fanning*, 2 Johns. Ch. 252, 1 N. Y. Ch. L. ed. 305; *Whitcoote v. Lawrence*, 3 Ves. Jr. 740; *Lord Hardwicke v. Vernon*, 4 Ves. Jr. 411; *Ex parte Lacey*, 6 Ves. Jr. 820; *Docker v. Somes*, 2 Myl. & K. 655; *Farnam v. Brooks*, 9 Pick. 212; *Saeger v. Wilson*, 4 Watts & S. 501; *Rogers v. Rogers*, 3 Wend. 508; *Terwilliger v. Brown*, 44 N. Y. 240; *Beaubien v. Poupard*, Harr. (Mich.) Ch. 206; *Dwight v. Blackmar*, 2 Mich. 330; *Moore v. Mandelbaum*, 8 Mich. 433; *Story*, Eq. Jur. § 322.

The rule that a trustee cannot purchase at a public sale where the trust estate is interested in having the property bring the highest price applies to all persons invested with a fiduciary power, as well as to trustees proper. *Price v. Thompson*, 84 Ky. 219.

A public sale of trust property which the estate is interested in having bring the highest price, at 9 L. R. A.

which a trustee or person invested with fiduciary power becomes the purchaser, is conclusively presumed to be invalid, and the transaction is voidable. *Ibid.*

It is a rule of equitable policy that a trustee cannot, himself, be a purchaser of a trust estate without leave of a chancery court. *Michoud v. Girod*, 45 U. S. 4 How. 505, 11 L. ed. 1077; *Faucett v. Faucett*, 1 Bush, 511; *McCarty v. Steam Cotton Press Co.* 5 La. 18; *Bergen v. Bennett*, 1 Cal. Cas. 20; *Chaplin v. Weed*, 1 Clarke, Ch. 409, 7 N. Y. Ch. L. ed. 175; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Froneberger v. Lewis*, 79 N. C. 426; *Willard*, Eq. Jur. 607; *Snell*, Princ. Eq. 148; *Willis*, Tr. 164; *Underhill*, Tr. 223, art. 53; *Lewin*, Tr. 7th ed. 443; *Hill*, Tr. 4th Am. ed. 159; *Perry*, Tr. 3d ed. § 195. See note to *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218.

For exceptions to this rule see note to *Anderson v. Butler* (S. C.) 5 L. R. A. 166.

The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring and over which he could not have had control, is upheld by numerous decisions of the United States Supreme Court, and other courts of this country. *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271; *Prevost v. Gratz*, 1 Pet. C. C. 373; *Twiss v. Lohs*

See also 17 L. R. A. 557; 47 L. R. A. 792.

3. The statute which provides that action for relief against frauds shall be brought within six years does not apply to an action brought to procure the cancellation of a sheriff's deed of land sold under a judgment which had been purchased and held by one who, acting under a trust, had collected funds for its satisfaction, to such purchaser, and to remove the incumbrance of the judgment from the property.

4. A landlord will not be bound by the result of a suit to which he was not a party on the record, instituted by his tenant, unless it very clearly appears that the action was instigated by him and that he conducted and controlled the litigation after it was begun.

5. The six years' Statute of Limitations is not available on behalf of a trustee who, with funds in his hands for the payment of a judgment against real estate of the beneficiary, purchases such judgment and has it assigned to himself, to defeat a suit by the beneficiary for its cancellation.

6. Where an action embracing a substantive cause in which a new trial as matter of right is not allowable, as well as other causes in which such new trial is allowable, proceeds to judgment, the former cause will control and warrant the refusal of a second trial.

(September 18, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to set aside a sheriff's deed of certain real estate and to procure a cancellation of the judgment under which it was made. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Ballard & Ballard for appellants.
Messrs. A. D. Thomas, J. F. Harney and W. W. Thornton, for appellee:

This is not an express trust, but one implied from the acts of the parties. In cases of resulting, implied and constructive trusts the Statute of Limitations will run, and it begins when the cause of action accrues to the *cestui que trust*.

Perry, Tr. § 865; *Ang. Lim.* § 178; *Wood*, *Lim.* p. 418; *Newcom v. Bartholomew County Comrs.* 1 West. Rep. 475, 108 Ind. 528; *McClane v. Shepherd*, 21 N. J. Eq. 79; *Lammer v. Stoddard*, 5 Cent. Rep. 407, 103 N. Y. 672; *Howell v. Howell*, 15 Wis. 61; *Harlow v. Dehon*, 111 Mass. 195; *Poe v. Domic*, 54 Mo. 127.

Under Rev. Stat., § 292, the phrase "for relief against frauds" applies as well to suits in equity as at law; and under it time begins to run at the time of the perpetration of the fraud and before the discovery of the cause of action, unless the defendant shall conceal his liability.

Fischer v. Flinn, 80 Ind. 208; *Muselman v. Kent*, 33 Ind. 458; *Wynne v. Cornelison*, 52 Ind. 817.

It is an old time principle that it is the policy of the law to prevent litigation, and when a matter has been once litigated it is forever put at rest.

Fischli v. Fischli, 1 Blackf. 860; *Kramer v. Mathews*, 68 Ind. 173; *Green v. Glynn*, 71 Ind. 836; *Ulrich v. Drischell*, 88 Ind. 358; *State v. Krug*, 94 Ind. 389; *Parrar v. Clark*, 97 Ind. 450; *Randall v. Lover*, 98 Ind. 263.

The Ladoga Seminary being in court by her tenant and also by her attorney, she was bound

Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; *Chorpenning's App.* 32 Pa. 315; *Fisk v. Barber*, 6 Watts & S. 18.

Trustee cannot be purchaser at his own sale.

A trustee cannot become a purchaser at his own sale, without special permission from a court of competent jurisdiction. *Allen v. Gillette*, 127 U. S. 569, 32 L. ed. 271.

In Texas a trustee may purchase the trust property at a judicial sale brought about by a third person, which he had no part in procuring and over which he could not have had control. *Ibid.*; *Erskine v. De La Baum*, 8 Tex. 417; *Howards v. Davis*, 6 Tex. 174; *Scott v. Mann*, 33 Tex. 725; *Goodgame v. Rushing*, 35 Tex. 722.

The purchase by a trustee, directly or indirectly, of any part of a trust estate which he is empowered to sell as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust. *Torrey v. Bank of Orleans*, 9 Paige, 649, 4 N. Y. Ch. L. ed. 853; *Scholle v. Scholle*, 2 Cent. Rep. 39, 101 N. Y. 172; *Davoue v. Fanning*, 2 Johns. Ch. 242, 1 N. Y. Ch. L. ed. 635; *People v. Open Board of Stock Brokers Bldg. Co.* 32 N. Y. 98; *Fulton v. Whitney*, 66 N. Y. 548; *Van Epps v. Van Epps*, 9 Paige, 237, 4 N. Y. Ch. L. ed. 682.

Sale may be set aside.

If one acting as trustee for others becomes himself interested in the purchase, the *cestui que trust* are entitled, of course, to have the sale set aside, unless the trustee had fairly divested himself of the character of trustee. *Stephen v. Beall*, 89 U. S. 22 Wall. 840, 22 L. ed. 788; *Van Epps v. Van Epps*, 9 Paige, 237, 4 N. Y. Ch. L. ed. 682.

Purchase inures to benefit of cestui que trust.

Purchase by a trustee will inure, in equity, to
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the use of the beneficiaries. *Leas v. Sternberg*, 69 Mo. 123; *Thornton v. Irwin*, 43 Mo. 153; *Rea v. Cope-llin*, 47 Mo. 78; *Story*, Eq. § 1211.

A trustee, who buys in the trust property under a prior incumbrance, at a price below its real value, is always considered as doing so for the use and benefit of his *cestui que trust*. *Colburn v. Morton*, 36 How. Pr. 160, 1 Trans. App. 149, 3 Keyes, 305, 3 Abb. Pr. N. S. 815, 1 Abb. App. Dec. 385; *Campbell v. Johnston*, 1 Sandf. Ch. 143, 7 N. Y. Ch. L. ed. 275. See note to *Manhattan C. & S. Co. v. Dodge* (Ind.) 6 L. R. A. 369; *Cranston v. Wheeler*, 37 Hun, 83.

If the purchaser, though a party to the action, is acting in a fiduciary capacity arising outside of the relation of mortgagor and mortgagee, his liability to his *cestui que trust* cannot be affected by a provision for sale of the property, nor by the order confirming the sale. *Fulton v. Whitney*, 66 N. Y. 557; *Gallatien v. Cunningham*, 8 Cow. 377, 381; *Conger v. Ring*, 11 Barb. 354.

Where a person standing in a confidential relation to another purchases land with the money of the latter, taking the title in his own name, a trust results in the latter's favor. *Cooper v. Lee*, 75 Tex. 114.

If a trustee traffics for his own profit in property held by him in trust, the beneficiary may, on timely application, claim the profit as his. *Hughes v. Hughes*, 37 Ala. 632.

If an agent purchases lands with money of his principal, and takes title in his own name without the latter's consent, the land, or the proceeds thereof, will be impressed with a trust in favor of the principal. *Kraemer v. Deustermann*, 37 Minn. 469.

Indemnification of trustee.

The trustee will, of course, be indemnified for his advances on a purchase held to be made for the benefit of the beneficiary, and will have a lien on

by the judgment against the Indiana Central Normal College.

Herman, Res Adjudicata and Estoppel, p. 146, § 135, p. 1011, § 899; *Robbins v. Chicago*, 71 U. S. 4 Wall. 679, 18 L. ed. 480; *Strong v. Phoenix Ins. Co.* 62 Mo. 295; *Harvie v. Turner*, 46 Mo. 448; *Conger v. Chilcote*, 42 Iowa, 28; *McNamee v. Moreland*, 26 Iowa, 111; *Stoddard v. Thompson*, 81 Iowa, 81.

A judgment is personal property.

Henry v. Henry, 11 Ind. 287; *Peacock v. Allen*, 89 Ind. 80; Wms. Pers. Prop. 68, 96; Bouvier, Law Dict. titles, *Chose and Chose in Action*; *Debt*.

The assignment, on record, of the Billingsly judgment to the appellant Wilson vested in him the title of the same (Rev. Stat. § 608); and when he held it without question for six years he became the undisputed owner thereof.

Rev. Stat. § 292; Cooley, Const. Lim. 865; *Campbell v. Holt*, 115 U. S. 629, 29 L. ed. 485; *Preston v. Briggs*, 16 Vt. 124; *Merrill v. Bullard*, 59 Vt. 389; *Winburn v. Cochran*, 9 Tex. 123; *Sims v. Canfield*, 2 Ala. 555; *Newcombe v. Leavitt*, 22 Ala. 631; *Whetham v. Pennsylvania & N. Y. C. R. Co.* 9 Phila. 284; *Yancy v. Yancy*, 5 Heisk. 353, 13 Am. Rep. 5.

Wherever the title to real property is at issue, whether the question be presented by the complaint or by a cross complaint, the court cannot refuse a proper application for a new trial as of right.

Adams v. Wilson, 60 Ind. 580; *Miller v. Evansville Nat. Bank*, 99 Ind. 273; *Hammann v. Mink*, Id. 281; *Kretzline v. Franz*, 4 West. Rep. 479, 106 Ind. 359; *Cotter v. Baston*, 89 Ind. 185; *Shucraft v. Davidson*, 19 Ind. 98; *Bender v. Sherwood*, 81 Ind. 168.

the property purchased for the sum advanced. *Colburn v. Morton*, 5 Abb. Pr. N. S. 81a.

Trustees cannot deal in trust property.

A trustee who buys in the trust property under a prior incumbrance, and at a price below its real value, is always considered as doing so for the use and benefit of his *cestui que trust*. *Slade v. Van Vechten*, 11 Paige, 21, 5 N. Y. Ch. L. ed. 42; *Colburn v. Morton*, 38 How. Pr. 160, 1 Abb. App. Dec. 885, 5 Abb. Pr. N. S. 315; *Fulton v. Whitney*, 5 Hun, 19; *Campbell v. Johnston*, 1 Sandf. Ch. 143, 7 N. Y. Ch. L. ed. 275; *Dickinson v. Codwise*, 1 Sandf. Ch. 214, 7 N. Y. Ch. L. ed. 304; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 7 N. Y. Ch. L. ed. 318; *Dobson v. Racey*, 3 Sandf. Ch. 60, 7 N. Y. Ch. L. ed. 770; *Iddings v. Bruen*, 4 Sandf. Ch. 263, 7 N. Y. Ch. L. ed. 1008; *Holman v. Holman*, 66 Barb. 222.

No act of the trustee shall prejudice the *cestui que trust*. *Platt v. Oliver*, 3 McLean, 27.

Trustees cannot profit by trust estate.

Trustees are not entitled to benefit themselves from the use of trust property. *Blauvelt v. Ackerman*, 20 N. J. Eq. 143; *White v. Parker*, 8 Barb. 53; *Conro v. Port Henry Iron Co.* 12 Barb. 64; *Green v. Winter*, 1 Johns. Ch. 27, 1 N. Y. Ch. L. ed. 47; *Parkist v. Alexander*, 1 Johns. Ch. 394, 1 N. Y. Ch. L. ed. 184; *Brown v. Ricketts*, 4 Johns. Ch. 303, 1 N. Y. Ch. L. ed. 348; *Evertson v. Tappen*, 5 Johns. Ch. 497, 1 N. Y. Ch. L. ed. 1154; *Hawley v. Mancius*, 7 Johns. Ch. 174, 2 N. Y. Ch. L. ed. 236; *Holridge v. Gillespie*, 2 Johns. Ch. 80, 2 N. Y. Ch. L. ed. 284; *Mathews v. Dragaud*, 8 Dessaus. 25; *Trenton Bkg. Co. v. Woodruff*, 2 N. J. Eq. 117; *Holman v. Holman*, 66 Barb. 222; *Slade v. Van Vechten*, 11 Paige, 21, 5 N. Y. Ch. L. ed. 42; 9 L. R. A.

Mitchell, J., delivered the opinion of the court:

Elijah V. Brookshire, as receiver of the Ladoga Seminary, brought this suit against James L. Wilson and William Hughes, to procure the cancellation of a deed for certain real estate, which the sheriff of Montgomery County conveyed to Hughes. A cross-complaint was filed by the latter, and upon issues made upon the complaint and cross-complaint there was a general judgment for the plaintiff below. The merits of the controversy may be determined by considering the facts specially found by the court. The material facts thus found are that the Ladoga Seminary, an incorporated company, owned the real estate in controversy, and had erected thereon buildings designed for an institution of learning. In 1876 the corporation found itself involved in debt, its real estate having become incumbered with liens to the amount of \$1,200. Among other liens there was one known as the "Billingsley judgment," rendered in 1878, and amounting to \$220.25, besides costs. About this time a number of citizens subscribed various sums, amounting in all to \$1,725, to the capital stock of the corporation, their purpose being to free the property from incumbrance and put the buildings in suitable repair. The subscriptions were all made on the express condition that no part of the amount subscribed should be expended in making repairs, except what might remain after paying off the incumbrances on the property.

The defendant James L. Wilson was mutually chosen by the officers of the corporation and the subscribers to the new stock to collect the amount subscribed, pay off the liens and

Jewett v. Miller, 10 N. Y. 402, 5 Abb. Pr. N. S. 315; *Schleffelin v. Stewart*, 1 Johns. Ch. 620, 1 N. Y. Ch. L. ed. 283.

A trustee cannot profit by the sale of the property of the *cestui que trust*, and upon his death his estate will be held liable to the beneficiaries of the trust. *Taylor v. Benham*, 46 U. S. 5 How. 278, 12 L. ed. 149.

Where trustees derive any benefit from the use of trust property they are chargeable with interest, either simple or compound, as the facts require. *Re Commonwealth F. Ins. Co.* 32 Hun. 79; *Manning v. Manning*, 1 Johns. Ch. 527, 1 N. Y. Ch. L. ed. 234; *Minuse v. Cox*, 4 Johns. Ch. 441, 1 N. Y. Ch. L. ed. 1135; *Mumford v. Murray*, 6 Johns. Ch. 17, 2 N. Y. Ch. L. ed. 43; *Kellett v. Rathbun*, 4 Paige, 110, 3 N. Y. Ch. L. ed. 364; *Ogilvie v. Ogilvie*, 1 Bradf. 368; *Duffy v. Duncan*, 32 Barb. 508, 35 N. Y. 191; *Lansing v. Lansing*, 45 Barb. 183; *Sweet v. Jacocks*, 6 Paige, 355, 8 N. Y. Ch. L. ed. 1018.

They may be charged with the whole profits, either by making periodical rests, and charging compound interest, or in such manner as may best carry out the principle of giving the *cestui que trust* the benefit of all the profits made beyond simple interest. *Utica Ins. Co. v. Lynch*, 11 Paige, 524, 5 N. Y. Ch. L. ed. 221; *Garniss v. Gardiner*, 1 Edw. Ch. 190, 6 N. Y. Ch. L. ed. 85; *Montjoy v. Lashbrook*, 2 R. Mon. 301; *Clarkson v. De Peyster*, Hopk. Ch. 424, 3 N. Y. Ch. L. ed. 478.

Rule applied to agents.

The law will not suffer any man to earn a profit, or expose him to the temptations of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser.

make the contemplated repairs. He accepted the trust, collected \$1,610 of the money subscribed, which the court finds was \$400 in excess of the amount required to discharge all the liens on the property. With the exception of several small items, amounting to \$288, it does not appear from the finding how the amount collected was disbursed, there being in the finding only a general statement that the residue was applied to the payment of judgments and in making repairs. Of the \$288, Wilson retained \$90 for his services.

On the 10th day of February, 1877, while Wilson was engaged in executing the trust he had undertaken, he paid Billingsley \$285, and took an assignment of the judgment theretofore rendered in favor of the latter against the Ladoga Seminary, to himself, and for more than six years prior to the commencement of this action openly asserted ownership of the judgment, and declared his purpose to enforce it against the property of the corporation, of which purpose its officers had notice. It is not found whether the Billingsley judgment was paid by Wilson with his individual funds or out of the subscriptions which he was engaged in collecting.

Subsequently, in December, 1884, Wilson caused the property to be sold at sheriff's sale to satisfy the judgment assigned to him as above, he becoming the purchaser. He afterwards assigned the certificate of purchase to Hughes, to whom he was indebted, the latter giving him credit for the amount on an antecedent debt, with knowledge at the time of Wilson's relation to the property and to the parties interested, and of the condition upon which

the subscriptions to the stock were made. Hughes obtained a sheriff's deed in December, 1885, and took possession of the property.

It is found that in the year 1883, when Wilson was about to sell the property on the Billingsley judgment, the Indiana Central Normal College, being in possession as tenant of the Ladoga Seminary, instituted a suit in the Montgomery Circuit Court for the purpose of enjoining the sale, on the alleged ground that Wilson had collected, as the agent or trustee of the Ladoga Seminary, and the subscribers to its stock, more than a sufficient amount of money to pay off the Billingsley claim, and all other liens on the property, and that, according to the condition upon which the subscriptions were made, and owing to the relations of Wilson to the property, the judgment was, as to him, actually paid. It is found that such proceedings were had in that case as that a judgment was rendered in favor of Wilson and against the Indiana Central Normal College. The Ladoga Seminary was not a party to that action, and did not participate in the trial, but it had knowledge that the suit had been instituted, and the president of the board of trustees, without any authority from the board, employed an attorney who appeared for the purpose of looking after the interests of the seminary.

The plaintiff below was duly appointed receiver, at the suit of divers persons interested in the property of the corporation. Upon the facts as above summarized the court stated conclusions of law adverse to the appellants Wilson and Hughes. The facts found were all within the issues of the case, and whether

either at a public or private sale. *Dwight v. Blackmar*, 3 Mich. 380, 37 Am. Dec. 138; *Moore v. Moore*, 4 Sandf. Ch. 48, 7 N. Y. Ch. L. ed. 1018; *Noyes v. Landon*, 59 Vt. 500; *Parkist v. Alexander*, 1 Johns. Ch. 394, 1 N. Y. Ch. L. ed. 184; *Reed v. Warner*, 5 Paige, 558, 3 N. Y. Ch. L. ed. 871; *Conro v. Port Henry Iron Co.* 12 Barb. 64; *Wright v. Ross*, 36 Cal. 422; *Blauvelt v. Ackerman*, 20 N. J. Eq. 148; *Saltmarsh v. Beene*, 4 Port. 291, 30 Am. Dec. 523; *Dodd v. Wakeman*, 26 N. J. Eq. 428; *Tagg v. Bowman*, 99 Pa. 380; *Bass v. Lucas*, 7 S. C. (N. S.) 118; *Story, Eq. Jur.* § 816; *Green v. Winter*, 1 Johns. Ch. 28, note, 1 N. Y. Ch. L. ed. 47.

Agent cannot assume incompatible relations.

An agent cannot take upon himself incompatible duties and characters, or act in a transaction where he has an adverse interest or employment. *Murray v. Beard*, 4 Cent. Rep. 130, 102 N. Y. 505; *Bent v. Priest*, 1 West. Rep. 749, 86 Mo. 475.

An agent cannot place his interests in conflict with those of his principal. *Le Gendre v. Byrnes* (N. J.) 13 Cent. Rep. 815.

An agent cannot be allowed to place himself in a position where duty and interest conflict; or be permitted to make a profit out of his agency. *Crump v. Ingersoll* (Minn.) July 15, 1890; *O'Grady v. Coe*, 13 Hun, 601.

One who is agent of one party to an agreement cannot, at the same time, be the agent of the other party to the same agreement, and the latter is not bound by his acts. *Leeds v. Penrose* (N. J.) 6 Cent. Rep. 545.

Money coming to the hands of an agent for a specific purpose cannot, without the consent of the principal, be diverted by the agent from that purpose, so as to create the relation of debtor and 9 L. R. A.

creditor. *Wells v. Collins*, 5 L. R. A. 531, 74 Wis. 341.

This principle applies equally, whether one deals with himself, acting as sole trustee, or with a board of trustees, of which he is a member, or with the directors of a corporation of whom he is one. *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 113; *Sargeant v. Solberg*, 22 Wis. 139; *Clafin v. Farmers & C. Bank*, 24 How. Pr. 1, 15; *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 85-91.

Character of agent inconsistent with that of purchaser.

No person can be permitted to purchase an interest in property when he has a duty to perform inconsistent with the character of purchaser. *South Baptist Soc. v. Clapp*, 18 Barb. 47; *Hawley v. Cramer*, 4 Cow. 730; *Van Epps v. Van Epps*, 9 Paige, 297, 4 N. Y. Ch. L. ed. 682; *Conger v. Ring*, 11 Barb. 856; *Randall v. Lautenberger* (R. I.) 5 New Eng. Rep. 730; *McKay v. Williams*, 12 West. Rep. 40, 67 Mich. 547.

A purchase *per interpositum personam*, by a trustee or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it. *Michoud v. Girod*, 45 U. S. 4 How. 503, 11 L. ed. 1076.

A sale by an agent to himself of the property of his principal is void at the option of the principal. *Louisville Bank v. Gray*, 84 Ky. 553.

Agent holds property purchased in trust for principal.

If one takes an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal. *Corse v. Leggett*, 25 Barb. 326; *Sweet v. Jacobs*, 9 Paige, 364, 8

the judgment shall be reversed, or a new trial ordered, depends upon the propriety of the conclusions of law stated.

The conclusions stated by the court are assailed upon various grounds.

1. It is said the facts found show that the cause of action accrued more than six years before the suit was commenced, and, assuming that the present is an action for relief against fraud, it is hence contended that the suit is barred by the Statute in which it is provided that actions for relief against frauds shall be commenced within six years, and not afterwards. Rev. Stat. 1881, § 292.

The conclusion is necessarily erroneous, because the premise from which it is drawn is incorrect. The action is not for relief against fraud within the meaning of subdivision 4 of the section above. The action was not brought to rescind a contract induced by fraudulent misrepresentation or concealment, nor to set aside a conveyance on the ground that it was procured or made as the result of an actual aggressive scheme to defraud; nor does the plaintiff's right to maintain his action depend upon his ability to prove that any actual fraud was either committed or contemplated. The action was brought to procure the cancellation of a sheriff's deed, and to have an incumbrance removed from certain real estate owned by the Ladoga Seminary, of which it is alleged one of the appellants is in possession. It proceeds upon the assumption that the Billingsley judgment was actually paid and satisfied at the time the sheriff's sale was made to Wilson, owing to the fiduciary relation which the latter occupied toward the property and those interested in it at the time he paid the money and took an assignment of the judgment. By accepting the

assumption upon which the relation to the property in controversy that he became disqualified from acquiring any right in it hostile to those in whose behalf he was acting, without their consent. And this was so whether he contemplated any fraud upon them or not. Having undertaken to perform a trust which required him to collect the money subscribed for stock, and out of the first moneys collected to pay off the incumbrances on the property, and having collected more than enough to pay off all the incumbrances, he could not, while standing in the relation of a trustee, acquire title to the trust property. The purchase by him was voidable absolutely at the election of those interested, and, in order to avoid it, nothing more was necessary than to show the relation which the purchaser occupied to the property and to the stockholders of the corporation.

The Statute which provides that actions for relief against frauds shall be brought within six years applies to actions, the immediate and primary object of which is to obtain relief from fraud, and not to actions which fall within some other class, even though questions of fraud may arise incidentally. *Eves v. Louis*, 91 Ind. 457; *Carese v. Foster*, 62 Ind. 145; *Vanduyne v. Hepner*, 45 Ind. 589.

As was in effect said in *Potter v. Smith*, 36 Ind. 281, a case closely analogous in principle, the Statute which requires actions for relief against frauds to be brought within six years embraces actual frauds, and possibly some cases of constructive frauds, but does not embrace a case like the present, where the *cestui que trust*, or person standing in his place, has the right to have the sale set aside, not because the purchaser or trustee has been guilty of fraud, but

N. Y. Ch. L. ed. 1022, 31 Am. Rep. 262; 2 Pom. Eq. § 969; *Church v. Sterling*, 16 Conn. 388; *McKinley v. Irvine*, 18 Ala. 681; *Smith v. Stephenson*, 45 Iowa, 645; *Krutz v. Fisher*, 8 Kan. 90, 9 Kan. 501; *Matthews v. Light*, 22 Me. 305; *Pillsbury v. Pillsbury*, 17 Me. 107; *Moore v. Mandelbaum*, 8 Mich. 433; *Reitz v. Reitz*, 80 N. Y. 588; *Bennett v. Austin*, 61 N. Y. 303; *Gardner v. Ogden*, 23 N. Y. 337; *Bariss v. Story*, 39 Tex. 354; *McMahon v. McGraw*, 26 Wis. 614; *Burrell v. Bull*, 3 Sandf. Ch. 15, 7 N. Y. Ch. L. ed. 762; *Blount v. Robeson*, 3 Jones, Eq. 73; *Welford v. Chancellor*, 5 Gratt. 39; *Massie v. Watts*, 10 U. S. 6 Cranch, 143, 3 L. ed. 181; *Colburn v. Morton*, 5 Abb. Pr. N. S. 315, 3 Keyes, 306, 1 Abb. App. Dec. 385, 36 How. Pr. 160; *Cambell v. Johnson*, 1 Sandf. Ch. 143, 7 N. Y. Ch. L. ed. 276; *Lytle v. Beveridge*, 58 N. Y. 406; *Dobson v. Racey*, 2 Sandf. Ch. 60, 7 N. Y. Ch. L. ed. 770.

A purchase of an outstanding title or interest in property, by a person sustaining the relation of agent to others interested in the same property, will, at the option of the latter, inure to their benefit. *Rothwell v. Dewees*, 67 U. S. 2 Black, 613 17 L. ed. 309.

It is enough that the law presumes such sales to be injurious to the principal, and the agent is not permitted to rebut the presumption. *McDonald v. Lord*, 26 How. Pr. 403, 2 Robt. 11.

If an agent purchases property of which he has the management belonging to his principal, he holds it as a constructive trust for the latter. *McClendon v. Bradford* (La.) Jan. 4, 1890.

Purchase by agent inures to benefit of principal.

A party may in equity prevent his agent from defrauding him, and secure the benefit of the purchase. *L. R. A.*

chase made by the agent. *Baker v. Wainwright*, 38 Md. 363, 11 Am. Rep. 504.

The agent is bound to give the principal the benefit of the purchase. *Columbus Co. v. Hurford*, 1 Neb. 160; *Sweet v. Jacobs*, 6 Paige, 364, 3 N. Y. Ch. L. ed. 1022; *Reed v. Warner*, 5 Paige, 660, 3 N. Y. Ch. L. ed. 899; *Massie v. Watts*, 10 U. S. 6 Cranch, 143, 3 L. ed. 181; *Irvine v. Marshall*, 61 U. S. 20 How. 553, 15 L. ed. 994; *Flagg v. Mann*, 2 Sumn. 433.

There must be no misrepresentation, and no concealment or suppression of any fact within the knowledge of the agent which might influence the principal; and the burden of establishing perfect fairness is on the agent. *Condit v. Blackwell*, 22 N. J. Eq. 488; *Banks v. Judah*, 8 Conn. 146; *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 91.

If an agent purchase at a discount an outstanding draft against his principal, the discount inures to the latter's benefit. *Noyes v. Landon*, 59 Vt. 568.

Application to set aside sale.

An application to set aside the sale must be made within a reasonable time, of which the court must judge under all the circumstances; and twenty years was named as the shortest period which a court of equity would be bound to consider an absolute bar. *People v. Open Board of Stock Brokers Bldg. Co.* 32 N. Y. 104, 28 Hun. 278.

See, for a resale that was refused after eighteen years, *Gregory v. Gregory*, Coop. Ch. Cas. 1, Eldon, 201, and after sixteen years, *Bergen v. Bennett*, 1 Cal. Cas. 1; on the other hand in *Hatch v. Hatch*, 9 Ves. Jr. 232, the sale was set aside after the lapse of twenty years, in *Purcell v. McNamara*, 14 Ves. Jr. 91, after seventeen years.

because he should be removed from all temptation to commit a fraud. The rule that a purchase by a trustee shall inure to the benefit of the *cestui que trust*, if the latter selects, is not intended to be remedial of actual injury, but to prevent the possibility of wrong, and it is wholly immaterial that the conduct of the former may have been innocent and free from any imputation of fraud or wrong; he can in no case acquire a title hostile to that of the latter, while acting within the scope of his trust.

The present action was brought to set aside a sheriff's sale, and to annul the deed made by the sheriff in pursuance of the sale, not because of any actual or constructive fraud, but because, owing to the relation which the purchaser sustained to the transaction, the judgment was actually paid and satisfied before the sale was made. It was therefore not an action, the primary purpose of which was to obtain relief from an actual or constructive fraud. We agree that trusts which arise by implication or construction of law are within the operation of the Statute of Limitations. *Newsom v. Bartholomew County Comrs.* 108 Ind. 526, 1 West. Rep. 475; Wood, Lim. p. 418.

Our conclusion is in no wise affected by this concession, for the reason that the Statute which prescribes the period within which actions for relief against frauds shall be commenced does not embrace cases like the one under consideration.

2. It is next insisted on the appellant's behalf that the conclusions of law cannot be maintained because the title and ownership of the Billingsley judgment had been litigated and adjudicated in Wilson's favor in the prior injunction suit, instituted by the Indiana Central Normal College, while it was in possession of the property in controversy as the tenant of the Ladoga Seminary. The general rule is undoubted that the prior judgment of a court of concurrent jurisdiction is conclusive only between those who were parties or their privies. It is equally true, however, that courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense, as real parties, and hold them concluded by any judgment which may have been rendered. *Palmer v. Hayes*, 112 Ind. 289, 11 West. Rep. 672, and cases cited; *Burns v. Gavin*, 118 Ind. 820; *Peterson v. Lothrop*, 84 Pa. 228.

Another exception to the general rule occurs when it is shown that a third person has such a relation to a title, or subject matter previously adjudicated, that it was his duty, although not a party on the record, to have defended the action, upon the requisite notice thereof being given, and that he had due notice and proper opportunity to make defense. *Robbins v. Chicago*, 71 U. S. 4 Wall. 657 [18 L. ed. 427]; *Caldwood v. Brooks*, 28 Cal. 151.

Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation and opportunity to control and manage it. This is the doctrine deduced from the whole current of authority on this subject. The qualification, however, is that where it is sought to make the judgment an estoppel, the litigation must have been

carried on without fraud or collusion, and conducted in a reasonable manner. *Strong v. Phoenix Ins. Co.* 62 Mo. 289, 21 Am. Rep. 417.

Before a third person, not a party or privy to an action, can be concluded by the judgment, it must appear that his title or interest was involved in the issue tried, and he must have actually conducted or controlled the action or defense, or he must have occupied such a relation to the controversy as that it became his duty, and that he had the right, upon receiving notice, to assume control of the litigation. One must either control the proceedings, or he must have had the right to do so, before he can be held concluded by the judgment. A third person who neither appears, nor has the right to appear and produce evidence or cross-examine witnesses, or take an appeal in case an appeal lies, regardless of the wishes of the party on the record, cannot be regarded as a party and bound by the judgment.

The facts found very clearly show that the Ladoga Seminary did not take charge of and conduct the previous injunction suit, nor did it occupy such a relation to the controversy that it was bound to appear and assume control of litigation instituted by the Indiana Central Normal College. A landlord is not bound to appear and prosecute suits instituted by his tenant, even though he may have notice of the action, and that his title is brought in question. The party who contests, or is invited to contest, the title with the tenant, in an action instituted by the latter, may, in a proper case, require the landlord to be made a party, so that the latter may be concluded by the judgment; but unless the landlord is admitted as a party, upon notice, or actually assumes control of the litigation, he will not be bound.

There is authority which goes much farther, and holds that where a tenant was assisted by his landlord, on a trial of trespass to try the title, yet the latter will not be bound, unless a party to the record, on the ground that unless he is a party it cannot appear, from the recovery against the tenant, that the landlord had the full opportunity for defense he would have had if he had been made a formal party to the record.

In *Samuel v. Dinkins*, 13 Rich. L. 172, the court said: "A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against his landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still, if the landlord was no party on the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense, which, as a party, he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining and fairly presenting his title were exercised by him, still he would not have been concluded." *Chirac v. Reinecker*, 27 U. S. 3 Pet. 618 [7 L. ed. 538], 24 U. S. 11 Wheat. 286 [6 L. ed. 474]; Wells, Res. Adjudicata, 67.

Without intending to go to the length indicated in the extract above, we unhesitatingly

declare that a landlord will not be bound by the result of a suit to which he was not a party on the record, instituted by his tenant, unless it very clearly appears that the action was instigated by him; and that he conducted and controlled the litigation after it was begun.

3. It is next contended that, inasmuch as the Billingsley judgment was assigned of record, and stood in the name of Wilson for more than six years, the title to the judgment thereby became absolute and unquestionable in him, by force of the Statute which provides that actions for the recovery of the possession of personal property shall be brought within six years. The force of this position is not apparent to us. We concede that, where one has had the peaceable, undisturbed and open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title, a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. *Roots v. Beck*, 109 Ind. 472, 7 West. Rep. 238; *Campbell v. Holt*, 115 U. S. 620 [29 L. ed. 438].

That principle, however, is not available in the present case, for the reason, as we have already seen, that the Billingsley judgment was paid off and extinguished when Wilson paid the money and took an assignment of the judgment himself.

When a judgment has once been paid, the six years' Statute of Limitations cannot bar the right of the judgment defendant to have satisfaction entered. *Palmer v. Hayes*, 112 Ind. 289, 11 West. Rep. 672.

When a debt has actually been paid, the Statute of Limitations cannot be appealed to as a means of reviving the debt, nor can it be employed in a court of equity to prevent the entry of satisfaction.

We agree that a judgment is personal property, and that in a controversy between persons asserting conflicting titles to a judgment, one who held the legal title under a claim of right and ownership for a period of six years might plausibly assume the position contended for here. There is no controversy as to the title or ownership of the judgment in the present case. The question simply is, May one who has paid a judgment maintain a suit for its cancellation or to have satisfaction entered after more than six years have elapsed from the time the judgment was paid?

4. A new trial as a matter of right was properly refused. The rule is that where a cause proceeds to judgment, which embraces a substantive cause of action, in which a new trial as a matter of right is not allowable, then, even though it embraces other causes in which a new trial as of right is allowable, the policy of the law is to regard that cause of action as controlling in which a second trial as of right is not permitted. *Bradford v. Marion*, 107 Ind. 280, 5 West. Rep. 840; *Butler University v. Conrad*, 94 Ind. 353.

Notwithstanding the cross-complaint in which one of the appellants asked to have his title quieted, there were other substantive causes of action embraced in the judgment, upon which a new trial as of right was not allowable.

9 L. R. A.

There was evidence which tended to sustain the finding of the court. Some other questions of minor importance are presented and discussed. What has preceded covers the merits of the controversy. We have examined the other questions, and, without prolonging the opinion, it is sufficient to say the court committed no error of which the appellants can complain.

The judgment is affirmed, with costs.

Petition for rehearing overruled.

Lewis A. HENDRY, *Appt.*,

v.

William W. SQUIER *et al.*

(....Ind....)

1. An answer in an action to recover rent, which attempts to plead a termination of the tenancy by written notice in accordance with the terms of the lease, is demurrable if it fails to show a sufficient notice, although it states facts sufficient to show a surrender and acceptance of the premises.

2. The breach by a landlord of his covenant to repair a leaky roof will not render him liable in damages for injuries caused by the leak to goods voluntarily left by his tenant beneath the roof after his refusal of the latter's request that the repairs be made.

(November 13, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Steuben County in favor of plaintiffs in an action brought to recover rent alleged to be due. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Croxton & Powers and Best & Bratton for appellant.

Messrs. Joseph A. Woodhull and W. M. Brown for appellees.

NOTE.—*Landlord and tenant; notice in summary proceedings.*

A notice to authorize summary proceedings against the tenant holding over after the termination of his lease must, either in direct terms or by clear and unmistakable implication, point out a day upon which the tenant is required to quit; which day must be at or after the termination of the lease. *Connell v. Chambers*, 22 Neb. 302.

Agreement by landlord to keep premises in repair.

No duty devolves upon a landlord to make repairs on leased premises, in the absence of an agreement to that effect, but the tenant takes the building at his own risk as to fitness of habitation and use, whatever its condition at the time of the lease. *Burks v. Bragg* (Ala.) Jan. 27, 1890.

He is not, in the absence of a special covenant, bound to keep the premises in repair. *Kenney v. Barnes*, 11 West. Rep. 490, 67 Mich. 238.

He is not chargeable with negligence in allowing a waste-pipe to be temporarily obstructed, unless he or his agent had notice thereof. *Ibid.*

A tenant who leases premises with knowledge of the bad condition of the passageway leading to her tenement, which is common to several tenements demised by the same landlord, cannot recover for injuries received in consequence of the bad condition of such passageway. *Quinn v. Ferham*, 15th Mass. 162.

Olds, J., delivered the opinion of the court:

On the 29th day of December, 1884, the appellees, by written contract, leased to the appellant a brick-store building for the term of three years, at the monthly rental of \$36, the appellant reserving the right to terminate the tenancy and vacate the premises by giving sixty days' notice of his intention prior to such intended termination, the appellees agreeing to put a new roof on the part of said building at the time used for a ware-room and clothing room, the roof to be put on before the 1st day of June, 1885. The appellees brought this suit to recover the rent for the premises under the lease. The lease contained a stipulation that the appellant released all claims for damages for injuries to goods in said ware-room which had occurred or might occur up to June 1, 1885. Issue was joined on the complaint and a trial had, resulting in a finding and judgment for appellees. The questions presented by this appeal arise on the rulings of the court in sustaining demurrers to the third paragraph of the appellant's answer and the first paragraph of appellant's cross-complaint. The answer seeks to avoid liability for a portion of the rent sued for, by alleging the giving of notice of his intention to terminate the lease and surrendering possession of the premises under the lease. The lease provides that the lease may be terminated by sixty days' notice on the part of the appellant, and the answer only avers the giving of twenty days' notice, and the surrender of the premises in thirty days from the date of giving of the notice. It is not contended on behalf of the appellant that notice was given and the lease terminated in accordance with the terms of the lease; but it is insisted that the answer pleads a surrender and acceptance of the premises, and is therefore sufficient regardless of the terms of the lease. The lease might undoubtedly be terminated by an agreement between lessor and

lessee, or a surrender by the lessee and acceptance by the lessor; but this paragraph of answer does not seek to set up any such termination of the lease, but attempts to plead a termination of the lease by written notice in accordance with the terms of the lease; and it does not show a compliance with the terms of the lease providing for its termination, and the demurrer was properly sustained.

The first paragraph of cross-complaint or counterclaim alleges the failure of the appellees to put a new roof on the ware-room as agreed, and that by reason of such failure appellant's goods were injured by the rain and snow, to the damage of the appellant in the sum of \$541.

It is not contended but that the appellant might set up and recoup all legal damages he had sustained by reason of appellees' failure to put a new roof on the building; but it is contended that he is not entitled to recover the damages pleaded for injury to his goods; that such damages are remote and speculative and not within the contemplation of the parties at the time of making the contract. If the appellant is not entitled to recover damages for injuries sustained to his goods, then the demurrer was properly sustained to the first paragraph of counterclaim.

It will be noticed that the lease went into operation in December, 1884, and the roof was not to be put upon the building until June, 1885, and that the room was in use at the time of the lease for a ware-room and clothing-room, so that the only inference to be drawn from the lease itself is that the room was to be used in the condition it then was up until June, 1885, and appellant was to have no claim for damages up to that date; and there is no stipulation in the contract by which appellees agree to pay for any injury to goods after that date. So the question is presented as to whether appellees are liable for damages sustained to the goods by reason of their agreement to

A lease providing for repair of the premises by the lessor, or termination of the lease in case the premises become partially or wholly untenable "by fire or the elements," refers, by the term "elements," only to some sudden, unusual or unexpected action of the elements, such as floods, tornadoes or the like,—extraordinary disasters not anticipated by either party,—and not to percolation of water through and under the basement walls, by reason of springs, making the basement so wet and unhealthy as to be untenable. *Haris v. Corlies*, 2 L. R. A. 349, 40 Minn. 106.

A covenant on the part of a landlord to keep the demised building in repair cannot be inferred in the absence of proof of its existence. *Buddin v. Fortunato* (C. P.) 81 N. Y. S. R. 278.

Lessor, when bound to keep premises in repair.

To render a lessor liable for breach of a covenant in a lease to "put and keep in repair" the roof of the building, notice of defects after the tenancy has begun must be brought to his attention. *Thomas v. Kingsland*, 10 Cent. Rep. 475, 108 N. Y. 616.

As between landlord and tenant, it is a general rule that when a landlord owes a duty, either by his own agreement or imposed by statute, a breach of such duty causing damage gives a cause of action. *Atkinson v. Abraham*, 45 Hun, 238.

A landlord who, at the solicitation of his tenant,

gratuitously undertakes to repair the leased premises, but does it so unskillfully as to cause an injury thereby to the tenant, is liable therefor. *Gregor v. Cady*, 82 Me. 181.

An express agreement between landlord and tenant that the former shall keep the premises in repair so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuitry of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved. *Ahern v. Steele*, 115 N. Y. 216; and to the same effect is *Larus v. Farren Hotel Co.* 116 Mass. 67.

If a landlord, having contracted to repair the roof of the leased premises, neglects or refuses to do so, so that the goods of the tenant are injured, the tenant has a right to recover for such injury. *Cantrell v. Fowler*, 82 S. C. 590.

The only remedy of a lessee for lessor's failure to repair a stable floor as agreed, within a reasonable time, is by an action on the contract. *Tuttle v. George H. Gilbert Mfg. Co.* 5 New Eng. Rep. 168, 145 Mass. 109.

In an action for rent, defendant's claim for damages for a breach of plaintiff's covenant to repair is not supported by an allegation, in the affidavit of defense, that defendant actually sustained a loss from the failure of plaintiff to repair. *McBrier v. Marshall*, 126 Pa. 390.

repair the roof by putting on a new one and failing to do so.

In the absence of any agreement to that effect, the lessor is not bound to make repairs, and it is only by virtue of the stipulation in the lease that he is liable in this instance to repair the building. If the appellees had refused to make the repairs and put a roof on the part of the building as they contracted, or had failed to do so within a reasonable time, the appellant might have made the repairs and off-set the amount against any rent due for the premises, or possibly he might have recovered the difference in value of the rent of the premises in the condition they were in and the condition they were to be placed in by the appellees; but we are not called upon to determine what would have been appellant's true measure of damages. It is only necessary to decide as to whether or not he is entitled to recover for the injury done to his goods by reason of the defective roof.

In Sedgwick on The Measure of Damages, vol. 1, top p. 128, it is said: "When, in a lease of a dairy farm for five years, the lessor agreed to put the barns on the premises in a good state of repair, but neglected to do so, it was held that the lessee could recover the amount it would cost to put the barns in repair but not the damages sustained by injuries to the cows and young cattle, the increase of and the decrease of produce resulting from the state of the barns, these damages being altogether too remote and contingent." *Dorwin v. Potter*, 5 Denio, 806.

In the case of *Leavitt v. Fletcher*, 10 Allen, 119, where the lessor agreed to make all necessary repairs to the outside of the building, a wooden carriage-house, and the house fell from the weight of snow and injured the lessee's carriage kept therein, it was held that the lessor was not liable for the injury to the carriage.

In *Cook v. Soule*, 56 N. Y. 420, it is held that the measure of the tenant's damages is the difference between the rental value of the premises as they are and as the landlord agreed to put them. In that case it is said by the learned judge writing the opinion: "In case where the requisite repairs are trifling and the damage by not making them are large, I think it is the duty of the tenant to make them and charge the landlord with the costs." See authorities collected in note to *Polack v. Pioche*, 85 Cal. 416, 95 Am. Dec. 118.

It is a well-settled rule that where one is subjected to injury from the breach of a contract he must make reasonable exertion to reduce his damages as much as practicable.

-9 L. R. A.

Louisville, N. A. & C. R. Co. v. Flanagan, 113 Ind. 488, 12 West. Rep. 190; *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55, 2 West. Rep. 668.

It would be manifestly unjust to hold that, even where a landlord had contracted to make all necessary repairs, the tenant might suffer his goods to so remain beneath a leak in the roof which it would cost but a trifle to repair, and which, if left out of repair, would cause large damage to his goods and subject the landlord to the payment of such damages. As shown by the averments in the pleading, the condition of this roof was well known to the appellant long before the time when the landlord was to repair it by putting on a new roof; and it is further averred that the appellant requested the repairs to be made and the appellees refused to make the repairs. This gave the appellant the right to make the necessary repairs and charge them to appellees. *Hopkins v. Rattliff*, 115 Ind. 218.

Certainly, after such refusal, appellant could not voluntarily permit his goods to remain in the building and suffer injury and recover the damage from the appellees. Yet under those circumstances the appellant allows his goods to remain in this end of the building and be damaged by the rain-fall, when from aught that appears by the pleading it would have been a small expense to have repaired it; or even a new roof upon the building would have cost much less than the damages sustained to the goods.

It is contended that the decision in the case of *Buck v. Rodgers*, 89 Ind. 223, sustains the theory of the appellant. We do not think it is in conflict with the view we take in this case. The facts in that case were peculiar and very strong in favor of the tenant. The landlord had covenanted to repair the fence; the tenant relied upon his doing so and planted his crop; the tenant had no rails; he could not repair the fence; he kept his son from school to guard his crops; he did all he could to protect them; the crops he could not remove and the tenant did all in his power to protect them, and it was held that under the circumstances in that case the tenant was entitled to the damages he actually sustained; but no general rule of damages is laid down or stated by the court; but this court sustains the charge of the court below and says, if not strictly correct, it worked no harm to the appellant.

We do not think the appellant entitled to recovery for the injuries to his goods, and there was no error in sustaining a demurrer to the first paragraph of counterclaim.

Judgment affirmed, with costs.

MICHIGAN SUPREME COURT.

Joseph HANAW, *Appt.*,

v.

David R. BAILEY.

(.....Mich.....)

1. The surrender of the leased premises by a tenant to his landlord after taking an appeal from the decision of a circuit court commissioner adjudging restitution of the property to the landlord because of the forfeiture of the tenant's contract will have no effect upon the appeal: such surrender does not amount to a satisfaction of the judgment of restitution so as to leave nothing to appeal from. Nor is it an admission that the tenant was wrongfully in possession when the suit was brought.
2. An affidavit for appeal from the decision of a circuit court commissioner to the circuit court in a summary proceeding by a landlord to recover possession of the leased premises from his tenant is sufficient if in the common form of affidavits on appeal from justices' courts, although it does not state the nature of the action, nor when it arose nor when it was tried.
3. When a circuit court commissioner takes an appeal bond in proper form containing a certain penalty in proceedings had before him by a landlord to oust his tenant from the leased property, and grants an appeal by making a return to the circuit court of such proceedings, with the affidavit and bond of appeal, it will be presumed, in favor of the jurisdiction of that court, not only that he approved the bond, but also that he fixed the penalty of the same in accordance with law, although the bond contains no indorsements to that effect.
4. Where one person leases to another for a fixed term a farm upon the agreement that it shall be worked in a good and workmanlike manner, and inserts in the lease a provision that in case the lessee does not do the work properly the lessor may have it done at the cost of the lessee, and strikes out from the blank upon which the lease is written a clause permitting a re-entry for breach of covenant, the lessee cannot be turned out of possession before the expiration of his term because of failure to properly work the farm.

(October 31, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought by a landlord to recover from his tenant possession of the leased property. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Austin Blair, with *Mr. A. E. Hewett*, for appellant:

The affidavit is very defective in not stating the nature of the action, nor when it arose, nor where it was tried.

The bond does not conform to the requirements of the statute in any particular. It is not in a penalty fixed by the commissioner not less than twice the amount of the annual rent of the premises in dispute; neither was it approved by the commissioner.

2 How. Stat. § 8307.

The circuit judge could not dispense with this requirement.

All questions of jurisdiction are open upon the appeal.

Salles v. Ireland, 9 Mich. 154; *Farrell v. Taylor*, 12 Mich. 113.

Defendant was not entitled under his contract to move into the house and occupy it and then do nothing on the farm for two years and still keep the plaintiff out.

An agreement to work land upon shares does not create a tenancy with rent payable in produce.

Taylor, Land. and T. § 24, and notes; *Pickard v. Kleis*, 56 Mich. 609.

Mr. Dwight D. Root, for appellee:

A defendant may, after appealing, remove from the land without jeopardizing his appeal.

Coburn v. Goodall, 72 Cal. 496, 1 Am. St. Rep. 75.

The motion comes too late. An appeal will not be dismissed because of a defective bond, if the motion is delayed until the second term after the appeal.

Wheeler & W. Mfg. Co. v. Burlingame, 137 Mass. 581.

Inasmuch as the trial was entered into by the plaintiff, and he there showed that he had no merits in his case, the ruling on the bond would be a harmless error, and should be disregarded.

O'Donnell v. Connecticut F. Ins. Co. 78 Mich. 1-4.

The court's decision is in keeping with *Langley v. Ross*, 55 Mich. 163, 476, and *Pickard v. Kleis*, 56 Mich. 609.

When the parties themselves have agreed upon a particular remedy in case of defendant's failure to perform, a court will not say that that remedy shall not stand.

Wood, Land. and T. p. 86.

A breach of covenant does not authorize a re-entry unless the lease itself expressly so provides.

Wood, Land. and T. p. 857.

The violation of the terms of a lease does not cause a forfeiture, although equity may enjoin the injury.

Wood, Land. and T. § 85.

NOTE.—*Landlord and tenant; appeal in summary proceedings.*

The circuit court can extend the time for appealing in the same manner as in case of judgments rendered in justices' courts. Severe sickness preventing an appeal in time is a sufficient cause. Extending time, etc., is discretionary, and cannot be reviewed. *Bearse v. Aldrich*, 40 Mich. 529.

A judgment of the circuit court on an appeal in

9 L. R. A.

a case of summary proceedings can be reviewed on error only; certiorari does not lie. *Parker v. Copland*, 4 Mich. 528.

The supreme court will not review the proceedings upon a common-law certiorari to the commissioner, unless under very urgent circumstances, holding that the remedy by appeal and certiorari to the circuit is ample in ordinary cases. *Smith v. Reed*, 24 Mich. 240; *Farrell v. Taylor*, 12 Mich. 113.

Contract rights cannot be forfeited unless the contract itself provides for it.

Nurney v. Fireman's Fund Ins. Co. 63 Mich. 637.

Morse, J., delivered the opinion of the court:

This is a summary proceeding instituted before a circuit court commissioner of Jackson County to recover possession of lands held by defendant under a contract for working the same. The commissioner after trial of the issue before him gave judgment of restitution in favor of the plaintiff, and for costs amounting to \$34.10. This judgment was rendered March 26, 1889. On the 29th of the same month defendant presented affidavit and bond for appeal, and paid the costs and entry and return fee required on such appeal. In the circuit court plaintiff made a motion to dismiss appeal, which was denied. Afterwards, when the cause came on to be tried, and after a jury was impaneled and sworn, but before proceeding to trial, the plaintiff objected to the appellant's proceeding with the trial on the ground that the appeal was not legally taken, and the court therefore had acquired no jurisdiction to try the case, assigning the same reasons as in his motion to dismiss. The objection was overruled. Thereupon, for the purpose of saving time on the trial, and the examination of a large number of witnesses, at the suggestion of plaintiff's attorneys, it was consented by the attorneys for the respective parties that the plaintiff might offer in evidence the lease or agreement of the parties under which the defendant had possession of the premises in controversy, and for violation of which the complaint was made, and the defendant might thereupon at once raise the question whether, under this lease, the plaintiff could recover possession of the farm under the Statute, the re-entry clause having been struck out by the parties, and the term not having expired. The plaintiff's attorneys thereupon stated that they desired and offered to put in testimony tending to show that the defendant had violated the agreements contained in the lease in all material particulars. He had not carried on the farm in a husband-like manner, and had produced substantially no crops and did not take care of the stock as he had agreed to do. It was admitted that these proceedings were commenced a few days before the expiration of the first year, the term being two years. After hearing arguments of counsel for the respective parties upon this question, the circuit judge did then and there state and deliver his opinion that the plaintiff could not recover in this action by showing that the defendant failed to work the farm in a good and husband-like manner, and so failed to produce crops that the farm ought to have produced, because the contract does not provide for a forfeiture of the tenancy for that reason, and does not provide for a re-entry on the premises in case that should occur. The motion to dismiss the appeal was grounded upon two reasons: *first*, that the defendant had surrendered the land to the plaintiff; *second*, because the affidavit and bond for the appeal of said cause were not sufficient to confer jurisdiction on the court.

The first reason was not a good one. It appears that, after the appeal had been taken,

or attempted to be taken, and on the 30th day of March, 1889, the defendant served a notice upon the plaintiff, to the effect that he should quit the place on the 1st or 3d of April, 1889, and asking him to come and divide the property on the farm, and subsequently left the land. This did not affect the appeal. The question to be determined by the appeal related to the forfeiture of defendant's contract, and his right to possession at the time the suit was commenced, and not afterwards. It is contended by plaintiff's counsel that this giving up of possession was a satisfaction of the judgment of restitution, and there was then nothing left to appeal from. This contention will not hold in such a case as this. The abandonment of the farm by the defendant cannot be considered as an act in satisfaction of the judgment, or an admission that he was at the commencement of suit holding possession of the land unlawfully. It was a transaction entirely independent of the judgment and prior proceedings in this case.

It is claimed under the second objection to the appeal that the affidavit was defective in not stating the nature of the action, nor when it arose, nor when it was tried. The affidavit for appeal was in the common form of affidavits on appeal from justice courts, and was sufficient. How. Stat. § 8907. It will be found in the margin of this opinion.¹

The bond is also said to be defective because it does not appear therein that the penalty was fixed by the commissioner in double the amount of the annual rent of the premises, or that it was approved by the commissioner. The bond is in a penalty of \$600, and is in proper form. A certificate is attached by the commissioner that the sureties justified their pecuniary responsibility upon oath before him. No approval is indorsed upon it, yet the commissioner received it, filed it and returned it with the appeal papers to the circuit court. In the absence of any showing to the contrary, this is a sufficient showing that he approved it. The Statute does not, in express terms, provide that the commissioner shall indorse on the bond either that he fixed the penalty or approved the bond, and when, as in this case, he takes a bond containing a certain penalty, and grants an appeal by making a return to the circuit court of the proceedings had before him, with the affidavit and bond of appeal, it will be presumed in favor of the jurisdiction of the circuit court that he not only approved the bond, but fixed the penalty of the same in ac-

¹"State of Michigan, }
County of Jackson, } ss.:

"David R. Bailey, of said county, being duly sworn, says that a final judgment was rendered upon an issue of fact and law, joined between the parties, by E. D. Teele, circuit court commissioner in and for said county, on the 26th day of March, A. D. 1889, in favor of Joseph Hanaw, as complainant, and against deponent, David R. Bailey, as defendant, whereby said Bailey is required to leave and deliver up possession of a farm to said Hanaw, and for thirty-four and 10-100 dollars costs of suit. Deponent further says that such judgment is not in accordance with the just rights of said deponent, as deponent verily believes, and that said deponent conceives himself aggrieved thereby, and appeals therefrom to the Circuit Court for the County of Jackson, and further deponent saith not. David R. Bailey, Sworn to and subscribed before me this 29th day of March, 1889. E. D. Teele, Circuit Court Commissioner."

cordance with law. There was no showing before the circuit court that the penalty of the bond was insufficient, or that the sureties were not good for the amount of the same, nor that the commissioner did not fix the penalty of the same. Furthermore, it was stated in the circuit court by defendant's attorney, and not denied by plaintiff's counsel, that the commissioner first decided that the bond should be in the sum of \$800, but plaintiff's attorneys insisted that the bond should be raised to \$600, whereupon it was so ordered by the commissioner; and that plaintiff's attorneys then declared themselves satisfied with the sureties as well as the penalty of the bond. This also appears by an affidavit of the commissioner, filed in rebuttal of the motion to dismiss the appeal.

We have now to consider whether the court was right in directing a verdict for the defendant upon the lease or agreement, and the offer of testimony made by plaintiff. The agreement was made on the 15th day of March, 1888, for the term of two years from April 1, 1888, and providing for a longer term of letting year by year if both parties "were satisfied with each other." The letting was on shares, the tools, implements and teams to be furnished by Bailey, said farm to be worked in a good and workmanlike manner, and all work to be done seasonable, and under the advice of said party of the first part [Hanaw], who, together with the members of his family, shall be privileged to go upon said farm at all times, but not to impede or hinder the work." Each party was to furnish one half the seed, etc., and to furnish and own one half of the stock on the farm. The products of the farm and the increase of stock was to be equally divided. It was further provided in another part of the agreement as follows: "The party of the first part reserves the right to say what fields on said farm shall be put into crops, and what kinds of crops shall be put in, but in no event shall said farm be sowed or planted to any one crop disproportionate to the size of said farm, and the amount of stock kept on said farm. The work in carrying on said farm shall be done by said party of the second part in a good and husband-like manner, and in due season, and, should he fail to do it, then said first party reserves the right to do it, or cause it to be done, and the cost thereof to be deducted from the share of the products of said farm going to said second party, according to the terms of this lease." It was also agreed that Bailey should have "full possession of the house on said farm during his tenancy without compensation therefor." The following clause, among others, in the printed blank upon which the agreement was written, was stricken out and erased: "Provided, that in case any rent shall be due and unpaid, or if default shall be made in any way of the covenants herein contained, then it shall be lawful for the said party of the first part,—certain attorney, heirs, representatives or assigns, to re-enter into and repossess the said premises, and the said party of the second part, and each and every other occupant to remove and put out." It would seem, as held by the circuit judge, that the striking out of this clause, with the insertion of the clause permitting and authorizing the

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604, 609; *Hilsendegen v.*
Langley v. Ross, Id. 168.

The judgment is affirm
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James M.
v.

Alfred WELBORN et al
A. Pratt et al

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A city lot purchased wit

County, resulting payment of a portion of the surplus proceeds of the money arising from a sale under the decree of foreclosure rendered in the action to defendant Pratt. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Howell, Carr & Barnard, for appellant:

Four things are necessary to a homestead exemption: (1) it must be confined to one lot and the dwelling-house situated thereon with the appurtenances; (2) it must be owned and occupied as such homestead; (3) it must not exceed in value \$1,500; (4) it must be selected as a homestead.

Const. art. 16; 1 How. Ann. Stat. 66; 2 How. Ann. Stat. § 7721.

When property is principally and chiefly used as a hotel, or for business purposes, it would be doing violence to the statutes to regard it as a homestead.

Laughlin v. Wright, 68 Cal. 118; *Reinbach v. Walter*, 27 Ill. 394; *Green v. Pierce*, 60 Wis. 872; *Geney v. Maynard*, 44 Mich. 578; *Philleo v. Smalley*, 28 Tex. 498.

In determining whether a building claimed as a homestead is exempt as such, the question is whether the principal use of the building was that of a residence for the debtor and his family, especially whether in its architecture it was designed exclusively or properly as a residence.

Thompson, Homesteads and Exemptions, § 137; *Dyson v. Sholey*, 11 Mich. 528, 529; *Rhodes v. McCormick*, 4 Iowa, 874; *Ackley v. Chamberlain*, 16 Cal. 183; *Gregg v. Bostwick*, 33 Cal. 228; *Mann v. Rogers*, 35 Cal. 319; *Re*

In a case like the one at bar, where the homestead right is claimed in property the value of which is largely in excess of the statutory exemption, covering two lots and a building, built and used for business purposes, and owned by tenants in common who are in no way connected, and hold the property merely for business purposes, there can be no such exemption. *Tharp v. Allen*, 46 Mich. 391-398; *Amphlett v. Hibbard*, 29 Mich. 298-300.

A partner cannot select and establish homestead rights in the real estate of the firm.

Drake v. Moore, 66 Iowa, 58.

Where the parcel levied upon includes more than the statutory quantity, then a selection becomes necessary.

First Nat. Bank of Constantine v. Jacobs, 50 Mich. 340; *Riggs v. Sterling*, 60 Mich. 651.

This homestead right may be varied, however, before the owner has made his election and selection by failure to make the same before sale by the sheriff.

Riggs v. Sterling, *supra*; *Beecher v. Baldy*, 7 Mich. 505; *Lamore v. Friebie*, 43 Mich. 189; *Stevenson v. Jackson*, 40 Mich. 702; *Matson v. Melchor*, 42 Mich. 477.

In order that the premises may be exempt, they must be set apart as a home by the owner and his family.

Dyson v. Sholey, 11 Mich. 527.

The law can make no selection for the parties.

Stevenson v. Jackson, 40 Mich. 702.

The burden was upon Pratt to show all of the requisites of a valid homestead.

Amphlett v. Hibbard, 29 Mich. 304.

ing it a homestead will be exempt from levy on execution from the time of purchase, although unimproved and without a dwelling thereon, if the purchaser incloses, uses and occupies it with the constant purpose of making it his homestead. What will be regarded as a reasonable time taken to improve the lot depends upon the circumstances of each particular case. *Deville v. Widoe*, 7 West. Rep. 843, 64 Mich. 593.

A homestead exemption is allowable in partnership property in South Carolina. See *Moyer v. Drummond*, 7 L. R. A. 747, 32 S. C. 165.

Homestead exemption in the several States. See note to *Miller v. Finegan* (Fla.) 6 L. R. A. 813.

Rights of insolvent debtor.

A debtor may give his interest in his homestead to his child; and, if occupied by her, it becomes her homestead, free from his debt. *Shay v. Wheeler*, 13 West. Rep. 899, 69 Mich. 224.

Where assignments were made to secure the assignee for money advanced for the purchase of a homestead for the insolvent, and the transaction was bona fide, and the premises were in the possession of such debtor, and were used as his family residence, it is not fraudulent, although the title to the property was taken in the name of the assignee and not recorded. *Bostwick v. Benjamin*, 5 West. Rep. 223, 63 Mich. 239.

Where a man having a stock of goods, and which was free and unincumbered and had been purchased with no fraud or misstatements to obtain credit, was in good credit, a purchase of land for a homestead, giving security upon the stock for the purchase price, will not be held fraudulent as to creditors, where he at once secured two of his 9 L. R. A.

creditors by mortgages upon the land, and the other creditors were secured by chattel mortgages upon the stock, so far as its value would go. *Melg v. Dibble*, 73 Mich. 101.

An administrator cannot, by misapplying trust funds belonging to the estate, in the purchase of a homestead, obtain a right superior to that of the creditors who have been injured by such misapplication. *Pierce v. Holzer*, 8 West. Rep. 754, 65 Mich. 263.

Marital rights of wife protected.

Where a husband sold his homestead, and induced his wife to join in the deed by misrepresentation and fraud, and immediately thereafter grantees conveyed the property to the mother of the husband, and, within four days after the mother received the title thereto, the husband had abandoned his home, packed up his goods, and taken his children to his mother, made her house his abiding place, and discarded his wife, no consideration having passed for either conveyance, the deeds should be set aside, and the wife restored to her rights. *Spiegel v. Spiegel*, 7 West. Rep. 627, 64 Mich. 345.

Where a wife is driven from her home by misconduct on the husband's part, of a nature so grievous that she might have claimed a divorce under the statute, she carries with her all her marital rights,—the right to support, to dower, to control the disposition of the homestead. *Stanton v. Hitchcock*, 7 West. Rep. 621, 64 Mich. 313.

Contract by husband alone, void.

A contract giving a railroad the right of entry upon a homestead, signed by a husband alone, is

One loaning money to a mortgagor upon an agreement to secure the repayment of the loan, will, upon failure of the mortgagor to give such security, be subrogated to the rights of a mortgagee to the amount of money loaned and interest thereon.

White v. Newhall, 68 Mich. 641, 646; *Bush v. Wadsworth*, 60 Mich. 255, 256; *Lockwood v. Bassett*, 49 Mich. 550; *Detroit F. & M. Ins. Co. v. Aspinwall*, 48 Mich. 238; *Laylin v. Knox*, 41 Mich. 47; *Warner v. Hall*, 53 Mich. 372; *Bills v. Mason*, 42 Iowa, 330; *Warhmund v. Merriitt*, 60 Tex. 24; *White v. Wheelan*, 71 Ga. 533; *Fox v. Brooks*, 88 N. C. 234; *Whitaker v. Elliott*, 78 N. C. 186; *Miller v. Brown*, 11 Lea, 155; *Kimble v. Enworthy*, 6 Ill. App. 517; *Bush v. Scott*, 76 Ill. 524; *Cook v. Cook*, 67 Ga. 381; *Herman, Executions*, 188; *Andrews v. Alcorn*, 18 Kan. 352.

The National House property was subject to two liens, Kelsey for purchase money and Welborn for money borrowed to make improvements upon the same. If the Pratts had homestead rights therein, they were subject to such liens, and when they exchanged this property for the Central House, these same liens were transferred and attached to it, and were superior to any homestead rights they might otherwise have therein.

Bills v. Mason, *supra*; *Thomson v. Rogers*, 51 Iowa, 333; *Terry v. Berry*, 13 Nev. 514; *Commercial & Sav. Bank of San José v. Corbett*, 5 Sawy. 173; *Herman, Executions*, 188; *Wofford v. Gaines*, 58 Ga. 485; *Harris v. Gilbert*, 56 Ga. 94; *Harris v. Viesscher*, 57 Ga. 229.

This is true, although Mrs. Pratt knew nothing about the agreement between her husband and Welborn regarding a lien upon the Central House for the amount of these claims.

Kimble v. Enworthy, 6 Ill. App. 517; *Midlebrooks v. Warren*, 59 Ga. 230; *Gillum v. Collier*, 53 Tex. 592.

Mr. S. M. Constantine, for appellees:
A homestead may be claimed in lands held in common.

Shepard v. Cross, 33 Mich. 98; *Loxo v. Sutherland*, 33 Mich. 168; *Sherrid v. Southwick*, 43 Mich. 518; *Tharp v. Allen*, 46 Mich. 389; *Cleaver v. Bigelow*, 61 Mich. 47; *Kruger v. LeBlanc*, 75 Mich. 425; *McClary v. Bisby*, 36 Vt. 257; *Thorn v. Thoin*, 14 Iowa, 49; *Horn v. Tufts*, 89 N. H. 478; *Tarrant v. Swain*, 15 Kan. 148; *Greenwood v. Maddox*, 27 Ark. 660; *McGuire v. Van Pelt*, 55 Ala. 844; *Lacey v. Clements*, 86 Tex. 668; *Sears v. Hanks*, 14 Ohio St. 301; *Barber v. Dayton*, 28 Wis. 368; *Doyle v. Coburn*, 6 Allen, 71; *Freeman, Co-Ten.* § 54; *Thompson, Homesteads and Exemptions*, §§ 128, 184; *Smyth, Homesteads and Exemptions*, § 127.

The Statute fixes as the limit for the value of the exemption, \$1,500, but makes provision, when the property in value exceeds that sum, for an appraisal, with a sixty-day option to the creditor to pay excess to officer on execution or decree.

How. Stat. § 7723.

The Statute allows also a money value when such exemption cannot be set off or divided. *Id.* § 7729; *Vermont Bank v. Elliott*, 53 Mich. 259; *Armitage v. Toll*, 64 Mich. 413.

The law permits a debtor at any time to select or appropriate out of his property as exempt the amount allowed by statute, or to convert non-exempt property into that which is exempt.

O'Donnell v. Segar, 25 Mich. 367.

A homestead, though not exclusively occupied as a dwelling, but partly for business, is exempt.

void. Evans v. Grand Rapids, L. & D. R. Co. 13 West. Rep. 170, 68 Mich. 602; *Pilcher v. Atchison, T. & S. F. R. Co.* 38 Kan. 517.

Where, under such a contract, the railroad made entry upon the Sabbath, and tore down a barn, courts will not hasten, because of technical defects in the bill, to uphold such a course. *Evans v. Grand Rapids, L. & D. R. Co. supra.*

Mechanics' Lien on.

Under the Act providing that no mechanics' lien shall attach to a homestead unless the contract for the improvements be in writing, no mechanics' lien can attach for the building of a house on an unimproved lot which it is the present intention of the owner to occupy as a homestead, unless the contract for the improvements be in writing; and it is immaterial that the intention to use it as a homestead is not manifested to the contractors. *Mills v. Hobbs*, 75 Mich. 122.

The value of homestead premises on which a lien is claimed as to the value in excess of the homestead right is to be taken as of the date the lien attached; and if at that time the value in excess of incumbrances does not exceed the homestead right allowed by law, the whole premises are exempt, even though of greater value at the time of trial. *Ibid.*

Mortgage, foreclosure.

One who executes a mortgage on his homestead, in which he is joined by a woman whom he married after he supposed he obtained a legal divorce from his former wife, as against the mortgagee or purchaser L. R. A.

chaser at foreclosure sale, after obtaining a final divorce from his wife, who died without ever having asserted the homestead, cannot set up the invalidity of the mortgage because his real wife at its execution did not sign it. *Trout v. Rumble* (Mich.) Aug. 1, 1890.

In foreclosing a mortgage executed by husband and wife upon several parcels of land, including a homestead, the homestead can be sold only to pay the deficiency remaining after sale of all the other property mortgaged. A second mortgagee has no right to have the liability of the homestead increased, by requiring it to be first sold to satisfy the mortgage debt. *Campbell, J., dissents. Armitage v. Davenport*, 7 West. Rep. 653, 64 Mich. 412.

Conveyance of.

Where one of the parties to a contract, and his wife, occupied the property agreed to be sold, it could not, while so occupied, be disposed of, except by the joint action of husband and wife. The fact that the property contained more in value than the homestead, and that it might be valid for the excess, would not avoid the difficulty. *Hall v. Loomis*, 6 West. Rep. 617, 63 Mich. 700.

Where a husband deeds the homestead to a third party, who simultaneously deeds it to the wife, the transaction in law is a simple conveyance from the husband to the wife. In such case, the deed to such third person would not be void because of the wife not joining in its execution. A grantee in a deed made by the wife after leaving her husband is affected with notice by the possession of the husband. *Stevens v. Castel*, 5 West. Rep. 724, 63 Mich. 111.

Orr v. Shraft, 22 Mich. 260; *Skinner v. Shannon*, 44 Mich. 87; *Stanton v. Hitchcock*, 64 Mich. 328, and authorities cited; *Lazell v. Lazell*, 8 Allen, 575; *Gregg v. Bostwick*, 33 Cal. 228; *Rhodes v. McCormick*, 4 Iowa, 368; *Mercier v. Chace*, 11 Allen, 194; *Baldwin v. Tillery*, 62 Miss. 878; *Kirtland v. Davis*, 48 Ga. 818; *Smith v. Quiggans*, 65 Iowa, 637; *Rush v. Gordon*, 38 Kan. 535; *Smyth, Homesteads and Exemptions*, 88; *Re Sharp*, 78 Cal. 483; *Jacoby v. Parkland Distilling Co.* 41 Minn. 226.

Grant, J., delivered the opinion of the court:

Upon the foreclosure of a mortgage executed by the defendants April 6, 1882, the surplus in excess of the amount due, including costs, was \$1,375.50. Defendant Jacob A. Pratt thereupon filed a petition claiming one half of this amount, and asking that it be decreed to him. The defendant Welborn answered said petition, and interposed two objections to petitioner's claim: (1) that he owned the land by virtue of a sheriff's sale, upon execution and deed in pursuance thereof; (2) that he holds an equitable lien upon the fund as against the petitioner. The defendants Alfred Welborn and Jacob A. Pratt were tenants in common of the premises, which were described as lots 1 and 2 in block 48, and also lot 21 in block 49½, in the Village of Three Rivers. Upon lots 1 and 2 was a three-story building used as a hotel, and a two-story wooden building in the rear used as a dwelling-house, and a barn upon lot 21 used in connection with the hotel. They and their wives executed the mortgage in question. Welborn leased to Pratt his undivided half of the premises for an annual rental. Pratt, his wife and daughter, carried on the hotel from 1882 till the property was sold upon the mortgage in 1887. They lived in the hotel, and had no other residence or home, and land or other property out of which to construct a homestead. When the sheriff levied upon the property, defendant Pratt gave him a verbal and written notice that he claimed a homestead in it. This claim was disregarded, and the property sold by the sheriff, without any regard to the homestead. The rights of the parties have, by the foreclosure sale, been transferred from the land to the money realized upon the sale in excess of the amount due. If the petitioner had homestead rights, then the execution sale was void, and he is entitled to one half of the surplus, which was accorded to him by the decree of the court below. His right to a homestead is denied, because it is claimed that it was of such a character and description as not to permit homestead rights being claimed therein. It is well settled in this State that a homestead can be claimed by a tenant in common. *Shepard v. Cross*, 38 Mich. 98; *Loeo v. Sutherland*, 38 Mich. 168; *Sherrid v. Southwick*, 43 Mich. 518; *Tharp v. Allen*, 46 Mich. 889; *Leaver v. Bigelow*, 61 Mich. 47; *Kruger v. Le Blanc*, 75 Mich. 425.

It is equally well settled that a homestead can be claimed upon premises used partly for business and partly as a dwelling. *Orr v. Shraft*, 22 Mich. 260; *Skinner v. Shannon*, 44 Mich. 87; *Stanton v. Hitchcock*, 64 Mich. 328.

Any reference to the authorities of other States upon these points is unnecessary.

9 L. R. A.

But it is insisted that this building was occupied by petitioner and his family for the sole purpose of conducting a hotel, and that therefore no homestead right attached. We cannot agree with this contention. The adoption of this doctrine would be in plain defiance of the Statute, and render it nugatory as to those engaged in the business of hotel keeping. The benefits of this Statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent apparent anywhere to exclude the families of hotel keepers from the benefits of the Act. Of the authorities cited by the defendant Welborn, only one contains language which can be construed into a support of his position, viz., *Laughlin v. Wright*, 68 Cal. 113. The language of that decision must, however, be construed with reference to the facts. The declaration claiming a homestead was made May 25, 1874. In August, 1874, the defendant Wright and his family left the hotel, put it in other hands, and resided elsewhere. But, if it should be found to fully sustain defendant's contention, we cannot adopt it as the law of this State.

In *Green v. Pierce*, 60 Wis. 372, defendant, who claimed a homestead right, owned only a leasehold interest in the premises, and by the very terms of his lease it was provided that the premises should be used only as a hotel and eating-house, and upon this ground alone the right to the homestead was denied.

Defendant also insists that the statutory homestead is limited to one lot, and that this property covered two lots; hence, that no homestead could be claimed without a selection and designation of some portion as such. This is too narrow and technical a construction to place upon this beneficial Statute. One who has constructed his house, which he occupies as a homestead, upon two lots, is not thereby to be deprived of his exemption. If the property comprising the homestead is worth more than \$1,500, the Statute provides a way by which he may receive the value of his exemption, and his creditors the balance to apply on his debts.

Defendant Welborn also claims that he has an equitable lien upon this money, because he says that Pratt promised to secure him by a mortgage upon the hotel property for debts due him from Pratt; that at the time they purchased the hotel property, each taking an undivided one half, he (Welborn) paid a part of a mortgage given by Pratt, secured the balance and discharged the mortgage which he himself had upon the hotel property; and that Pratt then promised that he would secure him by mortgage upon the hotel property at any time he felt insecure or wanted it. This claim is expressly denied by both Mr. and Mrs. Pratt, and we find nothing in the record to show a preponderance of evidence in favor of Welborn. But, aside from this, a verbal promise to give security cannot create a mortgage lien upon the homestead. Such holding would be in direct violation of the Statute.

The decree of the court below, giving one half of the surplus to the petitioner, must be affirmed, with costs of both courts.

The other Justices concurred.

WISCONSIN SUPREME COURT.

Charles E. WRIGHT *et al.*, *Resps.*,

v.

Bernard MULVANEY, *App.*

(....Wis....)

1. **Negligent failure on the part of one navigating public navigable water to see and avoid a fishing net set therein**, when he could have done so without detriment to the prosecution of his voyage, will render him liable for the injuries he occasions to the net. Maliciousness or wantonness in running upon the net is not necessary to a right of recovery.
2. **It is not negligence as matter of law for the owner of a fishing net set in a public navigable water, from which he is engaged in taking fish, to fail to warn an approaching vessel of the existence and situation of the net**, so as to prevent a recovery from the owner of the vessel for injuries done by its running through the net. Whether or not such failure is negligence is a question for the jury.
3. **A party at the request of whose counsel a question has been prepared and submitted to the jury for a special verdict at the trial of an action, without any suggestion as to its insufficiency, will not be heard to object for the first time on appeal that the question was not broad enough to cover the point in controversy.**
4. **The suggestion by the trial judge, in his charge to the jury, of a doubt as to the truthfulness of the witnesses of one of the parties, is immaterial if the jury show by their verdict that they believed them.**
5. **Where a special verdict sufficiently covers all material and controverted questions of fact in the case, it is not error to refuse to submit other questions to the jury as the basis of a special verdict.**

NOTE.—Common and paramount right of navigation.

The privilege of navigation is not confined to the channel of a water highway, but extends to high-water mark in tidal rivers and tide waters. *Mobile v. Eslava*, 9 Port. (Ala.) 577, 41 U. S. 16 Pet. 234, 10 L. ed. 948; *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Porter v. Allen*, 8 Ind. 1; *Simpson v. Seavey*, 8 Me. 138; *State v. Babcock*, 30 N. J. L. 20; *Conn. v. Church*, 1 Pa. 105.

It is a common and paramount right, irrespective of the purpose of its exercise, whether for trade or pleasure. *The Montolio*, 87 U. S. 20 Wall. 430, 22 L. ed. 361; *Atty-Gen. v. Woods*, 108 Mass. 436; *West Roxbury v. Stoddard*, 7 Allen, 158; *Charlestown v. Middlesex County Comrs*, 3 Met. 202; *Murdock v. Stickney*, 8 Cush. 113; *Williams v. Wilcox*, 8 Ad. & El. 314; *Colchester v. Brooke*, 7 Q. B. 339; *Atty-Gen. v. Lonsdale*, L. R. 7 Eq. 377; *Atty-Gen. v. Terry*, L. R. 9 Ch. 423; *Ewing v. Colquhoun*, L. R. 3 App. Cas. 339.

The master of a vessel is not required to shorten sail or yield the channel to a fishing net, but may lawfully prosecute his voyage or approach the shore at any point without regard to seines or nets drawn across the way. *Mason v. Mansfield*, 4 Cranoh, C. C. 580; *The City of Baltimore*, 5 Ben. 474; *Moulton v. Libbey*, 37 Me. 472; *Conn. v. Chapin*, 5 Pick. 196; *Post v. Munn*, 4 N. J. L. 61; *Lewis v. Keeling*, 1 Jones, L. 209; *Davis v. Jenkins*, 5 Jones, L. 200; *Flanagan v. Philadelphia*, 42 Pa. 219; *Cobb v. Bennett*, 75 Pa. 339; *Gould, Waters*, 164.

If, however, the master of a vessel has warning
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6. **The measure of damages in an action against a ship owner to recover damages for his running his vessel upon and partially destroying a fishing net**, is the cost of repairing the net and the value of the labor required to reset it, together with the value of its use during the time it is necessarily idle; prospective profits which might have been realized from a continued use of the net cannot be allowed as damages.

(November 5, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Oconto County in favor of plaintiffs in an action brought to recover damages for injuries alleged to have resulted from defendant's vessel running through plaintiff's fishing net. *Reversed*.

Statement by Lyon, J.:

In the year 1888 the plaintiffs were engaged in the business of fishermen, in the waters of Green Bay, and had what is called a "pound" or "pot net" set near the direct route from the mouth of Oconto River to Peshtigo Harbor. The net was set at right angles to the shore, and extended from near such route where the pot was set about sixty-five rods northeast towards the shore. It was held in position by posts five rods apart, reaching four feet above the surface of the water, to which the net was attached. These could be seen in the day-time in still, clear weather for a considerable distance. At the pot, and in its vicinity, the posts were much closer together,—that is, from eight to twenty feet apart,—and were more conspicuous. On a still, clear morning, in August, 1888, at about 6 o'clock, the defendant left the mouth of the Oconto River with his steam-tug, having some boom sticks in tow, and went near the direct route towards Pesh-

of the position of a fishing net, he cannot approach it wantonly or maliciously without being answerable for damages for the injuries inflicted by his act. See authorities *supra*.

Fishery rights.

A right of fishing is a property right, and not a mere privilege or immunity of citizenship. *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 243; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 209. See *Atty-Gen. v. Tarr*, 2 L. R. A. 37, 148 Mass. 309.

Each State owns the beds of tide waters within its jurisdiction, subject to the paramount right of navigation. The fisheries belong to the State. *Smith v. Maryland* and *McCready v. Virginia*, *supra*.

Fisheries, even in waters not navigable, are so far public rights that the Legislature of the State may ordain and establish regulations, and permit the usual and uninterrupted enjoyment of the right of the riparian owners. *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wal. 500, 21 L. ed. 133. See *Com. v. Manchester (Mass.)*, 9 L. R. A. 236; *McClain v. Tillson*, 82 Me. 281; *Clarke v. Providence*, 1 L. R. A. 725, 16 R. L. —; *State v. Smith*, 61 Vt. 346; *Clinton v. Bacon*, 56 Conn. 508; *White v. Patty*, 57 Conn. 578; *United States v. Nickerson*, 58 U. S. 17 How. 204, 15 L. ed. 219.

The taking of fish with nets in specified waters may be prohibited by the Legislature and the setting of nets for that purpose declared to be a public nuisance. *Lawton v. Steele*, 7 L. R. A. 134, 119 N. Y. 223.

through plaintiff's net a few rods from the pot and injured the same. This action was brought to recover damages for such injuries. The jury returned a special verdict, in which they found that the steam-tug ran through the net, but without the knowledge or consent of defendant or his employés; that the net was not in the route or course of steam-tugs between the two points above named; that it was so placed in the water that it could readily have been seen when so injured, by the wheelman or a lookout on the tug, for a considerable distance before reaching it; that the course of the tug, after the net was in sight, might have been changed so as to have avoided it, without prejudice to the reasonable prosecution of the voyage; that the injury was caused by the negligence of the defendant or his servants; that the plaintiffs were not guilty of negligence contributing to the injury "in locating their net at that place at that time;" that the net was damaged in the sum of \$110, and that the plaintiffs were damaged in their business \$200, in consequence of the injury to the net. Motions by defendant for judgment on the special verdict, and for a new trial, were overruled by the court, and judgment for plaintiffs for \$310 damages, and for costs, was thereupon entered. The defendant appeals from such judgment.

Messrs. Ellis, Greene & Merrill, for appellant:

Because of the paramount right of navigation the defendant cannot be held liable unless for wantonness or intentional wrong.

Gould, Waters, § 87; *Post v. Munn*, 4 N. J. L. 61, 62; *Cobb v. Bennett*, 75 Pa. 326; *Flanagan v. Philadelphia*, 42 Pa. 228, and cases there cited; 6 U. S. Dig. 1st Series, p. 590, No. 92, citing *Collins v. Benbury*, 5 Ired. L. 118, 3 Ired. L. 277, and *State v. Glen*, 7 Jones, L. 321.

Ordinary care required the plaintiffs, in view of the "seen danger," to try to avert it. But they, knowing, as they said, that the tug was coming in a direct course towards their net, kept quiet and let it come. Plaintiffs neglected the ordinary precaution of warning the persons in charge of the tug. And their neglect to give such warning certainly contributed to if it did not actually bring on the injury.

Potter v. Chicago & N. W. R. Co. 31 Wis. 377; *Cunningham v. Lyness*, 22 Wis. 251; *Dreher v. Fitchburg*, 22 Wis. 677, 678; *Ward v. Milwaukee & St. P. R. Co.* 29 Wis. 151, 152; *McCandless v. Chicago & N. W. R. Co.* 45 Wis. 372; *Randall v. Northwestern Teleg. Co.* 54 Wis. 149; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 257; *Collins v. New York Cent. & H. R. R. Co.* 5 Hun, 502, 503.

All erections or impediments made by riparian owners so as to obstruct the free use of the river as a highway for boats or rafts are deemed nuisances.

Hooker v. Cummings, 20 Johns. 90; 2 Kent, Com. *412; Wood, Nuisance, § 602.

As the right of navigation in public waters is of a higher character than a fishery, the latter cannot be exercised in derogation of commerce.

Gould, Waters, § 156.

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safe than formerly. What the public are entitled to is free navigation and immunity from artificial impediments or dangers.

Wood, Nuisance, § 613, p. 646.

It was error for the court, in charging the jury, to cast suspicion and doubt upon the defendant's testimony.

Valley Lumber Co. v. Smith, 71 Wis. 305; *Vedder v. Fellows*, 20 N. Y. 130; *Dreiss v. Woods*, 71 Wis. 332; *Long v. State*, 23 Neb. 23; *Markel v. Mundy*, 11 Neb. 213; *Kersenbrock v. Martin*, 12 Neb. 374; *Cross v. Tyrone Min. & Mfg. Co.* 121 Pa. 837; *Oushman v. Cogswell*, 86 Ill. 62; *Evans v. George*, 80 Ill. 51; *Russell v. Minter*, 83 Ill. 150, 153; *Calef v. Thomas*, 81 Ill. 479, 488, 484; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 507; *Graves v. Colwell*, 90 Ill. 619; *Adams v. Smith*, 58 Ill. 419; *Chapman v. Caverey*, 60 Ill. 520; *Bughman v. Byres* (Pa.) 10 Cent. Rep. 605; *Vulicevich v. Skinner*, 77 Cal. 329; *Maliby v. Plummer*, 71 Mich. 578; *Smith v. Com.* (Ky.) April 7, 1888; *Daniel v. Daniel* (Miss.) March 12, 1888; *Long v. State*, 23 Neb. 23; *Kelly v. Emery*, 75 Mich. 147; *Reichenbach v. Ruddach*, 127 Pa. 564; *Equitable Mortg. Co. v. Norton*, 71 Tex. 683; *McKee v. Munn* (Miss.) Feb. 11, 1889; *Heithecker v. Fitzhugh*, 41 Kan. 50; *Bierbach v. Goodyear Rubber Co.* 54 Wis. 218.

Loss of profits to business is not recoverable.

Bierbach v. Goodyear Rubber Co. 54 Wis. 208, 211, 212; *Masteron v. Mt. Vernon*, 58 N. Y. 891, 895, 896; *Green v. Williams*, 45 Ill. 207, 209; *Oiley v. Hawkins*, 48 Ill. 309, 311; *Anderson v. Sloane*, 73 Wis. 566, and cases cited; *Braunsdorf v. Fellner*, 76 Wis. 1; *Chicago R. Co. v. Hovison*, 86 Ill. 215; 2 Thomp. Neg. p. 1263, and cases cited; *Baker v. Drake*, 63 N. Y. 215.

Messrs. Webster & Wheeler, for respondents:

The two rights, that of navigation and fishery, must be in conflict before the latter must yield to the paramount force of the first.

Post v. Munn, 4 N. J. L. 61.

Where both can be enjoyed, that of navigation has no authority to trespass upon and injure the other.

Cobb v. Bennett, 76 Pa. 326; *Flanagan v. Philadelphia*, 42 Pa. 228.

The measure of damage allowed was correct.

Post v. Munn, *supra*; *Shepard v. Milwaukee Gas Light Co.* 15 Wis. 318; *Loes v. Humphreys*, 1 E. D. Smith, 210; *Jolly v. Single*, 16 W. a. 280; *Kinney v. Crocker*, 18 Wis. 74; *Flick v. Wetherbee*, 20 Wis. 392; *Poposkey v. Munkwitz*, 68 Wis. 322; *Gates v. Northern Pac. R. Co.* 64 Wis. 71.

Lyons, J., delivered the opinion of the court:

I. The learned counsel for defendant maintains that his client is not liable in this action unless he or his servants ran the steam-tug over plaintiff's net maliciously or wantonly. The jury have negatived the existence of any such malice or wantonness by finding that the injury was without the knowledge or consent of the defendant or his servants navigating the tug. If, therefore, the proposition of coun-

nel, that the defendant is only liable for the results of his malice or wantonness, is correct, there can be no recovery in this action. We cannot doubt that the plaintiffs might lawfully fish in the waters of Green Bay as of common right, subject only to legislative control, although they have shown no such right by prescription or express grant. See 8 Am. & Eng. Encyclop. Law, 24, 32, and notes.

The defendant might also lawfully navigate those waters with his steam-tug, and undoubtedly the right of navigation is paramount to that of fishing. But it does not necessarily result from this that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor, merely because he did not do so maliciously or wantonly. Such a proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that, when the two rights necessarily conflict, the inferior must yield to the superior right. But he may not, by his own negligence, unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right. Thus, he may run his vessel over a net in the night-time when he cannot see it, or in the day-time if he cannot avoid it, without interfering with the reasonable prosecution of his voyage, or be driven upon it by stress of weather, and not be liable therefor. But if he runs over the net in broad daylight in a calm sea, when, if he looks, he cannot fail to see it, and seeing, might easily and without prejudice to his voyage avoid it, the rule would be a strange one which would absolve him from liability because he merely failed to look and see the net, and was not, therefore, actuated by malice or wantonness. In support of his contention, counsel for defendant cites *Post v. Munn*, 4 N. J. L. 61, and *Oobb v. Bennett*, 75 Pa. 326; also a statement of the doctrine of those cases in Gould, Waters, § 87. In those cases it appeared that the persons in charge of the vessels knew the location of the nets, and willfully, or, in other words, maliciously and wantonly, ran their vessels into them unnecessarily. Of course, the owners of the vessels were held liable for the damages to the nets. The principle fairly deducible from these cases is, we think, correctly stated in a head note to the Pennsylvania case, as follows: "A vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master act without wantonness or malice, and does no unnecessary damage." How can it reasonably be said that the master does no unnecessary damage if he runs his vessel upon a net and injures it, when, by the exercise of a little forethought and care, he could have avoided doing so without prejudice to the reasonable prosecution of his voyage? We conclude that, in the present case, the negligent failure of the defendant and those operating his steam-tug to see the net and avoid it, when it could have been avoided without detriment to the prosecution of the voyage, is a sufficient basis for a recovery in this action.

II. The proofs show that the plaintiffs were taking fish from the pot when the steam-tug ran through the net, but gave no warning,

other than that given by their presence there, to those in charge of the tug, that the net lay across its path. It is claimed that this was contributory negligence on the part of the plaintiffs, which defeats the action. We cannot say as matter of law that it was such negligence, yet the fact was a proper one to be submitted to the jury on the question of contributory negligence, and the judge did so submit it to his charge. But the question the jury were required to answer did not include that fact. It was whether the plaintiffs were guilty of any negligence which contributed to the injury "in locating their net at that place, and at that time." The question was prepared by, and submitted at request of, defendant's counsel, who neither requested nor suggested that another and broader question should be submitted on the same subject. The court had the right to understand, and evidently did understand, that the question included everything the defendant desired to have submitted on the subject of contributory negligence. Under such circumstances, if the defendant can now be heard to allege the insufficiency of the question as ground for a reversal of the judgment, the right to a special verdict may be used as an instrument of injustice. *Schultz v. Chicago, M. & St. P. R. Co.* 48 Wis. 375.

It must be held that, on the subject of contributory negligence, the defendant is concluded by the answer to the question thus submitted at the request of his counsel.

III. A clause in the charge to the jury is claimed to be erroneous. All of the men on board the tug at the time the net was injured were witnesses on the trial, and each denied knowledge on his part that the tug ran through the net. The question whether it did so was submitted to the jury. In submitting it the court said: "The men who were on that tug at the time have all been witnesses, and they deny any knowledge of its going through, and it necessarily follows, it seems to me, that, if the tug did go through, some of those men have either forgotten the circumstance, or have willfully sworn falsely in reference to it." By this remark the judge expressed the opinion, hypothetically, that if the tug went through the net, some of the men on board would have known it, and from this premise he deduced the very rational conclusion that, if the tug did go through the net, these men had either forgotten the fact, or falsely denied knowledge of it. It seemed to the learned circuit judge quite incredible that the tug could have been navigated through the net in broad daylight, in calm, clear weather, and no person on board of her know the fact. And so it seems to us. Under the circumstances, we are unable to say that the challenged remark of the judge was improper. But were it improper, it could not have harmed the defendant, for, notwithstanding the hypothetical criticism by the judge, upon the testimony of the men on the tug, the jury believed what they said, and found that the tug ran through the net without their knowledge. This renders the alleged error immaterial.

IV. The special verdict sufficiently covers all material and controverted questions of fact in the case. Hence, it was not error to refuse

to submit certain other questions to the jury proposed on behalf of defendant, as the basis of a special verdict.

V. There is, included in the judgment, \$300 for damages to the plaintiff's business resulting from the injury to their net—that is to say, for loss of the profits of their business during the time necessarily required to restore the net. The net was never restored, and the plaintiffs' fishing in that vicinity for the remainder of the season was all done with another net located about one half mile south of the injured net. The testimony tends to show that the plaintiffs lifted the pot of their net and took the fish therefrom about every alternate day before the injury; that the profits from each lift were from \$40 to \$50; and that it would have required about ten days to restore the injured net, had it been restored. There was no other testimony introduced bearing upon the question of profits. Hence the jury necessarily assessed the damages to plaintiffs' business on the basis of four or five lifts of fish, at a profit of from \$40 to \$50 each. There was no testimony as to whether the conditions of successful fishing remained for ten days after the injury as favorable as they were immediately before the same,—none to show that the weather continued favorable during the ten days; that storms did not intervene to interrupt the business; that the fish continued to run over the same ground in equal abundance; that other fishermen operating in the vicinity were equally as successful in their business after as before the injury; nor that the market price of fish remained as high. Without any testimony concerning these essential conditions, the jury must have made their assessment of damages to plaintiffs' business largely upon mere conjecture. They must have assumed without proof that a business proverbially uncertain in results, depending for its success upon numerous conditions which the persons engaged therein cannot control or influence, and the presence or absence of which at a future time cannot be foretold with any degree of accuracy, would have continued after the

net was injured to be just as profitable as it was before the injury. Such an assumption, under such circumstances, is unwarranted in the law, and probably we should be compelled to reverse this judgment for want of sufficient evidence to support the assessment of damages for profits, even though it should be held that, under proper proofs, the plaintiffs might recover prospective profits. But we are of the opinion that prospective profits cannot properly be awarded as damages in this case. The reason therefor has already been suggested, which is that under any state of the testimony, in view of the character and conditions of the business, the jury could have no sufficient basis for ascertaining such prospective profits. At best, the assessment thereof must necessarily rest largely upon conjecture. This feature of the case brings it within the rule of *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 206, and *Anderson v. Sloane*, 72 Wis. 566, and the cases cited in the opinions therein. In the latter case, *Mr. Justice Taylor* has pointed out the distinction between that case and those cases in this court in which prospective profits have been allowed as damages. It is unnecessary to repeat the discussion here. It is sometimes quite difficult to determine to which of the above classes a given case belongs, and such a determination must be governed largely by the special circumstances of each particular case.

The jury assessed the damages to the net at \$110. This includes not only the cost of repairing it, but also the value of the services of the plaintiffs and their servants in resetting it. We conclude that the plaintiffs are entitled to recover no other damages, except the value of the use of the net during the time they were necessarily deprived of its use, which was about ten days.

The judgment of the Circuit Court must be reversed, and the cause will be remanded, with directions to award a new trial, or, at the option of the plaintiffs, to give judgment for them for \$110, and interest thereon from the date of the verdict, besides costs.

PENNSYLVANIA SUPREME COURT.

G. Newton HORN, *Appt.*, .

Samuel MILLER *et al.*

(....Pa....)

1. A covenant by and between owners of adjacent lands, as to the use and enjoy-

ment by the respective parties of the waters of a stream to which they are severally entitled, made for the mutual benefit of themselves, their heirs and grantees, runs with the land and binds not only the contracting parties, but also their heirs and grantees; although in subsequent deeds of the respective premises no mention is made of such covenant or of the rights accruing therefrom.

NOTE.—*Riparian right to use of waters of stream.*

Each proprietor is entitled to enjoy the natural fall of the stream. *M'Calmont v. Whitaker*, 3 Hawle, 84; *Brown v. Bush*, 45 Pa. 61; *Oakley Mills Mfg. Co. v. Neece*, 54 Ga. 459; *Dorman v. Ames*, 12 Minn. 451; *Plumleigh v. Dawson*, 6 Ill. 544; *Gould, Waters*, 363. He may make a reasonable use of the stream passing by his land for purposes which are not domestic. *Patten v. Marden*, 14 Wis. 473; *Gould, Waters*, p. 366.

The maxim of the law which every riparian proprietor L. R. A.

prior is bound to respect as regards his right to the water is, *sic utere tuo ut alienum non laedas*. *Shrewsbury v. Smith*, 12 Cush. 180, 191; *Ang. Waters and Watercourses*, 7th ed. § 97, and *note k*; *Davis v. Winslow*, 61 Me. 291; *Embrey v. Owen*, 6 Exch. 353.

The law is well settled that where an act is done which violates the right of another, and which is of such a character "that if it be continued for a sufficient period of time the wrong-doer may acquire a right by adverse possession, the person whose rights are violated may maintain an action therefor without proof of any other actual dam-

2. Trespass is the proper remedy for diversion by defendant of the water of a stream to the prejudice of the plaintiff's right as a riparian owner, as fixed and determined by the agreement of the predecessors in title of the respective parties.
3. Where the right to the use of the waters of a stream are fixed by a covenant between the riparian owners, made for the benefit of their respective heirs or grantees, the fact that a subsequent grantee is the grantee of a part only of the lands of one of the parties to which the covenant is applied, does not impair his rights under the covenant as a riparian owner.

(October 6, 1890.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Bedford County, entered in favor of defendants *non obstantes veredicto* in an action brought to recover damages for the diversion from their channel of the waters of a certain creek. *Reversed.*

The facts are stated in the opinion.

Messrs. Kerr & McNamara and John M. Reynolds for appellant.

Messrs. Hall & Hall for appellees.

Clark, J., delivered the opinion of the court:

This action was brought to recover damages for the diversion of the water of Wills Creek, from the channel through which the plaintiff supplied the wheel of his grist-mill, near Hyndman, in Bedford County. It appears that the waters of Wills Creek divide at a point about a mile above the plaintiff's land (whether from artificial or natural causes does not appear), and thence proceeds in two channels, one by the plaintiff's mill, and one by the defendants' mill, to a point a short distance below both mills, where a junction is again effected. It also appears that, in the year 1852, John Miller owned the land now owned by the

defendants, and also the land adjoining, upon which the stream divides, now owned by Jacob Evans, and that Enoch Cade was the owner of some forty-two acres in two adjoining parcels, one containing thirty-seven acres, more or less, part of the New Bridgeport tract, the other containing about nine acres, known as the "Carpenter Lot."

The appellant's contention is that the extent of his right is fixed by an agreement dated July 8, 1853, between John Miller and Enoch Cade, who were thus the predecessors in title to the respective premises involved in this controversy. In the year 1852, an action was pending in the Court of Common Pleas of Bedford County in which Enoch Cade was plaintiff, and John Miller defendant. The action was brought to recover damages for the diversion by Miller of the water of Wills Creek to his saw-mill, on one channel of the stream, to the prejudice of the right of Cade, who was the owner of a mill site on the other channel. The matters in controversy in this suit were settled according to the terms of the agreement mentioned. By this agreement it is provided, in substance, as follows: Cade, "his heirs, executors, administrators or grantees," were conceded the right to use and enjoy the "water right or power" for two wheels, of any capacity and size he or they might see proper to construct, on either of the lots mentioned as belonging to him, "without let, hindrance or diversion by said Miller, his heirs, executors, administrators or grantees." When there was any surplus water, "over and above what may be needed for the full, free and uninterrupted enjoyment of the two wheels," Miller was to have thereof what is sufficient for the full and free use of his saw-mill, "not requiring, using or diverting more" than was necessary for that purpose. The rest of the water of said creek (and there was to be no unnecessary waste of the water by either party) was to be used and enjoyed by Cade. The concluding clause of

age." *Lund v. New Bedford*, 121 Mass. 286, 290; *White v. Chapin*, 12 Allen, 516.

Conveyance of privilege of use of water.

A deed conveying all the rights and privileges of using the waters of a creek, which the grantor has theretofore possessed and has reserved in prior conveyances, where prior conveyances had reserved the privilege of banking water up the creek, and where a subsequent conveyance of the same grantor reserved to himself the privilege of banking water up the creek, although he had no land on which the right could be exercised,—conveys to the grantee in the first-named deed the privilege of using the waters of the creek by erecting a dam across it, although it should become necessary to use the bank of the creek owned by other parties under the prior conveyances. *Risien v. Brown*, 73 Tex. 135.

Covenants are as capable of running with incorporeal hereditaments as with those which are corporeal. *Baily v. Wells*, 3 Wils. 25; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Gould, Waters*, 504.

A covenant by which the proprietors upon opposite sides of a stream agree for themselves, their heirs and assigns to rebuild a dam is such a covenant. *Lindeman v. Lindsey*, 60 Pa. 93; *Jamison v. McCredy*, 5 Watts & S. 129.

A covenant, in a grant of a watercourse, to clear it and keep it in repair, is a covenant running with 9 L. R. A.

the land of the grantor through which the watercourse passes. *Holmes v. Buckley*, Prec. in Ch. 30, 1 Eq. Cas. Abr. 27; *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 108 Mass. 175, 184; *Van Rensselaer v. Read*, 26 N. Y. 553, 574; *Woodruff v. Trenton Water Power Co.* 10 N. J. Eq. 489; *Carr v. Lowry*, 27 Pa. 257.

A reservation of the right to use water in a particular manner, for the accommodation of land which remains vested in the grantor, is an assignable interest, although the right is reserved to him without words of inheritance, and without naming his assigns. *Kennedy v. Scoovil*, 12 Conn. 817, 820, 14 Conn. 62; *Morse v. Aldrich*, *supra*; *London v. Richmond*, 2 Vern. 421, Prec. in Ch. 156; *Merriman v. Russell*, 2 Jones, Eq. 470.

All covenants which relate to land and are for its benefit run with it, and may be enforced by the heir to whom the land descends, or by each successive assignee into whose hands it may come by conveyance or assignment. *Sharp v. Waterhouse*, 7 El. & Bl. 816; *Howard Mfg. Co. v. Water Lot Co.* 53 Ga. 689; *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230; *Norman v. Wells*, 17 Wend. 136.

Right to divert water of stream.

A riparian owner has the right to use the stream and divert its waters if he does not do so to a material and appreciable degree, and leaves sufficient for the use of other riparian proprietors; but not to

the contract is as follows: "Said Miller is to have a flood-gate erected at the mouth of his head-race, and shut the same down tightly and securely when the said creek does not furnish more than enough for the said two wheels of said Cade, as aforesaid, and also at all times else when he is not using his own mill, and at all times is not to interfere in any way with said two wheels, as aforesaid, or the rest of said water, over and above his own, belonging to said Cade as aforesaid." There is no dispute as to the proper construction of this agreement. There is no ambiguity of expression, or uncertainty of meaning, alleged, but the legal effect of it is what is most in dispute. It is certainly clear that the suit pending in 1852 was for redress of injuries for an invasion of Cade's right as a riparian owner. The agreement was made in adjustment of Cade's right as such. Miller had no right, by artificial means, to withdraw the water from Cade's use. He was restricted in his use and enjoyment of the water to the natural flow, and the foundation of the action was that the natural condition of the stream had been interfered with. The agreement was virtually a recognition of the superior claim of Cade, for his right was distinctly recognized and entitled to a preference, and was intended to be protected under the terms of the agreement. But the right which was thus protected was nevertheless his right as a riparian owner, the extent of which, in view of all the facts and circumstances, was declared and established between the parties, their heirs, executors, administrators and assigns, in the terms of the contract.

The right to reasonable use of water in its natural flow, without any diversion of it from its ordinary channel by artificial means, is incidental to the ownership of the land through which it flows, and the extent to which it may be used and applied affects the use and conse-

quent value of the land itself. These covenants, therefore, relate to the land of the respective parties, or to the enjoyment of the land which they had in possession in fee, and were to be performed upon and in connection with its use and enjoyment. The present parties litigant have, in part at least, the same lands respectively to which the agreement relates, also in fee. The covenants were by the covenantors for the mutual benefit of themselves, their heirs, executors, administrators or grantees, and the present owners, holding the land by conveyance from the covenantors respectively, under the law of this State, are in privity of estate with them respectively. There was no privity of estate between the contracting parties, but the covenants, being in adjustment of their respective rights to the use of the water of Wills Creek, must be construed as a mutual benefit to, and not as a burden upon, the lands of either. We are of opinion, therefore, that the covenants in question run with the land, and define the rights not only of the parties thereto, but of their respective heirs and assigns. To the general rule that between the covenantor and covenantee there must be such privity of estate as would formerly have given rise to the rule of tenure, there are in this State, and perhaps in some of the other States, well-recognized exceptions. Covenants capable of running with an assignment of a present estate in land may, it seems, have that capacity in certain cases, although no estate passes between the covenantor and covenantee at the time of covenant made. The obligation of contracts is, in general, limited to the parties making them. Where privity of contract is dispensed with, there must ordinarily be privity of estate; but justice sometimes even requires that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfillment, not to impose a burden upon

such an extent as to appreciably or materially lessen the stream. *New York Rubber Co. v. Rothery* (Sup. Ct.) 32 N. Y. S. R. 905.

The right to divert water of a stream does not include the right to lower the outlet of a great natural pond or lake, and lower the surface of the water. *Fernald v. Knox Woolen Co.* 7 L. R. A. 459, 32 Me. 48.

A riparian proprietor of land bordering upon a running stream has a right to the flow of its waters as a natural incident to his estate, and they cannot be lawfully diverted against his consent. *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761.

The right to divert or change the course of the stream itself so as to turn it away from a lower proprietor is unlawful, while the right to take water from a stream may be exercised to a reasonable extent. *Elliott v. Fitchburg R. Co.* 10 Cush. 191; *Dumont v. Kellogg*, 29 Mich. 420; *Wadsworth v. Tillotson*, 15 Conn. 368; *Hartzall v. Sill*, 12 Pa. 248; *Coalter v. Hunter*, 4 Rand. 58; *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Gould, Waters and Watercourses*, 580.

When the wrong consists in turning the water where it would not naturally flow, the source of the water is immaterial, if damage results. *Tillotson v. Smith*, 32 N. H. 90; *Butz v. Thrie*, 1 Rawle, 218; *Shaw v. Cumiskey*, 7 Pick. 76; *Tuthill v. Scott*, 43 Vt. 626; *Doud v. Guthrie*, 11 Ill. App. 194.

One is liable for diverting water alone or jointly with others, under a lease from third persons, or for its diversion by others under a lease from him. *Clement v. Gould*, 61 Vt. 573.

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A manufacturer has no right to divert the waters of a stream and discharge them into a different channel, without the consent of the lower proprietors on the stream, however beneficial his enterprise may be to the public. The necessities of his business cannot be made the standard of another's rights in a thing which belongs to both. *Wells v. Oregon L. & S. Co.* 13 Or. 496.

Damages recoverable for diversion of water of stream.

An action on the case lies for any wrongful diversion or obstruction to the injury of a riparian proprietor. *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 3 Barn. & Ad. 304, 5 Barn. & Ad. 7; 3 Kent, Com. 442; *Martin v. Bigelow*, 2 Aik. (Vt.) 184; *Gould, Waters and Watercourses*, 567, 568.

Compensatory damages only can be recovered for a wrongful diversion of surface water by a landowner so as to make it flow upon the lands of another. *Weddell v. Hapner* (Ind.) May 15, 1890.

Damages to the date of the writ only are recoverable for diverting water from its natural course. *Williams v. Camden & R. Water Co.* 5 New Eng. Rep. 352, 79 Me. 543. See *Dority v. Dunning*, 3 New Eng. Rep. 41, 73 Me. 381.

Riparian rights. See notes to *Ulbricht v. Bufala Water Co.* (Ala.) 4 L. R. A. 572; *Whitney v. Wheeler Cotton Mills* (Mass.) 7 L. R. A. 613.

Diversion of water of streams. See same cases, and notes to *Haines v. Hall* (Or.) 3 L. R. A. 609; *Morrison v. Coleman* (Ala.) 5 L. R. A. 384.

an ignorant and innocent third person, but to enable purchasers of land to avail themselves of the benefit to which they are in justice entitled. The character of a covenant of this kind must depend upon the effect of the entire agreement of which it is a part, and, where the benefit and the burden are so inseparably connected that each is necessary to the existence of the other, both must go together. The liability to the burden will be a necessary incident to the right to the benefit. See *note to Spencer's Case*, 1 Smith, Lead. Cas. pt. 1, p. 174. It was upon this ground that, in *Coleman v. Coleman*, 19 Pa. 100, a covenant entered into by the owners of the estate that a part only should be divided, and a part "remain together and undivided as a tenancy in common," was held to run with the land, and to bind not only the contracting parties, but their heirs and assigns, although not named in the contract, and therefore to constitute a bar to an action of partition upon the part undivided instituted by the heirs at law of one of the parties. Although there was not, in any proper sense, as to the undivided mine hills, a privity of estate between the tenants in common, yet, as the covenant pertained to and was attached to the realty, providing for the manner of its future enjoyment, it was styled a "real covenant;" and, being for the mutual benefit and advantage of all, it was held to run with the land.

In *Carr v. Lowry*, 27 Pa. 257, there was a grant of the mere easement,—the right to cut and keep up a tail-race through Carr's land for the benefit of the adjoining lands of Lowry, to which was annexed a covenant of Lowry, his heirs and assigns, to keep the race timbered, planked and covered with earth, and to be held for damages, etc. The burden imposed was necessarily incident to the enjoyment of the benefit, and it was held that the contract defined the duties which ought to be performed by whoever should be the owner of the mill for the benefit of which the easement was created. "We cannot presume," says *Mr. Justice Lowrie*, "that he [Lowry] intended to bind his personal representatives to such duties. In the natural order of affairs, they accompany the ownership of the property to which they relate, and therefore in the present case ought to be performed by the heirs or assigns of Lowry, if they claim under the title then acquired by him. The relation between Carr and Lowry on which the duty depends was dissolved by Lowry's death, if not before, and his administratrix can be charged to answer only for a breach in his lifetime." So also in *Lindeman v. Lindsey*, 69 Pa. 98, owners on opposite sides of the Conodoquinet Creek agreed jointly to erect a dam, each to have the use of half the water, with a covenant for themselves, their heirs and assigns, to repair and rebuild; and this covenant was held to run with the land, the dam having been constructed for the mutual benefit and advantage of the parties, with direct relation to the enjoyment and use of the land. "When, therefore," says *Mr. Justice Sharswood*, "they enter into an agreement to erect such a dam, with a covenant for themselves, their heirs and assigns, to repair, or rebuild it, if necessary, it is not a personal covenant merely, but runs with the lands of the

respective proprietors, and the stipulations contained in such agreement in respect to the enjoyment of the water-power created by the dam form the basis of their respective rights. It is sufficient to refer to *Jamison v. McCredy*, 5 Watts & S. 129, as a case entirely parallel, if not in point. If the instrument contain the grant of an easement or privilege to either party in the land or the water, against such a grant there is no Statute of Limitations without actual, hostile and adverse possession, and certainly no prescription or presumption from mere non-user. Nothing less than an absolute denial of the right, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it." The effect of the agreement of 1852 was therefore to adjust and fix the rights of the parties thereto, and of their heirs and assigns. It is of no consequence that in the deeds constituting the chain of title from Cade to Horn no mention of this agreement is made, or of the rights accruing therefrom. The right passes as appurtenant to the land. As the assignee of the land from Cade in fee, Horn has a right to enjoy the benefit of the contract which runs with it. This action is trespass upon the case, for diversion of the water to the prejudice of the plaintiff's rights as a riparian owner, which, in view of the alleged previous artificial diversion of the waters of the stream, were fixed and determined by the agreement of 1852. Trespass was the proper remedy. The agreement of 1852 established the rights of the parties, and the covenants were to that effect merely. The agreement was equivalent to a grant. Whatever may be conveyed by grant may be secured by covenant in this form. No one has ever supposed before, as was said in *Lindeman v. Lindsey*, *supra*, that upon a grant by deed of an easement or privilege upon land, or land covered by water, of one man to another, the remedy for disturbance of such easement or privilege was an action of covenant upon the deed. Take a common case of a grant or reservation of a right of way. Surely an action on the case may be maintained by the grantee for the obstruction of it, as well against the grantor and those claiming under him as against strangers. The books are full of such cases, in which no such point was made,—citing *Watson v. Bioren*, 1 Serg. & R. 237; *Kirkham v. Sharp*, 1 Whart. 833; *Jamison v. McCredy*, 5 Watts & S. 129; *Van Meter v. Hankinson*, 6 Whart. 307; *Ebner v. Stichter*, 19 Pa. 19.

It is true that Horn is the assignee of part only of the forty-four acres held by Cade, to which this covenant is applied, but his rights as a riparian owner are in no way impaired by this. If after the water leaves the tail-race of his mill others avail themselves of its power, we cannot see how this can affect Miller. But *non constat* that any other wheel will be placed on any other part of Cade's tract. One thing is certain,—that the mere apprehension of this cannot excuse Miller for diverting the water of the stream, in violation of the contract. It will be time enough to provide for this contingency when it happens. We are of the opinion that the learned judge of the court

below erred in entering judgment for the defendant *non obstante veredicto*.

The judgment is therefore reversed, and judgment is now entered on the verdict for the plaintiff for \$52.

George S. VEON

v.

Patrick CREATON, *Appt.*

(.... Pa.)

1. Under the Act of May 8, 1854, which authorizes anyone aggrieved to recover damages, against a person furnishing intoxicating drinks to another when intoxicated, for injury to person or property, the father of a son twenty-five years of age, between whom and the son no family relation subsists, is not a person aggrieved within the meaning of that Act, so as to be entitled to recover for moneys voluntarily expended by him for medical attendance, nursing, etc., of his son during the illness of the son, from injuries sustained by him from a sale of liquor to him when intoxicated.
2. The father cannot recover in such case by reason of his contingent liability for his son's support under the Poor Laws on account of such injuries, there being no certainty that such liability will ever attach. The contingency is therefore too remote.

(November 3, 1890.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Venango

NOTE.—*Liquor Laws of Pennsylvania construed.*

The Act of 1856, § 31, directing fines for the unlawful sale of liquor to be paid to the proper school district, is not repealed by the Acts of 1858 and 1867, nor by § 13 of the judiciary article of the Constitution of 1873. *Com. v. McGuirk*, 78 Pa. 238.

The special Act of Feb. 20, 1867, repealing so much of the statute as authorized the treasurer of Washington County to grant a license to vend intoxicating liquors by the quart, is inoperative, because at that time the Act of 1856 had already repealed the statute relating to a treasurer's license, and vested the power of licenses in the court of quarter sessions. *Reed's App.* 4 Cent. Rep. 809, 114 Pa. 452.

The Local Option Law of 1872, and Supplement of 1873, repealed the right to grant a brewer's license under former laws, including the Act of 1866, as to sales in Blair County, etc. *Rauch v. Com.* 78 Pa. 490.

By the Supplement of 1873, a county treasurer is prohibited from issuing a liquor license when the Local Option Law is operative and a distiller cannot justify a sale under such a license. *Com. v. Mueller*, 61 Pa. 127.

The title of the Pennsylvania Act of May 13, 1887, entitled "An Act to Restrain and Regulate the Sale of Vinous and Spirituous, Malt and Brewed Liquors," is sufficiently comprehensive to include a general prohibition of all sales without a license. *Com. v. Sweitzer*, 129 Pa. 644; *Com. v. Baughman*, Id. 651; *Com. v. Shultz*, Id. 651.

The provision of this Act making it unlawful "for any person, with or without license, to furnish, by sale, gift or otherwise, to any person any spirituous, vinous, malt or brewed liquors," on any election day or on Sunday, or at any time to any minor, or person of known intemperate habits, or persons visibly affected by intoxicating drink, is not confined to dealers, but is directed against any person. *Altenburg v. Com.* 4 L. R. A. 543, 126 Pa. 602.

It prohibits the sale of intoxicating liquors only 9 L. R. A.

County, in favor of plaintiff in a suit brought to recover moneys paid by him, for his son, for medical attendance, etc., during the illness of the son from injuries received by the sale of intoxicating drinks to him while drunk, against the provisions of the Act of May 8, 1854. *Reversed.*

The facts are fully stated in the opinion. *Mears, Dunn & Carmichael and S. B. Myers*, for appellant:

A father is not entitled to sustain a suit for damages for injury to an adult child, unless the relation of master and servant exists.

Pennsylvania R. Co. v. Adams, 55 Pa. 501; *Pennsylvania R. Co. v. Bantom*, 54 Pa. 497.

A man is *sui juris* as soon as he arrives at the age of twenty-one, and he can sue for all damages arising from his injury, the pain, money paid for medical and nurse attention, board, etc.

Cleveland & P. R. Co. v. Rowan, 66 Pa. 400; 2 Addison, Torts, § 830.

This plaintiff cannot sue by reason of a relation of master and servant, because that relation was dissolved when the son was twenty-one years old. Neither can he recover by reason of a possibility that the party injured might become a public charge.

Fairmount & A. St. P. R. Co. v. Stutler, 54 Pa. 378; 2 Addison, Torts, § 1274.

The Act of 1854 is out of the course of common law and should be strictly construed.

McMullin v. McCreary, 54 Pa. 230.

The family relation only comes to the relief of a plaintiff when the injury causes death.

so far as they are included in the description, "vinous, spirituous, malt and brewed liquors, and various admixtures thereof." *Com. v. Reyburg*, 2 L. R. A. 415, 122 Pa. 299.

Whether cider is vinous or spirituous is not a question of law to be decided by the court, but of fact to be determined by the jury. *Com. v. Reyburg*, *supra*.

It repeals local laws fixing a license rate less than provided therein, and it repeals the Act of April 3, 1872, which applied only to Allegheny County, and thereby revives in that county the Act of February 26, 1855. *Com. v. McCandless* (Pa.) 10 Cent. Rep. 758; *Durr v. Com.* (Pa.) 11 Cent. Rep. 181.

So the Act of February 26, 1855, prohibiting the sale of intoxicating liquors on Sunday, is repealed, so far as Allegheny County is concerned. *Com. v. Gedikoh*, 101 Pa. 354.

A person licensed to sell liquor, under the Pennsylvania Law of May 8, 1854, is not exempt from the operation of the Act of May 13, 1887. *Com. v. Sellers* (Pa.) Oct. 29, 1888.

Under the Pennsylvania Act of May 24, 1887, the power of the court of quarter-sessions to grant applications for licenses to sell intoxicating liquors is discretionary. *Re Knarr*, 127 Pa. 554.

The court of quarter-sessions alone has power to grant a license to a distiller to sell his products by the gallon, and the fact that he has taken out a license from the county treasurer is no protection. *Com. v. Sweitzer*, 129 Pa. 644; *Com. v. Baughman*, Id. 651; *Com. v. Shultz*, Id. 651.

It is discretionary with the courts of quarter-sessions, in localities not governed by special statute, as to whether they will grant or refuse a wholesale liquor license to a distiller. *Com. v. Wilson*, 127 Pa. 542.

Licensing sale of liquors.

On application for a license the court cannot, without remonstrance, proceed to consider the

Pennsylvania R. Co. v. Adams, 55 Pa. 499;
Pennsylvania R. Co. v. Keller, 87 Pa. 800.
Mr. J. H. Osmer for appellee.

Clark, J., delivered the opinion of the court:
 A brief reference to the facts of this case will aid in the determination of the questions of law involved. Myron H. Veon, the plaintiff's son, in company with one Shannon, and a young woman named Isabel Silver, on the evening of July 5, 1889, took the train on the Allegheny Valley Railroad at Franklin, and arrived at Emlenton about 7 o'clock on the evening of the same day. They went from the depot directly to the hotel of Patrick Creaton, the defendant. It was alleged at the trial that they had been drinking intoxicating liquors at Franklin; that they had whisky with them and that, when they came to the defendant's hotel in Emlenton, Veon was drunk, or intoxicated, to such an extent that his condition was obvious and apparent to all who saw him; that Veon and Shannon remained for several hours at the hotel, and during their stay there, and while Veon was in this drunken state, the defendant furnished him intoxicating drinks, both beer and whisky, and finally, about 10 or 11 o'clock, ordered him from the house. About 11 o'clock of the same night, Veon, in company with Shannon, after leaving the hotel, got upon the tracks of the Allegheny Valley Railroad, and was struck by the north-bound passenger train a few yards distant from the hotel. Shannon was killed, and Veon so injured as to necessitate the amputation of one leg, and part of the foot of the other leg. His father, the plaintiff, took charge

of his son at Emlenton, procured the necessary surgical and medical aid, and afterwards removed him to his own home, where he was nursed and cared for until his wounds were healed. The father thereupon brought this suit, alleging that he is aggrieved by the act of the defendant, and claiming to recover damages for the injuries sustained. The verdict of the jury establishes the fact that the defendant, on the occasion referred to, did furnish intoxicating liquors to the plaintiff's son when he was in a state of visible intoxication, and that by reason thereof the personal injuries to the son were sustained which are set up by the plaintiff as the ground of his recovery in this case. The Act of May 8, 1854 (Pub. Laws, 663), in the first section, provides that "the willful furnishing of intoxicating drinks, as a beverage, to any person, when drunk or intoxicated, shall be deemed a misdemeanor, punishable," etc.; and, in the third section, as follows: "Any person furnishing intoxicating drinks to any other person, in violation of any existing law, or of the provisions of this Act, shall be held civilly responsible for any injury to person or property, in consequence of such furnishing, and anyone aggrieved may recover full damages against such person so furnishing, by an action on the case."

The only question, therefore, for the determination of this court is whether or not George S. Veon, the plaintiff, who is the father of Myron H. Veon, is a person "aggrieved," or is a person who has sustained an injury to person or property, in consequence of the defendant's criminal act, within the meaning of this section

question whether the applicant is a fit person, but must grant the license unless other persons question the applicant's fitness. *Re Prospect Brewing Co.*, 127 Pa. 523; *Re Pollard*, 127 Pa. 507.

Where an application for a mandamus was made to compel the issue of a license to sell liquor, under the Pennsylvania Act of May 13, 1887, the mandamus was refused, although it was alleged that the court had wholly neglected to exercise the discretion vested in it by the law, but had concluded to grant no license, on the ground that there was an aggregate preponderance of remonstrances over the petition in respect to the issue of such licenses. *Re King's Application* (Pa.) 28 W. N. C. 182.

A decided preponderance of remonstrances against granting a license as compared with the petition is not sufficient to justify refusal of the license, where the applicant is a citizen of temperate habits and good moral character, and keeps a good hotel necessary for public accommodation, and no charge or complaint has ever been made of any violation of law by him, although he has been licensed previously. *Re Sparrow* (Pa.) 26 W. N. C. 74.

An applicant whose moral character is attacked by remonstrances, and who declines to appear in person when ordered to do so by the court for purposes of examination, is properly punished by denial of his application. *Re Wheelin*, 134 Pa. 554.

In granting a license, the Commonwealth does not exempt the licensee from the provisions of subsequent laws regulating the sale of intoxicating liquors. *Com. v. Sellers*, 130 Pa. 32.

Pa. Act April 9, 1890, § 2, prohibiting the issuing of licenses in certain boroughs, prescribing the punishment for a violation of the Act, being unconstitutional because the subject is not clearly expressed in the title, a person who had no license violating the Act by selling liquor in one of the 9 L. R. A.

boroughs is amenable to the General Law of 1887, prescribing the punishment for selling without a license. *Com. v. Frantz*, 135 Pa. 339.

An employé in selling liquors is not protected by his employer's license, where the employer would not be protected. *Com. v. Holstine*, 132 Pa. 357.

License bond exacted.

The approval of a liquor-dealer's bond, from which the name of one of the sureties has been erased, apparently after qualification by the sureties, is discretionary with the court. *Com. v. Wilson*, 127 Pa. 542.

Where a person, on being licensed to keep an inn, filed his bond with sureties and warrant of attorney to confess judgment, conditioned to pay all fines and penalties imposed on him, judgment may be entered thereon for the full amount of the penal sum and the damages laid in the narr. for a fine imposed by the quarter-sessions for illegal sale of liquors on Sunday. *Brown v. Com.* (Pa.) 5 Cent. Rep. 240.

In an action to recover fines imposed for illegal sale of liquor, brought on a license bond, an affidavit of defense that the action was not commenced within six months of the alleged violation; that defendant complied with the alternative of the sentence and had undergone imprisonment and thereby satisfied the sentence; and that no judgment, within the meaning of the Act, had been recovered against such defendant; and that the sureties were not liable for the fine imposed on the principal for the illegal sale, except when sold in his licensed business,—discloses no legal defense, and judgment is properly ordered against the principal and sureties. *Stehle v. Com.* (Pa.) 5 Cent. Rep. 554.

That the principal in a bond has satisfied the fines by submitting to an imprisonment is no reason for the discharge of the sureties. *Ibid.*

of the Act of 1854. As by the words of the Act the defendant is only responsible civilly "for any injury to person or property" in consequence of his unlawful act, a person "aggrieved" must necessarily be one who has suffered "an injury to person or property." The term "property" has not been construed in its strict or literal sense, however; it has been held to embrace the pecuniary interest which a wife has in the life of her husband, and therefore a widow is entitled to recover for the death of her husband. *Pink v. Garman*, 40 Pa. 95.

But even the widow has no right of action, either at the common law or by the statute, except for injuries to her person, or her property, or for her husband's death, and under some circumstances, perhaps, for the death of a child. The reason for this is obvious. During the lifetime of her husband, the right of action is in him, for injuries to his person or his property, and a recovery by both husband and wife, in separate suits, for the same cause of action, was of course never contemplated. Myron H. Veon was twenty-five years of age, and *sui juris*, and if there is any right of recovery for these alleged injuries, in consequence of the defendant's wrongful act, it would seem to be in the son, and not in the father. If the son had been a minor, his father might, perhaps, have sustained a suit for the loss of his services, or, if the son's death had ensued as a result of his injuries, and it was shown that although the son was *sui juris*, the family relation still subsisted, the father might have recovered damages for his death under the Act of 1855; for, in either case, he might be regarded as a person aggrieved within the meaning of the Act of 1854. So, also, if the son, while in this state of intoxication, in consequence of the liquors furnished him by the defendant, had assaulted his father and inflicted personal injuries upon him, or had applied the torch to his father's house, or had mutilated or destroyed his father's property, then the father, being one aggrieved, might have sustained a suit for the injuries suffered. When a minor child has been injured through negligence, a suit may lie in his own right, and another in the right of the father, and both be maintained, for the claim,

in each case, is entirely distinct,—in the former, damages for the personal injuries received, in the latter, damages *per quod servitute amissit*, medical attendance, etc. Where, after suit brought, the infant dies in consequence of the injury, the action will not abate, but will survive to his personal representatives; and, by reason of the death, a right of action may also accrue to the parent. There may, in such case, be a recovery in both suits, for the appropriate or proper damage sustained by the son and by the parent respectively. In all these supposed cases I speak for myself only by way of argument or illustration merely. No such case exists here, and of course what is said in this connection is not authority in any other case. But, in the case at bar, neither the infancy nor the death of the son form any portion of the plaintiff's claim; nor was any relation of master and servant shown to exist. It is unnecessary to discuss the effect of a subsisting family relation, if that relation had been shown to have continued from the time of the son's arrival at age to the time of the injury. There was no evidence to this effect,—no evidence to justify any reasonable inference of the fact,—and it was error to submit the question to the jury. The plaintiff was allowed to recover not for injuries to his person, or his property, or for any pecuniary loss he suffered in the death of his son, but for money which he voluntarily paid, laid out and expended in relief of his son, for surgical skill, medical attendance, nursing, time lost and traveling expenses incurred during his son's illness, and during the period of his restoration from the effects of his injuries. Nor can the plaintiff found a right of recovery upon his contingent liability for his son's support under the Poor Laws. The injuries sustained through the defendant's negligence and wrong may increase the probabilities of the son's becoming chargeable under the Statute, and of the father's ultimate liability for his support, but no liability has yet attached, and *non constat* that any such liability ever will attach; the contingency is therefore too remote. *Fairmount & A. St. P. R. Co. v. Stuller*, 54 Pa. 878; Addison, Torts, § 1274.

The judgment is reversed.

The bond given under the Act of 1872 creates no liability for the payment of a judgment obtained in proceedings under the Act of 1855. *Crawley v. Com.* 123 Pa. 275.

Cancellation of license, and delivery up of bond.

A notice saying, "We want to cancel our license. . . . You will please return our bond to us, and we will return the license to you by return mail,"—is a positive notice of cancellation, and not a mere expression of a wish. *Ireland v. Dick*, 120 Pa. 290.

Under city ordinance.

A city ordinance classifying liquor-sellers into classes according to the amount of their estimated annual sales, and imposing different license taxes on the different classes, does not violate Pa. Const., art. 9, § 1, requiring all taxes to be uniform upon the same class of subjects. *Allentown v. Gross*, 123 Pa. 319.

Civil Damage Act.

The Act 1875, April 12, allowing the wife, etc., of a person in the habit of drinking intoxicating liquors to excess to recover damages for a sale to

such person, and requiring the court to assess the amount of damages, is constitutional. Section 7 is a general regulation of the sale of intoxicating liquors throughout the State, regardless of license or manner of licensing, and is not inapplicable to Allegheny County by reason of the local and special Act of April 3, 1873. *Mardof v. Hemp* (Pa.) 5 Cent. Rep. 720.

A man under the influence of liquor so as not to be entirely himself, although he can walk straight and attend to his business, and may not give any outward and visible sign to the casual observer that he is drunk, is intoxicated, within the meaning of the Pennsylvania Statute relating to the sale of liquors to a man when intoxicated. *Elkin v. Buschner* (Pa.) Nov. 5, 1883.

It is not necessary that a man should know of his own personal knowledge that a person to whom he sells liquor is a man of intemperate habits, in order to make him liable for such sale, under the Pennsylvania statute. It is sufficient if he knows that such is the reputation of the person to whom he sells. *Ibid.*

See note to *Fletcher v. Forier* (Mich.) post, —, and cases referred to.

SOUTH DAKOTA SUPREME COURT.

John ROSUM, *Resp.*,
v.

L. F. HODGES *et al.*, *Appls.*

(....S. Dak....)

*1. A party has no right to cross-examine a witness except as to the facts and circumstances connected with the matters stated in his direct examination.

2. Whether, under section 4603, Comp. Laws, providing that "the detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with the interest from that time, or, (2) where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party," etc., the plaintiff must be held to have elected to have his damages assessed under the first rule, by demanding in his complaint interest on the value of the property alleged to have been converted, is not decided; but where in such case the defendant has, without objection, admitted plaintiff's evidence going directly and specifically to the highest market value, such evidence being the only testimony as to damages, nothing occurring during the entire trial to suggest to the court that defendant disputes plaintiff's right to such measure, the court is justified in assuming that both parties agree to that rule of damages, and in instructing the jury accordingly.

*Head notes by KELLAM, J.

3. Where personal property is taken from the true owner tortiously, and by the wrong-doer sold to an innocent purchaser, the true owner, having been guilty of no wrong or negligence, may maintain an action for the recovery of the property or its value without previous demand.

(November 24, 1890.)

APPEAL by defendants from a judgment of the District Court for Minnehaha County in favor of plaintiff in an action brought to recover damages for the alleged conversion by defendants of plaintiff's flax-seed. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Bailey, Davis and Lyon, for appellants:

The plaintiff, by taking the benefit of Gerde's acts in selling the flax and applying a portion of the proceeds to the payment of plaintiff's debt, directly ratified Gerde's act to that extent, and confirmed the sale to that amount.

The sale of the grain by Gerde was an indivisible transaction, and the ratification of a part of it was a ratification of the whole.

Civ. Code, § 1850; Comp. Laws, § 3973; Story, Ag. § 250; *Mills v. Hoffman*, 92 N. Y. 189; *Seago v. Martin*, 6 Helsk. 308.

It was error for the court to charge the jury that no demand was necessary.

Gillet v. Roberts, 57 N. Y. 28; 6 Wait, Act. and Def. 207.

In the most favorable view for the plaintiff

NOTE.—Conversion; demand before suit, when not necessary.

Conversion may be shown by other evidence than demand and refusal. *Taylor v. Lyon* (Pa.) 12 Cent. Rep. 365.

To maintain an action brought by a woman against the estate of her husband, based on his appropriation, without her consent, of the proceeds of her separate property, no previous demand is necessary. *Armstrong v. Lindley*, 118 Ind. 295.

No previous demand is necessary to maintain an action of trover for a wrongful conversion of property, against a purchaser from one without title, and the possession of which is given to the purchaser by a warehouseman on the order of the seller and without the consent of the depositor. *Velasian v. Lewis*, 15 Or. 539.

Wrongful attachment and levy.

Where certain persons levied an attachment on corn, which had been set apart as an exemption under section 3040 *et seq.* of the Code, without any oath to subject it as for purchase money, seized it, carried it into another county and put it into their crib, and they afterwards obtained judgment, had execution issued and levied upon it, and bought it themselves, no demand and refusal was necessary in order to recover against them in trover. *Braswell v. McDaniel*, 74 Ga. 319.

An officer who levies an attachment so far represents the creditor as to entitle him, in an action against him for a conversion of the property, brought by an assignee for creditors, to contest the validity of the assignment, although the attachment has been set aside as having been erroneously issued, where there has been no subsequent demand for a return of the property. *Lux v. Davidson*, 66 Hun. 345.

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Sale of converted property.

If goods converted have been sold by defendant, proof of demand and refusal is not necessary. *Taylor v. Lyon* (Pa.) 12 Cent. Rep. 365; *Velasian v. Lewis*, 15 Or. 539.

In the case of a conversion by a wrongful taking of the chattel, it is not necessary to prove a demand and refusal; and so the wrongful assumption of the property, and of the right of disposing of it, may be a conversion in itself, and render a demand and refusal unnecessary. *University of N. C. v. State Nat. Bank*, 96 N. C. 290.

Where one in possession of personalty, but without title thereto, sold the property and received the proceeds for his own use, this was a conversion, and a demand and refusal to deliver was not necessary before the bringing of an action of trover by the owner; nor does the fact that he sold the property in good faith make the act less a conversion than would his refusal in good faith to deliver the property on demand. *Branch v. Planters L. & S. Bank*, 75 Ga. 343.

A tender or demand is not necessary to render a mortgagee in possession of chattels liable in trover, where he has sold a portion of the chattels for enough to pay the debt, and denies the title of the debtor to the balance. *Hier v. Baker* (Mich.) Aug. 1, 1890.

A defendant in an action for the conversion of personal property, who alleges in his answer that he is the owner of the property, and admits on the trial that he sold it and received the proceeds, thereby waives his right to object to the want of demand before suit. *Reading v. Lamphier* (Sup. Ct.) 31 N. Y. S. R. 53. See, generally, note to *Hayes v. Massachusetts Mut. L. Ins. Co.* (Ill.) 1 L. R. A. 303.

the question of demand should at least have been submitted to the jury.

Delano v. Curtis, 7 Allen, 470.

Messa, Winsor & Kittredge and H. Robinson, for respondent:

A demand was only necessary when the party came in possession of property rightfully, *i. e.*, with the consent of the owner of the property, and by authority or process of law.

Stanley v. Gaylord, 1 Cush. 536; *Galvin v. Bacon*, 11 Me. 28; *Smith v. McLean*, 24 Iowa, 322; *Eldred v. Oconto Co.* 33 Wis. 138.

Kellam, J., delivered the opinion of the court:

Respondent was the owner of certain flaxseed in his granary, on his farm in Minnehaha County. During his absence from home, and without his knowledge or consent, Gerde, his hired man, hauled to appellants' elevator, and sold and delivered to appellants, a quantity of such flax, receiving the pay therefor. Appellants bought innocently, supposing Gerde had a right so to sell. Immediately after the sale, Gerde absconded with the proceeds, with the exception of a small amount, noticed hereafter. The action was brought against appellants for the conversion of the flax. Respondent had judgment, and appellants appeal.

The first and second assignments of error are entirely ignored in appellants' brief and argument, and, as error in respect to either is not apparent to the court, they are passed without discussion.

The third error alleged is the exclusion of the testimony of witness Haugen in answer to the question, "Did you have any talk with Mr. Rosum in regard to \$10 of this money that Mr. Johnson paid you, if he paid any?" This question was propounded to the witness Haugen upon his cross-examination, to which respondent objected. Apparently in response to such objection, and without waiting for any ruling of the court thereon, appellants' counsel made the following offer: "We offer to show that Mr. Johnson, the witness last on the stand, borrowed of Gerde \$10 of the money that was received from the grain in question in this suit; that he saw Mr. Rosum after Gerde had gone away, and told him of the transaction with Gerde, and offered to pay it to Mr. Rosum, and Mr. Rosum told him that he might keep it to apply on the wages that he owed him for services; that Mr. Rosum knew at the time that the money came from the grain in question; and that he said he would not take it himself, for fear it might have some effect upon his claim upon the defendants, but he would allow him to keep it to apply on his wages,"—to which respondent's counsel also objected, among other grounds stating that it was not proper cross-examination. This objection was sustained by the court, as we think it should have been. The direct testimony of this witness was only that he, in company with Gerde, hauled twelve sacks of the flax in controversy from Rosum's place to appellants' elevator. It had no other force or bearing than to show the single fact that so much of respondent's flax had been taken from his granary to appellants' elevator, and the manner of its transfer. The question presented to the witness, as well as

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the matter proposed to be proved by him, was entirely outside of and distinct from his direct examination. Cross-examination, both in the learning of the books and the practice of the courts, is confined within the limits of the examination in chief, or, as tersely stated by the court in *Philadelphia & T. R. Co. v. Simpson*, 39 U. S. 14 Pet. 460 [10 L. ed. 541]: "A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination." Of course the trial court may, under justifying circumstances, in its discretion, allow the range of cross-examination to be extended beyond the strict rule, but such a case is not presented here. In this case appellants offered evidence obnoxious to the rule; the court excluded it; and such ruling constitutes the alleged error. The assignment cannot be sustained.

The next error assigned is that the court erred in instructing the jury on the question of damages as follows: "The plaintiff in this case, so far as the measure of damages is concerned, has (and he has a perfect right to do it, under the Statute) decided to take the highest market value of that flax between the date of its conversion and the time when you shall have arrived—if you agree—at a verdict. That being the case, the law says that you shall not add to the amount which you shall find due the plaintiff—if you find in his favor—any interest; so that the only question, if you should find that the plaintiff was entitled to recover in this action, would be the highest market value of the flax between the time of its conversion and to-day, or whenever you agree upon a verdict."

Under our Statute (§ 4603, Comp. Laws), "the detriment caused by the wrongful conversion of personal property is presumed to be, (1) the value of the property at the time of the conversion, with the interest from that time; or, (2) where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party," etc. Under this Statute the respondent was entitled, if the action had been prosecuted with reasonable diligence, to make his election between the first and the second measure of damages, but the Statute is silent as to when and how such election shall be manifested.

In *Pickert v. Rugg* (N. Dak.) 46 N. W. Rep. 446, it was held that, to entitle a party to the highest market value between the time of the conversion and the rendering of the verdict, it must affirmatively appear that the action was commenced and prosecuted with reasonable diligence, and that a delay of eleven months in bringing action was fatal to the claim of such reasonable diligence. In this case, however, the alleged conversion occurred on the 22d day of November, 1888, during respondent's absence from the State, which absence continued until December 16 or 17. The action was commenced on the 26th day of February, 1889, and tried at the ensuing April Term. This, we think, was reasonable diligence.

The next inquiry is as to respondent's right to exercise his election as to the rule of damages upon the trial. Appellants claim that respondent had already made his election, and

declared the same in and by his complaint, which demanded judgment for "the sum of two hundred and sixty-six and eighty-five hundredths dollars, with interest from the 26th day of November, 1888;" that as, by the terms of the Statute, the first measure of damages should include interest, and the second should not, the demand of interest was a plain election of the first measure. Upon this question we express no opinion; but, conceding this view to be correct, it was clearly competent for the parties, upon the trial, by mutual consent, to adopt the other measure. Upon the trial the only evidence upon the question of damages was that going directly and exclusively to the highest market value of the flax intermediate the conversion and the trial, and, except upon the theory that respondent was then and there entitled to recover such damages, such evidence was clearly inadmissible, but neither objection nor suggestion of its inadmissibility was made. The appellants, by failing to object in any manner to such testimony, either by preliminary objection or subsequent motion to strike out, plainly consented that it was admissible and proper. By admitting the same unchallenged, appellants gave the court to understand that the respondent was entitled to prove such fact, and that he consented to it as tending to show the damages he was properly entitled to recover, if any. It will not do to say that the court had the complaint before it, and must have known from it that respondent had already exercised his option, for, if that were all so, the appellants might still be willing to waive their right, if they had such right, to hold respondent bound by such first election; and how could they have more plainly manifested such willingness than by consenting to the introduction of evidence that would have been inadmissible under any other theory? As above stated, the evidence as to the measure of damages—to wit, the highest market value of the flax between the alleged conversion and the verdict—was distinct, pointed and direct, and the appellants must have understood its object and significance. By so consenting to its admission, they conceded that it might be regarded as proper evidence in the case. *Warder B. & G. Co. v. Inglis* (S. Dak.) 46 N. W. Rep. 181; *Becker v. Becker*, 45 Iowa, 239.

In *Colrick v. Swinburne*, 105 N. Y. 503, 10 Cent. Rep. 701, the complaint demanded damages according to a measure therein declared. Upon the trial, evidence was offered and received without objection tending to show damages under a different rule or measure from that indicated in the complaint. In its opinion the Court of Appeals says: "It is a sufficient answer to the objection that the plaintiff, by his bill of particulars, was confined to a recovery of damages of the exact nature therein specified; that the objection was not taken until the close of the plaintiff's proofs, and after the evidence of the rental value had been given, without raising any question that it was not competent on the ground of variance from the bill of particulars." In this case nothing occurred during the entire trial, as shown by the record, to suggest to the court that appellants disputed or questioned respondent's right to recover the

highest market value of the flax between the time of conversion and the trial, if he was entitled to recover at all; but, on the contrary, the evidence offered by respondent, and received without objection by appellants, clearly led the court to understand that both sides were trying the case upon that theory. We think the evidence in the case fully justified the instruction of the court.

The next assignment alleges error in the charge of the court upon the question of authority of Gerde to sell the flax. We do not stop now to examine this instruction in respect to the error alleged, for the reason that there is no evidence in the case tending in any degree to show authority, either express or implied, in Gerde to sell the flax. If the jury had so found under any instruction we think it would have been the duty of the court to set such verdict aside.

The next and last assignment is that the court erred in charging the jury that no demand was necessary before bringing the action. The question as to whether, without previous demand, an action for the conversion of personal property can be maintained against an innocent purchaser of such property from one who tortiously obtained the same from the owner, has been and still is the subject of frequent and elaborate discussion in the courts.

In *Stanley v. Gaylord*, 1 Cusb. 586, the question was examined at great length, both upon principle and as affected by the rules applicable to and distinguishing the actions of trespass, trover and replevin, and the court concludes (Wilde, J., dissenting) that trespass may be maintained without demand.

In *Hyde v. Noble*, 18 N. H. 494, it was held that the purchase of property from one who had no power to sell, when the purchaser took a delivery of it, and retained possession under the sale, was in itself a conversion by the purchaser, sufficient to enable the owner to maintain trover against him without a previous demand.

In *Trudo v. Anderson*, 10 Mich. 857, the court held that, where one's property is disposed of without authority by the person having it in charge, the owner may bring replevin therefor without a previous demand, and he may do this notwithstanding the property is in the hands of one who has bought in good faith, and without notice of the title of the real owner; and, after discussing at some length the necessity of a previous demand in such a case, the court says: "We do not think the question of intent or of good faith in a party receiving possession from a wrongful taker in such cases, and where the owner has been guilty of no wrong or negligence, can have any bearing upon the right of recovery in a civil action for the property or its value, and such is clearly the weight of authority both in England and in the United States." And this doctrine was reiterated in *Bailou v. O'Brien*, 20 Mich. 804. It is also so held in *Galein v. Bacon*, 11 Me. 28; *Whitman G. & S. Min. Co. v. Trille*, 4 Nev. 494; *Clark v. Lewis*, 85 Ill. 417; *Shoemaker v. Simpson*, 16 Kan. 43; *Eldred v. Oconto Co.* 33 Wis. 183; *Smith v. McLean* 24 Iowa, 822.

announced and has been adhered to in that State.

In *Barrett v. Warren*, 3 Hill, 348, Cowen, J., referring to the rule announced in *Storm v. Livingston*, and followed in later cases in New York, used the following significant language: "I will not, however, deny that an exception in favor of the taker, where he is a bona fide purchaser from the wrong-doer, has found its way into the books; nor that, however discordant it be with established principles, it may, at least in this State, have become too inveterate to be displaced." The rule adopted in New York seems also to have been followed in Indiana. See *Wood v. Cohen*, 6 Ind. 455, and *Connor v. Comstock*, 17 Ind. 90.

In *Eldred v. Oconto Co.*, *supra*, the Supreme Court of Wisconsin, after noticing the fact that the New York courts have uniformly held as above indicated, says: "But we find a decided weight of authority the other way, and we are satisfied that the New York rule is not sound in principle." Upon principle, it is not easy to give a satisfactory reason why the true owner, who has been guilty of no wrong or negligence, should be prejudiced by a transaction between the wrongful taker of his property and a third person, or how such a transaction can impose upon him a new obligation. Having been guilty of no act impairing, or in any manner qualifying, either his right of property or his right of immediate possession, he may assert such right whenever and wherever he finds his property. The wrongful taker had no rightful possession against the true owner, and he could convey none to another. In this case the respondent was deprived of the possession of his property by the tortious, if not felonious, act of Gerde, and appellants' claim to the same comes through such tortious taking. The taking did not deprive respondent of his right in and to the property so taken, neither could its sale by the wrongful taker. It remained the absolute property of respondent, as much after as before the sale. The possession of appellants being wrongful as against respondent, the true owner, no previous demand was necessary before bringing the suit for the property or its value.

Referring to the apparent equity of the New York doctrine as applied to cases where the purchaser was clearly innocent, the Supreme Court of Michigan says, in *Trudo v. Anderson*, *supra*: "The principle upon which the New York rule rests might properly have some weight with the court upon a question of costs where these are discretionary, or might justify the Legislature in refusing costs to the plaintiff where a previous demand could have been made without serious risk or inconvenience, and the suit has been brought without such demand; but we think the principle of the rule cannot properly be extended to the right of action." Upon the case presented by the evidence, the instruction complained of was correct.

The judgment of the District Court is affirmed.
All the Judges concur.

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See also 18 L. R. A. 37.

ISSAC A. MURPHY, Resp.

(.....S. Dak.....)

1. It has been settled upon sound considerations of public policy that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity or misconduct of the jury or of some one or more of the panel.
2. The only exceptions to this rule are those in which the Legislature has by express enactment authorized such attack upon the verdict by those rendering it.
3. From the mere fact that a grandson lived with, and made his home with, his grandfather before he became of age, and rendered him service, the law will not imply any contract to pay therefor.
4. The evidence of a contract to pay in such a case must be positive and direct. It must be such as will warrant a jury in finding that there was an express agreement to that effect.
5. Where instructions are given, stating positively that, when a grandson lives with and works for a grandfather, the relation of parent and child exists, it is error to charge the jury that the grandson can recover the value of such services upon an implied contract.

(November 24, 1890.)

A PPEAL by plaintiff from a judgment of the District Court for Minnehaha County allowing defendant's counterclaim for services performed, which was interposed in plaintiff's action brought to recover the amount alleged to be due on certain promissory notes. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Palmer & Rogde, for appellant:

When at the close of the defendant's evidence it appeared that the relation of parent and child existed between the plaintiff and defendant, and that no express contract existed, it was the duty of the court to have granted plaintiff's motion for a direction of a verdict.

*Head notes by BENNETT, J.

NOTE.—Juror cannot impeach his own verdict.

A juror cannot be heard to impeach his own verdict. *State v. Bird*, 88 La. Ann. 497; *State v. McNamara*, 100 Mo. 100.

Evidence of jurors cannot be received to impeach the correctness of an answer to a special interrogatory, by proving that the word "Yes" was written and returned as the answer instead of "No." *McKinley v. Crawfordville First Nat. Bank*, 118 Ind. 375.

Jurymen are not permitted to impeach their own verdict by direct testimony that they acted upon improper and illegal motives; much less can their declarations that they so acted be proved by others, particularly by a fellow juror. *State v. Morris*, 41 La. Ann. 785.

Testimony of jurors will not, in general, be received to impeach their verdict. *Bartlett v. Patton*, 5 L. R. A. 523, 33 W. Va. 71; *Elam v. Commercial Bank (Va.)*, 13 Va. L. J. 894.

It is not admissible to show the misconduct of

Davis v. Goodenough, 27 Vt. 715; *Williams v. Hutchinson*, 8 N. Y. 812; *Duffey v. Duffey*, 44 Pa. 402; *Hall v. Finch*, 29 Wis. 278; *Pellage v. Pellage*, 82 Wis. 186; *Tyler v. Burrington*, 39 Wis. 876; *Wells v. Perkins*, 48 Wis. 160; *Leidig v. Coovers*, 47 Pa. 584; *Traver v. Shiner*, 65 Iowa, 57; *Builer v. Stam*, 50 Pa. 456; *Swires v. Parsons*, 5 Watts & S. 357; *Lantz v. Frey*, 14 Pa. 201; *Murdock v. Murdock*, 7 Cal. 511; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Ormsby v. Rhoades*, 59 Vt. 505; *Spragus v. Waldo*, 88 Vt. 139; *Mulhern v. McDavitt*, 16 Gray, 404.

The misunderstanding between the court and jury while in the jury box in open court upon the return of the verdict is the injury complained of by the appellant here. When it appears by the affidavits of jurors or otherwise that such errors exist it is clearly the duty of the court to set such erroneous verdict aside and grant a new trial.

Capen v. Stoughton, 16 Gray, 864; *Heffron v. Gallupe*, 55 Me. 563; *Cutler v. Cutler*, 48 Vt. 680; *Newkirk v. State*, 27 Ind. 1; *Wright v. Mississippi & I. Teleg. Co.* 20 Iowa, 195; *Perry v. Bailey*, 12 Kan. 589; *Little v. Larrabee*, 2 Me. 87; *Jackson v. Dickenson*, 15 Johns. 309; *United States v. Reid*, 58 U. S. 12 How. 361, 18 L. ed. 1023.

Mr. U. S. G. Cherry, for respondent:

Except where statutes provide otherwise, modern practice has been uniform not to entertain a motion to set aside the verdict on the ground of error, mistake, partiality, irregularity or misconduct of the jury, or any of them, on the testimony or affidavits of one or more jurors.

Polhemus v. Heiman, 50 Cal. 438; *Turner v. Toulumne County Water Co.* 25 Cal. 898; *Hoare v. Hindley*, 49 Cal. 275; *People v. Gray*, 61 Cal. 183; *Graham & Waterman*, New Trials, 1429, 1430; *Hayne*, New Trials, § 73; *Newton v. Booth*, 13 Vt. 320, 37 Am. Dec. 596; *Bennett v. Baker*, 1 Humph. 399, 34 Am. Dec. 13, 655; *Smith v. Eames*, 4 Ill. 76, 38 Am. Dec. 515; *Norris v. State*, 3 Humph. 335, 39 Am. Dec. 175; *Clark v. Carter*, 12 Ga. 500, 58 Am. Dec. 485.

If a child, after arriving at majority, renders valuable services to the parent a contract to pay for the same may be implied, but strong circumstances are required to raise such implication. If the relation is more distant than

that of parent and child, and valuable services be rendered, a contract to pay for the same may be implied, and less strong circumstances are sufficient to raise the implication; and where the relationship is distant, very slight circumstances are sufficient. Whether facts and circumstances surrounding the employment are sufficient to overcome the presumption that the services were gratuitous, is a question of fact to be submitted to the jury, and their conclusion thereupon will not be disturbed by the court. If the services be rendered at the request, procurement or by the arrangement of the party receiving the same, and the relationship be more distant than that of parent and child, this fact alone is sufficient to sustain a verdict for compensation.

Wood, Mast. and Serv. §§ 72, 73; *Schouler*, Dom. Rel. § 274; *Hart v. Hart*, 41 Mo. 444; *Thornton v. Grange*, 66 Barb. 507; *Mountain v. Fisher*, 22 Wis. 98; *Doane v. Doane*, 46 Vt. 485; *Briggs v. Briggs*, Id. 571; *Andrus v. Foster*, 17 Vt. 556; *Cobb v. Bishop*, 27 Vt. 624; *Way v. Way*, Id. 625; *Davis v. Goodenough*, Id. 715; *Putnam v. Town*, 84 Vt. 429; *Friermuth v. Friermuth*, 46 Cal. 43; *Freeman v. Freeman*, 65 Ill. 106; *Smith v. Milligan*, 48 Pa. 107; *Schoch v. Garrett*, 89 Pa. 144; *Roberts v. Swift*, 1 Yeates, 209; *Steel v. Steel*, 12 Pa. 64; *DeCamp v. Wilson*, 81 N. J. Eq. 656; *Guild v. Guild*, 15 Pick. 129; *Corey v. Corey*, 19 Pick. 29; *Smith v. Denman*, 48 Ind. 66; *Rogers v. Millard*, 44 Iowa, 466; *Price v. Price*, Cheves, Eq. 167, 84 Am. Dec. 608.

Bennett, J., delivered the opinion of the court:

The plaintiff and appellant brought his action on two promissory notes, aggregating, principal and interest, at the time of trial, \$888. The defendant makes no defense to the notes, but alleges, by way of counterclaim, that the plaintiff is indebted to him in the sum of \$2,162, with interest from July 3, 1888, for work and services performed by defendant for plaintiff. The plaintiff put in a general denial to the counterclaim. A trial was had upon the issues and a verdict rendered by the jury as follows: "We, the jury in the above-entitled cause, find in favor of the defendant, Isaac Murphy, and assess his damages, over and above the amount claimed in the complaint, at

the jury as a ground for setting aside the verdict. *State v. Harper*, 101 N. C. 761.

Jurors cannot impeach their own verdict by depositions after their discharge, for the purpose of showing a misunderstanding of an answer to one of the questions submitted by the court. *Coleman v. Slade*, 75 Ga. 61.

Neither the testimony of jurors, nor their declarations out of court after their verdict, are competent evidence to prove irregularities in considering the verdict. *Shepherd v. Camden*, 82 Me. 586.

Declarations made by a juror after the verdict has been rendered are not admissible to impeach the verdict on a motion for a new trial; nor could his direct testimony to his own misconduct in the jury room be received for that purpose. *Warren v. Spencer Water Co.* 3 New Eng. Rep. 502, 143 Mass. 155; *Lafoon v. Shearin*, 95 N. C. 391.

Affidavits of jurors cannot be received to impeach their verdict. *International & G. N. R. Co. v. Gordon*, 73 Tex. 44; *People v. Stimer* (Mich.) July 2, 1890; *Tarbell v. Tarbell*, 6 New Eng. Rep. 353, 60 9 L. R. A.

Vt. 486; *Cattell v. Dispatch Pub. Co.* 3 West. Rep. 843, 88 Mo. 356; *Ward v. Blackwood*, 48 Ark. 866; *People v. Pratt*, 78 Cal. 388; *Jones v. Parker*, 97 N. C. 33.

Affidavits of jurors are not admissible to show what their understandings of the facts were and upon what ground they rendered a verdict in order to support a motion for a new trial. *Wills Point Bank v. Bates*, 73 Tex. 137.

While not favored, they may be considered upon the question whether the verdict was a gambling verdict. *East Tennessee & W. N. C. R. Co. v. Winters*, 85 Tenn. 240. See *State v. Harper*, 101 N. C. 761.

Affidavits of jurors, though not receivable to impeach or avoid their verdict in respect to a matter which essentially inheres in the verdict itself, may be received in Nebraska as to overt acts, such as all jurors present may with equal knowledge testify to. *Harris v. State*, 24 Neb. 303.

See generally note to *Bartlett v. Patton* (W. Va.) 5 L. R. A. 523.

intended to move the court to vacate and set aside the verdict and grant a new trial, for the following reasons: (1) misconduct of jury; (2) accident and surprise, which ordinary prudence could not have guarded against; (3) excessive damages, appearing to have been given under the influence of passion and prejudice; (4) insufficiency of the evidence to justify the verdict, and that it is against the law; (5) errors of law occurring at the trial, and excepted to by plaintiff.

With the notice of intention to move for a new trial, the following affidavit of the jurors was filed:

Territory of Dakota, }
County of Minnehaha. } ss.

H. C. Aldrich, Ira Winter, John Fortune, Henry Brandt, C. C. Metcalf, C. H. Wangsness, D. O. Crooks, James Riley, Allen Gould, Thos. Rickard, William Hodgkinson and James N. Corothers, each being first duly sworn, depose and say that they were members of the jury who rendered a verdict in the case of *John Murphy v. Isaac A. Murphy*, in the District Court in and for said County and Territory, on the twenty-seventh day of November, 1888; that, in considering what verdict to render in said case, the jury agreed that a verdict of about two dollars (\$2) in favor of the defendant would be proper and correct, but, through the mistake and misunderstanding of said jurors, a verdict of six hundred and ninety dollars (\$690) in favor of the defendant was rendered. The deponents further say that said mistake and accident happened in this way: The plaintiff in the above-mentioned action claimed there was due him from the defendant, on two promissory notes, the sum of six hundred and twenty-five dollars (\$625), with interest. The defendant set up a counterclaim of two thousand one hundred and sixty dollars (\$2,160), for work and labor performed. After considering the evidence, said jurors agreed to offset the plaintiff's notes and give the defendant about two dollars (\$2) over and above said notes, making a sum total of six hundred and ninety dollars (\$690); deducting therefrom the amount the plaintiff claimed, left a balance in favor of the defendant of about two dollars (\$2), but in framing their verdict the said jurors disagreed, some claiming a verdict reading six hundred and ninety dollars (\$690) in favor of the defendant would express their intention properly and some two dollars (\$2). After some discussion, the majority concluded the first would be correct, but instructed their foreman to ask the advice of the court on the matter before delivering the verdict. This the foreman attempted to do, but, as the deponents verily believe, he through some misunderstanding failed to obtain the information wanted, and the verdict remains as first written. The deponents further say that, believing the court had understood the foreman in his attempt to get the information required, and that the court had decided that the verdict as written conveyed the meaning intended, they answered "Yes" to the question if it was their verdict. The deponents further say that the verdict rendered was not the one intended; that the result

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in the case was inconsistent with the verdict rendered.

C. C. Metcalf.
Jas. E. Riley.
D. O. Crooks.
H. P. Brandt.
Wm. Hodgkinson.
Thos. Rickard.
Allen Gould.
H. C. Aldrich.
J. P. Winter.
C. H. Wangsness.
John Fortune.
James N. Corothers.

A bill of exceptions was settled on the 27th day of March, 1889, being the evidence introduced and exceptions taken during the trial, together with the notice of motion for new trial, and the affidavit of jurors upon the record of the court. At the regular April Term the motion for a new trial was brought on for hearing. The defendant moved that the foregoing affidavit be stricken from the files and disregarded, upon the ground that said affidavit was improper, incompetent and inadmissible, and contrary to law. This motion was sustained and the affidavit was stricken from the files. To the granting of this motion, plaintiff excepted. The motion for new trial was heard, and was overruled and denied, to which order of the court plaintiff excepted. A judgment was then rendered in accordance with the verdict and an appeal duly taken. A large number of assignments of error was filed, but, for the purpose of fully reviewing the case, these may be grouped under two heads: (1) the errors committed on the hearing of the motion for a new trial, in denying the same, and granting the order striking the affidavit of the jurors from the files of the case; (2) the errors of law committed upon the trial, in refusing to direct a verdict for plaintiff as requested upon the trial, and also in the law of the case as given to the jury by the court.

1. As to the first of these alleged errors, it has been settled upon sound considerations of public policy that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity or misconduct of the jury, or of some one or more of the panel. This rule is conceded by counsel for appellant, but he insists that in the present case the mistake which is proved by the testimony of the jurors is of a different character and nature from those from which the general rule emanated; that it is not one connected with the consultation of the jury or the mode at which the verdict was arrived at or made up. No fact or circumstance is offered to be proved which occurred prior to the determination of the case by the jury and their final agreement on the verdict which was to be rendered by them. But the evidence of the jurors is offered only to show a mistake, in the nature of a clerical error, which happened after the deliberations of the jury had ceased and they had actually agreed upon their verdict. The error consisted, not in making up their verdict on wrong principles, or on a mistake of the facts, but an omission to state correctly in

writing the verdict to which they had honestly and fairly arrived; in other words, a case of a mere formal and clerical error, which, despite the general rule, the court ought to interfere to correct, in order to protect the rights of parties. This contention on the part of the appellant seems to be just and right, and highly salutary and reasonable, and we should be inclined to hold with him if it were not for the adjudications of a court of the highest standing and ability to the contrary, viz., the Supreme Court of California, the Statutes of which State upon new trials are identical with our own. While we do not wish to be understood that the decisions of that court are conclusive upon us in such case, yet when we are asked to make an exception to a general and unreversed rule, it will be safest, to say the least, to make these exceptions as few as possible, that the rule may not be obliterated in time by the numerous exceptions that may be made to govern special cases. The statutory grounds upon which the affidavit of jurors is permitted to be heard are: "Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." Comp. Laws, subd. 2, § 5068.

The above subdivision is a literal copy of the California Statute upon that subject, and has been before the Supreme Court of that State several times.

The facts in the case of *Polhemus v. Heiman*, 50 Cal. 438, are very similar to the one under consideration, and are as follows: The defendants on the trial admitted that they owed the plaintiff \$578.75, but claimed, as due them on the counterclaim, \$932.48, thus making a balance in their favor of \$353.73. The jury rendered a verdict in favor of defendants for \$660.16, which was \$306.43 more than they claimed. The defendants remitted the surplus and took judgment for the amount they claimed. The plaintiffs, on motion for a new trial, filed affidavits of the jurors that they rendered their verdict with the understanding that the amount admitted to be due to the plaintiff would be deducted by the court from the amount found in the verdict and that judgment would be rendered for the balance, viz., the sum of \$81.41. The plaintiff appealed. In considering the case the court says: "In this State the affidavits of jurymen cannot be received to defeat or impeach a verdict. The prohibition extends beyond cases of willful misconduct on the part of jurors, and to every case in which the affidavits are attempted to be used as ground for setting aside a verdict because of a misunderstanding of its effect by some or all of the jurors who unite in its rendition. The only exceptions to this rule are those in which the Legislature has by express enactment authorized such attack upon the verdict by those rendering it." See also *Boyce v. California Stage Co.* 25 Cal. 474.

The language of such an authority is entitled to and does receive great consideration from all judicial tribunals. If the conclusions we have come to are seemingly harsh, and may be unjust so far as the plaintiff in this case is con-

cerned, he could have been fully protected at the time the verdict was rendered. The verdict could have been scrutinized, and, from the circumstances transpiring at the time of its delivery into court, the verdict could have been read to the jury and it polled before discharged, and if any disagreed with it they could have been sent to their room to have returned a new verdict that would have expressed their determination. Upon the first proposition of appellant, we say the court committed no error.

2. Did the court err in refusing to direct a verdict for plaintiff as requested upon the trial, and also in the law of the case as given to the jury in the charge? From the evidence upon the trial, the court charged the jury as matter of law as follows: "There is a legal and moral obligation resting upon the parent to provide for, educate and take care of his minor children until they arrive at the age of majority. That being so, the law imposes a correlative duty or entitles the parent to the benefit of the earnings of the child during his minority. Out of that existing state of things arises this presumption: That, where a child performs labor for its parents without an express or implied agreement or contract that the child shall receive compensation therefor, it must be presumed that the services were gratuitous, and that the child cannot recover therefor. Of course this presumption grows less and less as the distance from the parent tree increases. But I am of the opinion, and so charge you, that the law is that a grandson working for a grandfather—that the same presumption exists there, in the absence of any proof of an express or implied agreement by the parties that the grandson shall receive wages for what he did. If you believe from all the evidence in this case that the defendant, Isaac Murphy, was taken into the family of the grandfather, and treated as one of the family, and that there was no contract, either express or implied, and that neither party, the defendant or the plaintiff, understood or expected that there was any remuneration for the services rendered, then I say to you, gentlemen, if you find this state of facts to exist from all the evidence in the case, the defendant cannot recover in this action upon his counterclaim. . . . You are to determine from all the evidence in the case, the facts testified to and surrounding this employment, its origination and its termination, and determine from that evidence whether or not there was any contract, expressed or implied, between these parties, which would authorize you to find that the services were to be paid for." This instruction declares that a parent is bound by law to provide for, educate and take care of his minor children, and for this duty the law entitles the parent to the benefit of the earnings of the child during his minority; and the presumption is that, in the absence of an express or implied agreement that compensation shall be paid the child, the labor of the child is gratuitous. The court then, in the same instruction, says: "I am of the opinion, and so charge you, that the law is that a grandson working for a grandfather—that the same presumption exists there, in the absence of any proof of an express or implied agreement by the parties that the grandson shall receive wages for what he did."

arises (and the court announced to the jury that it did arise in the case at bar), either as a matter of law or of fact, can a recovery for wages due or labor performed by the child for the parent be had on an implied contract? If so, what is the necessity of making the distinction between parent and child and other persons where this relationship does not exist? Authorities are numerous, and perhaps unconflicting, that express contracts made between parent and child that the child shall be paid wages for his labors during a portion of all his minority will be enforced, but it is for the child to establish such a contract before it is entitled to recover; but we know of none where an implied contract exists to that effect, unless there are facts or circumstances that indicate that it was clearly understood by the parties that the services were to be paid for.

In a leading case, *Pellage v. Pellage*, 32 Wis. 141, Judge Cole says: "The only other exception arising upon the record material to be considered is the one taken to the refusal of the court to give the instructions asked on the part of the defendant. These instructions are as follows: 'If the jury find that the plaintiff, except during short intervals, resided with his father, the defendant, had there his board and clothing and whatever in the way of money he needed, the same as any other member of the family, and that there was at no time any agreement what he was to receive as compensation, then he cannot recover. To entitle the plaintiff to recover, he must show that he had an agreement with the defendant that he was to be paid for his services, either at a fixed price or what they should be worth.' Were not the instructions correct as propositions of law, and can it fairly be assumed that the defendant was not prejudiced by the refusal of the court to give them? The relation between these parties was that of father and son. And where such a relation of kindred exists, it is well settled that the law will imply no promise on the part of the father to pay for the services of the son rendered by the latter after he arrives at age. The presumption is that the child renders the service gratuitously, or in consideration of having a home with his father, of being furnished with board and clothing and of receiving care and attention in case of sickness. And, therefore, in order to sustain an action for compensation for services by a child against the father, this court has, in effect, held in several cases that it must be shown by the evidence that a contract existed between the parties to pay for such services, and that such a contract, as to proof of its existence, is not to be placed on the same grounds as 'a contract between strangers, unaffected by any personal relation.'" *Fisher v. Fisher*, 5 Wis. 472; *Kaye v. Crawford*, 22 Wis. 331; *Hall v. Finch*, 29 Wis. 278.

The same rule relating to children by blood appears to apply equally to children by adoption, in *Mountain v. Fisher*, 22 Wis. 98. See also *Tyler v. Burrington*, 39 Wis. 881.

In the case of *Titman v. Titman*, 64 Pa. 484, the claim was for services rendered by the plaintiff to her father when she was eighteen years of age. Judge Sharswood said: "The first question is whether there was sufficient evidence
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father and daughter merely, but, superadded to that, the contract relation of master and servant. The presumption, *prima facie*, was undoubtedly against the plaintiff's claim, and the *onus* was therefore on her to show, by clear and distinct evidence, a contract by her father to pay her wages."

To the same effect is *Barrett v. Barrett*, 5 Or. 411. It is not enough that the party rendering the service expected to be paid, unless the circumstances are such as show that the person for whom they were rendered expected to pay for them, or ought to have understood that such services would be a valid charge against him. Where the parties stand to each other in the relation of members of the same family, as brothers, father and son, or father and daughter, or if inmates of the same family, though only remotely related, there is *prima facie* no implied promise to pay for labor done.

In this case there is no pretense that there was an express contract proven, and the jury, under the broad charge of the court, no doubt believed, and they had good reason to so believe, that, when the labor was shown to have been performed by the defendant, he could recover upon a *quantum meruit* action without taking into consideration the relationship he bore to the plaintiff. If the court had left the determination of this relationship to the jury, instead of having absolutely declared what it was, then, presumptively, we might have inferred that they did not stand as parent and child towards each other, and if so, a *quantum meruit* action could have been maintained.

For this error the case must be reversed, and remanded for a new trial.

All the Judges concur.

J. J. WHITE, *Rept.*,

v.

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *Appt.*

(....S. Dak....)

***1. In an action for negligence, where buildings, trees or crops are destroyed or injured by fire, the proper measure of damages is not the difference in the value of the land**

***Head notes by BENNETT, J.**

NOTE.—*Railroad company liable in damages for loss by fire originating in sparks, cinders, etc.*

A railroad company upon whose right of way a fire originates from sparks and cinders from a locomotive, igniting inflammable material which the company has permitted to grow along the way-side, is, whether the engine is out of order or not, charged with the duty of using all reasonable means to arrest the fire, so as not to injure adjoining property; and such duty is not discharged where the station agent, although his attention was called to the fire, made no effort to put it out, observing that boys were engaged in an apparently successful effort to extinguish it. *Richme v. Rome*, W. & O. R. Co. (Sup. Ct.) 32 N. Y. S. R. 787.

The mere fact that the owner of lands adjoining

upon which they are situated before and after the injury, but of the value of the buildings, trees, etc., themselves.

3. In an action for damages upon injuries caused by sparks, etc., from a locomotive, the plaintiff must not only prove that the fire might have proceeded from the defendant's locomotive, but must show by reasonable affirmative evidence that it did so originate. It is not necessary, however, to prove this beyond a reasonable doubt.
3. If in the necessary use of fire for the production of steam, by the usual and best approved appliances, without negligence, sparks escape from a locomotive engine and set on fire the premises of adjacent owners of property, such loss must be borne by the owner as one of the incidents of the operation of railroads.
4. After it is shown that a fire originated from sparks or cinders of a locomotive, the burden of proof of establishing the fact that the railroad company used the most approved appliances, which had been tested and found practicable at the time, is upon the company.

(November 24, 1890.)

APPEAL by defendant from a judgment of the District Court for Moody County in favor of plaintiff in an action brought to recover damages for injuries alleged to have resulted from fire negligently set out by defendant. *Affirmed.*

The facts are fully stated in the opinion.

Mr. H. H. Field, with **Messrs. John T. Fish and Winsor & Kittredge**, for appellant.

Messrs. Rice Bros., for respondent:

If the property is totally destroyed by the injury, the proper measure of damages is the value of the property at the time of the injury.

2 Thomp. Neg. p. 1262; *Toledo, P. & W. R. Co. v. Arnold*, 43 Ill. 418; *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83; *Whipple v. Walpole*, 10 N. H. 180; *Barnard v. Poor*, 21 Pick. 381; *Atkinson v. Atlantic & P. R. Co.* 68 Mo. 367; *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 304; Dak. Comp. Laws, § 4600.

The amount that will compensate plaintiff is the full value of the house destroyed.

2 Thomp. Neg. p. 1262; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451; *Whitbeck v. New York Cent. R. Co.* 86 Barb. 644; *Delaware, L. & W. R. Co. v. Salmon*, 89 N. J. L. 316; *Atkinson v. Atlantic & P. R. Co.* 68 Mo. 367; *Bevier v. Delaware & H. Canal Co.* 13 Hun,

a railroad knew that fire had been set by the company's employes upon its right of way, and was still smouldering thereon in stumps and logs, does not, as a matter of law, require him to leave his harvesting and extinguish the fires. *Clune v. Milwaukee & N. R. Co.* 75 Wis. 532.

That the title to the land on which a building destroyed by fire stood was in the railroad company does not change the degree of prudence and care it was bound to exercise to guard against the injury, or tend to show contributory negligence on the part of the owner of the building. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 460, 24 L. ed. 256; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 354.

The Statute of Vermont as to the liability of railroad companies for buildings burned by fire from an engine, embraces buildings on the line of the
9 L. R. A.

254; *Cleland v. Thornland v. Muscatine*, 9 Io

The question of negligence for the jury, and not by the jury will not be

Moline Plow Co. v. French v. Lancaster, 2 Bogle, 2 Dak. 464; *W. St. P. R. Co.* 5 Dak. City, St. J. & C. B. R. 88 Mo. 848; *Sioux City* 84 U. S. 17 Wall. 657; *Pittsburgh, O. & E. L.* 5 Cent. Rep. 912; *Rich* 68; *Caledonia Gold* 4 Dak. 203; *Star Wagon* Dak. 233; *Indianapolis* son, 13 West. Rep. 332 v. *Syndicate Ins. Co.* 88

The fourth of the would have been proper the evidence as to the stack had been introduced

1 Thomp. Neg. p. 15 R. Co. v. *Chase*, 11 Ka ware & H. Canal Co. 11 *Sioux City & P. R. Co.* Wisconsin, I. & N. R. v. *Churchill*, 58 Mich.

The evidence justifies the fire complained of locomotive.

Dean v. Chicago, M. Minn. 413; *Allard v. C* 78 Wis. 165, and cases v. *Chicago, M. & St. I Atchison, T. & S. F.* Kan. 200; *Ohidester v.* 59 Cal. 201; *McKeever* Id. 300; *New England* Cush. 321.

A verdict cannot be sustained by the evidence when, dence together, it will warrant the conclusions

Johnson v. Chicago, Minn. 57; *Sloosen v. I R. Co.* 60 Iowa, 215; 1 L. S. & W. R. Co. 55 V

Bennett, J., deliver court:

The complaint alleged on and prior to the 10th the owner of, and in house, valued at \$250,

roadway and buildings from other buildings to municated from a locom Co. v. Richardson, supra.

In an action against a negligently burning a mill way, evidence that it was the company is admissible

Evidence of a custom to employ a watchman for railroad

Evidence that, at various times, before the fire, defendant's locomotives saw the mill, is admissible. *It ton v. New York & N. E* 625; *St. Louis, I. M. & S. R* 604.

the defendant so negligently managed its locomotives and engines on its road, and that they were so defective, that sparks escaped and set fire to the prairie adjacent to the premises of the plaintiff, which spread to and destroyed said dwelling-house, damaging him in the sum of \$260. The answer of the defendant is, in substance, a general denial. The cause was tried by a jury. A general verdict and several special verdicts were rendered. Exceptions to several of the special verdicts were taken by the defendant. A motion for a new trial upon a bill of exceptions was filed and heard, and denied by the court, judgment rendered for the plaintiff, and an appeal taken.

The first exception or assignment of error is to the overruling by the court of defendant's objection to the question, "What was your intention to do with the house?" The plaintiff had testified that he was the owner of the house and land situated as described in the complaint. The question was then asked him, "What was your intention to do with the house?"—and the answer was, "I probably would have moved it, because I sold the land, all but the eighty it was on. I should have moved it from there, probably. I bought a house and lot here, and I could put it on that lot or two lots up here, if I wanted to. The value of the house was somewhere from \$250 to \$300, and it was burned up on the 10th day of October." It may be true that the competency of the above testimony as to what plaintiff was intending to do with the house may be questioned; yet, if its admission has not resulted in any harm to the party objecting, a reversal on that ground will not be granted. The nature of the property, its ownership, or its value, was not disputed; neither what the plaintiff would do with the property if it had not been destroyed. The answer to the question could have had no influence on the result, and the finding of the jury would have been the same if it had been excluded. The appellant in his brief endeavors to point out the difference in the measure of damages between real and personal property. His contention may be well taken when a cause involving that distinction arises, which is not the fact in the case under consideration. The fact of the ownership of the house gave the plaintiff a right of recovery, and not the fact as to whether it was real or personal property, or as to what plaintiff intended to do with it. "For the purposes of actions for injuries through negligence, many things which are attached to the realty, and a part of it, such as fruit-trees, houses, timber, etc., are considered separate and distinct from it because they have a value which is distinct from the value of the land. Therefore, where buildings, trees, crops, etc., are destroyed or injured, the proper measure of damages is not the difference in the value of the land before and after injury, but of the buildings, trees, etc., themselves; and where buildings are destroyed by fire, the proper measure of damages is the value of the buildings when destroyed." 2 Thomp. Neg. 1262; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 816; *Atkinson v. Atlantic & P. R. Co.* 9 L. R. A.

It is contended by the defendant that the finding of the jury is not warranted by the evidence. This contention is embodied in the third, fourth and tenth assignments of error, and upon these we shall make a general review of the case, as upon these, in great part, this appeal depends. These are as follows: "(3) That the court erred in not sustaining defendant's motion to direct a verdict for the defendant at the close of the testimony introduced by the plaintiff. (4) That the court erred in not sustaining defendant's motion to instruct the jury to return a verdict for the defendant at the close of the entire testimony. . . . (10) That the court erred in not granting defendant's motion for a new trial."

An analysis of plaintiff's testimony when he rested his case shows that on the 10th day of October, 1885, he owned the dwelling-house, as described in the complaint; that a locomotive and train of cars belonging to defendant passed, about 12 o'clock of that day, on defendant's road; that in going up a grade in the road near the plaintiff's house the locomotive was laboring very hard, and emitting a large number of sparks; that no fire was seen previous to the passage of the train; that soon after it passed the prairie grass immediately adjacent to the track was seen to be on fire, which ran to and burned down and destroyed the dwelling-house aforesaid; and that it was worth from \$250 to \$300.

In an action for damages upon injuries caused by sparks, etc., from a locomotive, the plaintiff must not only prove that the fire might have proceeded from the defendant's locomotive, but must show, by reasonable affirmative evidence, that it did so originate. It is not necessary, however, to prove this beyond a reasonable doubt. Evidence showing that the engine emitted sparks in size and number sufficient to account for the fire, and flying near the building or field actually caught fire, and that the fire was discovered very soon afterwards, no other cause being known, is sufficient to go to the jury, to show that the fire originated from the passing locomotive. *Kennedy v. Hannibal & St. J. R. Co.* 70 Mo. 243, 80 Mo. 578; *Sheldon v. Hudson River R. Co.* 14 N. Y. 218.

As was held in the case of *Kelsey v. Chicago & N. W. R. Co.* (S. Dak.) 45 N. W. Rep. 204, by this court, the decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders, so as to prevent the ignition of fire to surrounding combustible matter. The authorities were very generally collated in the above-mentioned case to sustain this proposition, and need not be repeated here. Such being the facts and the law governing them as the case stood at the close of plaintiff's testimony, there was no error in not directing of a verdict for defendant at that time.

We now come to the defendant's side of the case. The rule in this State has been laid down

by Chief Justice Tripp in *Hannah v. St. Paul, M. & N. W. R. Co.*, 5 Dak. 1, to be as follows: "It has now become the settled law of this country and of England that the right of way obtained in every charter permits railroads to use steam engines in propelling their trains; and that if in the necessary use of fire for the production of steam for such purposes, by the usual and best approved appliances without negligence, sparks escape and set on fire the premises of adjacent owners of property, such loss must be borne by the owners as one of the incidents of the operation of railroads." See also *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 83 Wis. 583; *Read v. Morse*, 84 Wis. 815; *Hoff v. West Jersey R. Co.* 43 N. J. L. 201, 13 Am. & Eng. R. R. Cas. 476.

The law does not require that engines shall be so constructed, equipped or managed that the escape of sparks is impossible; and although a fire may originate from a spark or cinder from a railroad locomotive, yet that of itself does not render the defendant liable, but it can only be held liable in case it appears by the evidence that there was negligence on the part of defendant in respect to the condition or the handling or management of its engines. A railway company is not liable, nor would any other person be liable, from the mere fact of the setting of the fire. Negligence in some way on the part of the company or any other person is necessary in order to form the basis of the liability for damages which occur; because fire may be used carefully and prudently by a railway company, or by any other person, and in that case, if it escapes by some unforeseen and uncontrollable circumstance, the railway company or other persons using it is not liable. Railroads have the lawful right to use upon their right of way steam in propelling their trains. Steam can only be produced by the use of fire. That being so, it is only necessary that it shall be used in such a way as shall, as far as practicable, prevent its escape, and so used with due regard to the rights of others that they may not suffer. It is therefore necessary that a railroad company, to prevent the escape of sparks, shall use the most improved appliances which have been tested and found practicable. If they adopt such contrivances on their engines, and their engines are skillfully and carefully managed, and fire escapes from an engine notwithstanding such contrivances and appliances, and sets fire to adjoining property, the company is not liable. But the burden of proof of establishing these facts, after it is shown that a fire originated from sparks or cinders of a locomotive, is upon the company. It has been presumptively shown that the fire which caused the damage in the case in hand originated from sparks or a cinder from defendant's locomotive. This raises in favor of plaintiff a presumptive case of negligence, and entitles him to recover, unless this presumption can be rebutted by the defendant, by showing that this locomotive was not in a defective condition and was not unskillfully handled. The engineer and fireman who had charge of the locomotive on the day in question have both testified as to the manner in which the engine was being run at the time the fire is alleged to have been set. The engineer testified that he

had run this locomotive about fifteen months. Its general condition was good. It steamed splendidly; it was an easy steamer, and he was working it about eight inches and a light throttle. The full extent of a quadrant would be twenty-four inches. At the time it was passing where the fire is said to have originated, it was not laboring hard, nor throwing any unusual amount of fire, and had not been doing so on that day. The fireman was a good one, and was firing light, with about four inches of fire. There was nothing in the way of handling the engine or fire that tended to increase the escape of sparks or cinders. Was drawing fifteen cars. The full grade of that train was sixteen cars. The engine was run with the forward damper closed and the rear damper open. With the rear damper open, the draft passes through damper towards the smoke-stack, so that the effect of the draft is all the time towards the smoke-stack. The engineer and fireman were shown to be experts and competent men for their respective duties. This testimony was corroborated by the fireman. This was all the material evidence as to the running and management of the locomotive. Now, as to the condition of it. The engine was at the round-house at Woonsocket on the 7th and 8th days of October, 1886, and the smoke-stack was examined, and a couple of the wires belonging to the netting were found to be worn in two, and were wired down, and a patch put on. The patch was about a foot long and eight inches wide. The engine came back on the 11th, and the same patch was on, and in good condition. The old netting was not taken out when the patch was put on, but the patch was fastened to it. On the 15th the stack was taken off, and a new one was put on, and at the time of taking off the stack the netting appeared to be good. It was not worn out, nor was it used again. The meshes or holes in the netting would be about three sixteenths of an inch in size. The engine was equipped with what is called a "diamond-stack," manufactured by Danforth & Cook. The dimensions of the cylinder were sixteen inches in diameter and twenty-four inch stroke, and it was what is called an "ordinary" engine. The netting was 8½x3½, No. 12 wire, and is the standard netting for diamond-stack engines, and was such as was in the engine on the day of the fire, and was the kind in general use at the time. Experience has demonstrated that finer netting in a smoke-stack will operate to prevent the free steaming of a locomotive; it operates upon the draft; and if a coarser netting than that is used in a stack, it is liable to allow larger cinders to escape. The netting bears directly upon the draft and the escape of sparks. Very explicit and detailed testimony was introduced by the defendant, showing the condition of the smoke-stack, size and length of flues, the action of sparks upon the netting, the effect of the draft upon the sparks and cinders and the general condition of the engine, and that the engine had been repaired the June previous, at an expense of \$1,081.

The evidence clearly indicates that this engine was an old one, and had been extensively repaired, but that it was in apparent good condition, with the exception of the smoke-stack,

or the netting in it. It is shown that on the 7th or 8th day of October a hole was in the netting, and that a patch had been put over it. There is no evidence that this patch did not become loose between the 9th and 10th. There can be but little doubt that this engine set this fire by a spark or cinder emitted through the smoke-stack. So whatever testimony was introduced as to the other parts of the engine being in good condition need not be considered. The question of negligence is confined to the smoke-stack and netting. O. Henan, a witness for plaintiff, testified that when he got to where the fire started he found a piece of live coal outside of the fire-break. It was a large chunk of coal, about an inch in diameter and three-fourths inch in thickness. The witnesses for defendant say it would have been impossible for a piece of coal of that size to have been thrown from the smoke-stack under any circumstances with the netting in good condition. The fire occurred on the 10th of October. There is no evidence that this patch did not become loose between the 9th and 11th. The engine was examined on the 11th, and the patch was there. Why the defendant did not show that the patch was on in good shape, and the netting all right, on the 10th, is unexplained. It is an uncontroverted fact that sparks were freely emitted from the smoke-stack on the day of the fire; and that one of them, corresponding with the hole in the netting, was found, is a circumstance showing that the patch might have become loose, and one which the jury may have considered in rendering their verdict. The best that can be said of the condition of the engine, and of its being equipped with the best of appliances on the day of the fire, is that it was doubtful as to both its condition and its equipments. The court did not err in refusing to direct a verdict for defendant at the close of the whole testimony.

The fifth assignment of error is to the refusal of the court to give the following instruction: "You are instructed that the fact that the engine in question, No. 356, was changed by replacing the netting and stack when it was at Wells, on the 15th or 16th of October, 1885, after the fire in question, is not a matter from which you are liberty to infer that it was out of repair or imperfect at the time the fire in question was set."

The record shows that the defendant's witness Hohenstein testified without objection that this engine came into Wells on the 15th day of October, 1885, and that he took off the old smoke-stack and put on a new one. The new smoke-stack had new netting. For what purpose the defendant introduced the evidence is not shown; yet this is the record. If this fact was prejudicial to the defendant in any way, it should not have introduced it; or if it came in incidentally, or to the surprise, or against the wish, of defendant, it should have had it stricken out at the time. There can be no doubt that it was proper for the jury to give such weight to the testimony of the change of the smoke-stack, made so soon after the fire, as they should deem it entitled to, and they might consider the fact as a circumstance in determining whether the engine was in proper condition or not on the day of the fire. This instruction was not improperly refused.

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The sixth, seventh and eighth assignments of error are in the refusal of the court to set aside special verdicts 3, 6, and 7, for want of evidence to sustain them. These special verdicts are as follows: "(3) If you say that said fire was set by said piece of coke escaping from said engine, then state from what part of said engine said piece of coke escaped. *A. Smoke-stack.*" "(6) If you say that said engine was not in good repair, then state where and in what respect said engine was out of repair. *A. Smoke-stack and wheels.* (7) Were there any other holes in said netting at said time, except the one covered by the patch and those made by the meshes of the wire? *A. Yes; we think there was.*"

The jury found that the fire was set by the piece of coal found by O. Henan, and that the piece of coal was about one inch long and three-fourths inch thick. The train was going up a grade; and sparks flying from the smoke-stack. There was no fire previous to the train passing, but shortly afterwards the fire broke out, and this live piece of coal was found ten or fifteen feet outside the fire-break. One of the bases of evidence is "the known and experienced connection subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy." 1 Greenl. Ev. 18.

It is recognized, even in criminal prosecutions, as in the case of the possession of goods recently stolen, accompanied with personal proximity in point of time and place, and the inability of the possessor to show how he came by them. These facts warrant the inference that the possessor stole them. They are prima facie evidence of guilty possession. Upon an indictment for arson, proof that property which was in the house at the time it was burned was soon afterwards found in the possession of the prisoner was held to raise a probable presumption that he was present, and concerned in the offense. From the facts established, the unknown fact is deduced, and is by the law presumed; and if the facts found from which the fact is presumed be unexplained, either by direct evidence or by attending circumstances, it is taken as conclusive. If a locomotive engine passed through plaintiff's field or near his house, and in doing so was obliged to go up a grade, and sparks were seen emitting from the top of the smoke-stack in large quantities, no fire seen previous to the passage of the train, but immediately afterwards a fire breaks out, and a live piece of coal is found near where the fire originated, and around which the grass and combustible matter was burned, would a court be justified in declaring that there was no evidence to say that that piece of coal came from the smoke-stack? If so, courts could say that one found in possession of goods recently stolen was not presumably guilty.

"The true question in trials of fact is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence. . . . By satisfactory evidence, which is sometimes called 'sufficient evidence,' is intended that amount of proof which ordinarily satisfies an unprejudiced mind." Id. 4.

The same principle applies to the sufficiency

of the evidence in relation to the condition and repair of the smoke-stack. The evidence shows that the netting on the day or two previous to the fire was broken, and a large hole was in it; that a patch had been put on over this hole, and that it was an old stack,—so much so, that on the fifth day after the fire it was taken off, and the netting thrown away as worthless. It is true that other testimony was introduced tending to show that it was in good condition on the day of the fire, but both the testimony and circumstances were of such a nature that a jury could have found very reasonably as they did, and in doing so have violated no rules of evidence or reason.

A great deal of the evidence was rebutted by other evidence of the highest character and respectability, and perhaps in some of the points raised the weight of it was with the defendant; but the jury found against the defendant on this conflicting evidence. So long, therefore, as cases are submitted to juries, so long some respect must be given to their verdicts; and when the court below has sustained the verdict of the jury, as in this case, such action of the court adds force and weight to it. *The judgment of the court below must be affirmed.*

All the Judges concur.

LOUISIANA SUPREME COURT.

SUCCESSION OF Paulino DEL ESCOBAL.

(43 La. Ann.....)

- *1. The nuncupative testament by public act need contain no other description of the witnesses than their names, their number and their residence. It need not expressly negative the existence of incapacities, which are matters for exterior proof, as ground of nullity.
- *2. Where the will describes the witnesses as domiciled in the place, that sufficiently declares their residence, because domicil, *ex vi terminis*, includes residence.

(November 17, 1890.)

APPEAL by the legal heir from a judgment of the Civil District Court for the Parish of Orleans establishing a nuncupative will by public act. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. Charles Louque for appellant.

Mr. James Wilkinson, for appellee:

The judgment appealed from is correct, because the will of the deceased was received by the notary in the presence of "Messieurs Gabriel Prato, Nicolas Burga and John Burga, *sous trois temoins requis, domiciliés en cette*

* Head notes by FENNER, J.

NOTE.—*Nuncupative will, defined.*

Originally, a nuncupative will was a public declaration in solemn words (Anderson, Law Dict.). In the civil law "nuncupative" means, to pronounce orally, or in words, without writing; to dictate. Succession of Morales, 16 La. Ann. 293.

A nuncupative will depends upon oral evidence of the declaration of the testator *in extremis*, before witnesses, and afterwards reduced to writing. 2 Bl. Com. 600; 1 Jarman, Wills, 180, 183; 4 Kent, Com. 578.

It is a will made when there is neither time nor opportunity to make a written will, and which of necessity must be verbal. Carroll v. Bonham, 8 Cent. Rep. 649, 42 N. J. Eq. 637.

The provisions of the Statute of Frauds relating to nuncupative wills did not prevent admitting to probate actual testamentary dispositions, which had been committed to writing by authority of the testator with intention to execute, if left unsigned by accident, or by the act of God. *Re Will of Hebdon*, 30 N. J. Eq. 473, cited in Public Admr. v. Watts, 1 Paige, 347, 3 N. Y. Ch. L. ed. 673.

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ville." This is a substantial compliance with art. 1578 of the Civil Code.

Residence does not necessarily constitute domicil, but the latter term implies far more. It implies the fact of residence with the intention of making it one's permanent home.

"The domicil of each citizen" is his "habitual residence."

Rev. Civ. Code, art. 88; 1 Hennen, *verbo Domicile*.

The objection that the will fails to state that these witnesses were not convicts, deaf, dumb, blind, under sixteen years of age or women (Rev. Civ. Code, 1591), is effectually disposed of in *Succession of Murray*, 41 La. Ann. 1109.

Fenner, J., delivered the opinion of the court:

The decedent left a nuncupative will by public act, probate of which was opposed by the legal heir on the grounds that the will does not show on its face, (1) that the witnesses were over the age of sixteen years, and male; (2) that said witnesses are not stated to be possessed of their sight; (3) that they do not appear to be residents of the place where the will was made; (4) that it is not stated the will was dictated within the hearing of said witnesses, and that they understood the language in which it was made.

A statement by a woman in the presence of two persons that she wanted to see her sister, and that she desired to give her all her property, but without requiring such persons to bear witness that she had made her will, or that she had disposed of her property to her sister, is not a valid nuncupative will, under N. C. Code, § 2143. *Bundrick v. Haygood*, 108 N. C. 468.

N. C. Code, § 2143, providing that a nuncupative will can be admitted to probate only on the oath of at least two credible witnesses present at the making thereof, who state they were specially required to bear witness thereto by the testator, must be strictly complied with and observed in all material respects. *Ibid.*

By the laws of Kentucky a nuncupative will does not pass real estate. *Hunter v. Bryant*, 15 U. S. 3 Wheat. 32, 4 L. ed. 177.

The omission to make express mention in a nuncupative will by public act, or in equivalent terms, that it was written by the notary, is fatal and invalidates the instrument. *Miller v. Shumaker*, 43 La. Ann. —.

law provides that the indorser's liability by public act must be received by the notary in presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place." Rev. Civ. Code, art. 1578. The act need contain no other description of the witnesses than their names, their number and their residence. Subsequent articles 1591 and 1592 prescribe certain circumstances which render persons incapable of being witnesses to testaments, and proof of such incapacities might serve as ground for annulling the will. But no provision requires that the testament should expressly negative the ex-

ception, "et vi termini," includes residence, at least when coupled with the presence of the party at the place of the domicil. Rev. Civ. Code, art. 88.

The fourth objection is unfounded, because the testament expressly states that the will was dictated in the presence of the witnesses, and it was not necessary to state that they understood the language in which it was made.

Judgment affirmed.

MISSISSIPPI SUPREME COURT.

J. T. STINSON *et al.*, *App'ts.*,

v.

S. D. LEE.

(....Miss....)

To render the indorser liable on a note signed by one who affixes the word "agent" to his name without disclosing his principal, payment must be demanded of, and refused by, the agent; demand on the principal is not sufficient.

(October 27, 1890.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Noxubee County sustaining the indorser's demurrers to the declaration and amended declarations in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts appear in the opinion.

Mr. J. E. Rives for appellant.

Mr. A. C. Bogle for appellee.

Cooper, J., delivered the opinion of the court:

The demurrers to the original and amended declarations were properly sustained. Lee was the payee in a promissory note, subscribed by the maker thereof, "A. G. Cunningham, Ag't," nothing appearing on the face of the note indicating for whom he professed to act as agent. After the maturity of the note, he indorsed the

same to the plaintiffs, who, some time thereafter, presented the note to S. A. Cunningham, the wife of A. G. Cunningham, and who, the declaration avers, was his principal, "and demanded payment thereof, and sued out an attachment for rent against her, in order to collect said note; of all of which said Lee had immediate notice." The present suit is against S. A. Cunningham, as maker, and against Lee, as indorser, of the note. The liability of Lee rested wholly upon his indorsement, and that liability was to pay the note, if seasonable presentment to the maker should be made, and payment refused, and Lee notified thereof. A. G. Cunningham, and not S. A. Cunningham, was the maker of the note, the word "Agent" following his signature being, in the absence of the name of the principal, merely *descriptio personæ*. 1 Daniel, Neg. Inst. §§ 303-305.

We are not called upon to decide whether, in a proper action, Mrs. S. A. Cunningham might be made liable on the consideration for which the note was given; nor whether, as between the original parties, A. G. Cunningham was liable on the note. The sole question is whether Lee, who indorsed the note signed by "A. G. Cunningham, Agent," can be held on his indorsement by virtue of a presentment to one whose name nowhere appears on the note, and we decide that he cannot, because such person was not the maker of the note, for whose default only was he bound by his indorsement.

Judgment affirmed.

NOTE.—Commercial paper, signed by one as agent of undisclosed principal.

In suits upon negotiable instruments no evidence is admissible to charge anyone as principal whose name is not disclosed on the instrument itself. *Stackpole v. Arnold*, 11 Mass. 27; *Hyde v. Page*, 9 Barb. 150; *Bass v. O'Brien*, 12 Gray, 477; *Brown v. Parker*, 7 Allen, 339; *Slawson v. Loring*, 5 Allen, 240; *Pentz v. Stanton*, 10 Wend. 271; *Arnold v. Sprague*, 34 Vt. 409; *Manufacturers & M. Bank v. Follett*, 11 R. I. 92; *Lincoln v. Crandell*, 21 Wend. 101; *Newcomb v. Clark*, 1 Denio, 226; *Chappell v. Dann*, 21 Barb. 17; *Auburn City Bank v. Leonard*, 40 Barb. 119.

This rule, however, is limited to commercial paper and does not generally apply to contracts not under seal, and made by or with an agent, as a contract 9 L. R. A.

for the sale of land. See note to *McWhorter v. McMahan*, 10 Paige, 896, 4 N. Y. Ch. L. ed. 1022; *Neaves v. North State Min. Co.* 90 N. C. 417, 47 Am. Rep. 532; *Johnson v. Dodge*, 17 Ill. 433; *Curtis v. Blair*, 26 Miss. 809; *Champlin v. Parish*, 11 Paige, 405, 5 N. Y. Ch. L. ed. 178.

An agent is bound on a note or bill to which he fails to affix the name of his principal, even though he adds the word "agent" to his signature; this addition, being deemed a mere *descriptio personæ*, does not constitute notice to the holder or indorsee. *Hall v. Bradbury*, 40 Conn. 32; *Graham v. Campbell*, 56 Ga. 258; *Anderson v. Pearce*, 36 Ark. 233; *Kenyon v. Williams*, 19 Ind. 45; *Toledo Agricultural Works v. Heisser*, 61 Mo. 128; *Williams v. Robbins*, 16 Gray, 77; *Bryson v. Lucas*, 84 N. C. 630; *Collins v. Buckeye State Ins. Co.* 17 Ohio St. 215; *Arnold v. Sprague*, 34 Vt. 409.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MAYO
v.
INDIA MUTUAL INSURANCE CO.

(....Mass.....)

1. A constructive total loss and abandonment of a ship's cargo will render the insurer liable on a policy insuring the same, although it provides that the insurance shall be "free from partial loss;" at least if the cargo does not consist of articles of a perishable nature which are included in the common memorandum clause of the policy.

2. Fertilizer when constituting a ship's cargo will not be treated as if included in the common memorandum clause of a policy insuring it, which exempts the insurer from liability

for partial loss in certain enumerated articles of a perishable nature, among which fertilizers are not included, so as to defeat a claim for constructive total loss and abandonment.

(September 4, 1890.)

REPORT from the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to recover the amount alleged to be due on a policy of marine insurance in which a verdict had been returned for plaintiff. *Judgment on verdict.*

The case is sufficiently stated in the opinion.

W. Allen, J., delivered the opinion of the court:

The cargo arrived at the port of discharge in

NOTE.—Right to abandon.

The right to abandon a vessel, under the contract, is to be determined from the facts as they existed on the day of abandonment. *Orient Mut. Ins. Co. v. Adams*, 128 U. S. 67, 81 L. ed. 63.

If the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, although it should happen that she might be recovered afterwards at a less expense. *Ibid.*

The right of the insured to abandon and recover for a total loss depends upon the state of the facts at the time of the offer to abandon, and not upon the information received. *Marshall v. Delaware Ins. Co.* 8 U. S. 4 Cranch, 202, 2 L. ed. 596; *Rhineland v. Insurance Co. of Pa.* 8 U. S. 4 Cranch, 29, 3 L. ed. 540; *Bradlee v. Maryland Ins. Co.* 37 U. S. 12 Pet. 373, 9 L. ed. 1123.

If the loss was the result of a peril not insured against, there was no right to abandon. *Richelieu & O. Nav. Co. v. Boston M. Ins. Co.* 136 U. S. 403, 34 L. ed. 398.

A final decree of restitution, although not then executed, terminates the right to abandon, unless something can be shown to prove the continuance of the peril. *Marshall v. Delaware Ins. Co. supra.*

An election to abandon cannot be retracted. *Bell v. Beveridge*, 4 U. S. 4 Dall. 272, 1 L. ed. 330.

It is not necessary to a total loss that there should be an absolute destruction of the thing insured, so that nothing of it can be delivered at the point of destination. *Great Western Ins. Co. v. Fogarty*, 86 U. S. 19 Wall. 640, 22 L. ed. 216.

A destruction *in specie*, while some of its component elements may remain, is a total loss, where no part is delivered in a condition capable of use. *Ibid.*

The right to abandon may be kept in suspense by mutual consent. *Livingston v. Maryland Ins. Co.* 10 U. S. 6 Cranch, 274, 3 L. ed. 222.

Abandonment to underwriters.

"Abandonment" is surrendering to underwriters whatever is left of the property insured, and resorting to the policy for indemnity. *Camberling v. M'Call*, 2 U. S. 2 Dall. 230, 1 L. ed. 381.

The insured must yield up to the underwriters all his right, title and interest in the subject insured. *Patapeco Ins. Co. v. Southgate*, 30 U. S. 5 Pet. 604, 8 L. ed. 243.

No particular form of words is necessary to constitute an abandonment. *Bell v. Beveridge*, 4 U. S. 4 Dall. 272, 1 L. ed. 330.

The abandonment is limited to the interest insured when a definite part, or the interest of a part

owner, is insured, but when the insurance covers the vessel as a whole, the abandonment reaches the entire property. *The Manitoba*, 80 Fed. Rep. 129.

It relates back to the date of the loss, and vests the insurers with the title as of that date. *Ibid.*

But this relation takes place only for the protection of the underwriters, and does not derogate from the title that is transferred by the abandonment, and cannot be used to enable the owners to obtain a lien for services they were bound to render before the abandonment. *Ibid.*

Time for abandonment.

An abandonment, to be effectual, must be made in a reasonable time. *Chesapeake Ins. Co. v. Stark*, 10 U. S. 6 Cranch, 263, 3 L. ed. 220; *Fuller v. M'Call*, 2 U. S. 2 Dall. 219, 1 L. ed. 356; *Bell v. Beveridge*, 4 U. S. 4 Dall. 272, 1 L. ed. 330.

What is a reasonable time in which to abandon insured property is a question for the jury. *Bell v. Beveridge, supra.*

The question whether the abandonment was made in due time is not a question of fact to be exclusively left to the jury, but to be decided by them under the direction of the court. *Livingston v. Maryland Ins. Co.* 11 U. S. 7 Cranch, 506, 3 L. ed. 421; *Chesapeake Ins. Co. v. Stark, supra*; *Maryland Ins. Co. v. Ruden*, 10 U. S. 6 Cranch, 333, 3 L. ed. 242.

Where the jury find an abandonment, but do not find whether it was in due time or otherwise, the special verdict is defective. *Chesapeake Ins. Co. v. Stark, supra.*

Notice of abandonment.

Where the sale of an insured vessel is justifiable, no notice of abandonment is necessary. *Avery v. New York Mut. Ins. Co.* (Super. Ct. N. Y.) 32 N. Y. S. R. 118.

Insurers who, on receipt of a written notice of abandonment of a vessel, take it in charge and cause it to be repaired at great expense, and retain possession without returning or offering to return it to the owners, cannot, in an action for the insurance, for the first time set up a claim that their acceptance was not conclusive because made in ignorance of the real cause of loss. *Richelieu & O. Nav. Co. v. Thames & M. Ins. Co.* 72 Mich. 571.

The abandonment of a vessel to insurers, once made and accepted, fixes the rights of the parties, and renders the insurers liable as for a total loss. *Ibid.*

No particular form of a notice of abandonment to insurers is necessary; and where an insurance company has received and acted upon a notice

specie almost undiminished in quantity, and of substantial, though greatly diminished, value. If the risk continued to that time there was not a total loss. *Forbes v. Manufacturers Ins. Co.* 1 Gray, 871.

The plaintiff's contention is that the risk had been terminated by a constructive total loss and abandonment. It was agreed that there had been a loss from the perils insured against of over 50 per cent of the value of the cargo, and the jury found that the cargo had been abandoned by the plaintiffs to the underwriters on account of the loss. It is not denied that these facts would show a total loss under a general insurance, but it is claimed that the insertion in the policy of the words "free from partial loss" changes the character of a total loss under the policy, so that there can be no recovery for a constructive total loss, but only for the actual total destruction of the thing insured.

without objection, it cannot afterwards complain as to its form and sufficiency. *Ibid.*

Revocation of abandonment.

The revocation of an abandonment before accepted by the underwriters may be inferred if the acts and interference of the assured with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. This intention is a question of fact for the jury. *Columbian Ins. Co. v. Ashby*, 20 U. S. 4 Pet. 139, 7 L. ed. 809.

Acceptance and effect of.

An offered abandonment may be accepted, even when the assured has no right to abandon. *Phoenix Ins. Co. v. Copelin*, 78 U. S. 9 Wall. 481, 19 L. ed. 739.

If an underwriter takes a vessel to repair, if he delays in repairing beyond a reasonable time, it is an acceptance of the offer. *Ibid.*

His liability is not varied by a clause in the policy "that the acts of the assurers in recovering, saving and preserving the property insured in case of disaster shall not be considered an acceptance of an abandonment." *Ibid.*

Where an abandonment has been accepted, the plaintiff has no right to abandon the voyage. *New Orleans Ins. Assn. v. Plaggio*, 83 U. S. 16 Wall. 378, 21 L. ed. 368.

If an abandonment be legally made, the agent of the assured becomes the agent of the underwriter, and the acts of the agent interfering with the subject insured will not affect the abandonment. *Columbian Ins. Co. v. Ashby*, 20 U. S. 4 Pet. 139, 7 L. ed. 809; *Chesapeake Ins. Co. v. Stark*, 10 U. S. 6 Cranch, 268, 3 L. ed. 220.

It is only after an actual abandonment and the passage of the title, that the captain becomes the insurer's agent. *Richelleu & O. Nav. Co. v. Boston M. Ins. Co.* 136 U. S. 408, 34 L. ed. 393.

Abandonment of a vessel by its owners to underwriters will not affect by estoppel or ratification a previous unauthorized sale by the master. If circumstances justified the sale, no abandonment was necessary. *Ward v. Peck*, 50 U. S. 18 How. 267, 15 L. ed. 383.

If the abandonment be legal, it puts the underwriters completely in the place of the assured, and they become legally entitled to all that can be saved. *Chesapeake Ins. Co. v. Stark*, *supra*; *Comerys v. Vasse*, 26 U. S. 1 Pet. 193, 7 L. ed. 108; *Columbian Ins. Co. v. Ashby*, *supra*; *Delaware Mut. Safety Ins. Co. v. Gessler*, 98 U. S. 645, 24 L. ed. 553.

By an abandonment the insurer can have no

It was decided in *Heebner v. Eagle Ins. Co.*, 10 Gray, 131, that an insurance upon a ship against "total loss only" covered a constructive total loss. The same decision was made in regard to an insurance against total loss only on a vessel and outfits in *Greene v. Pacific Mut. Ins. Co.*, 9 Allen, 217.

In *Burnham v. Boston M. Ins. Co.*, 139 Mass. 399, it was held that there was a constructive total loss of advances insured free from average by the constructive total loss of the catch of a fishing vessel. *Kettrell v. Alliance Ins. Co.*, 10 Gray, 144, is very much like the case at bar. There part of a cargo consisting of tin plates was insured, "partial loss excepted." In the case at bar the entire cargo, consisting of fertilizer, is insured "free of partial loss." *Mr. Chief Justice Shaw* says: "We can have no doubt that, by the true construction of this clause, the insurers were not to be liable for loss in tin plates, unless such loss, estimated

greater right than the insured. *Delaware Mut. Safety Ins. Co. v. Gessler*, *supra*.

The holder of a bottomry bond is preferred over the insurer or owner, to the extent of his legal claim for principal and marine interest. *Ibid.*

Technical total loss.

Where an abandonment is founded upon a supposed technical total loss by an injury, exceeding one half of the value of the vessel, although the fact of such injury must exist at the time, yet it is necessarily open to proof, to be derived from subsequent events. *Bradley v. Maryland Ins. Co.* 37 U. S. 12 Pet. 373, 9 L. ed. 1123.

Subsequent circumstances will not affect an abandonment so as retroactively to impart to it a validity which it had not by its origin, or to change the rights acquired under it, if it was valid. *Ibid.*

A technical total loss must continue to the time of abandonment. *Olivera v. Union Ins. Co.* 16 U. S. 8 Wheat. 183, 4 L. ed. 355; *Rhineland v. Insurance Co. of Pa.* 8 U. S. 4 Cranch, 29, 2 L. ed. 540; *Alexander v. Baltimore Ins. Co.* 8 U. S. 4 Cranch, 370, 2 L. ed. 650; *Bradley v. Maryland Ins. Co.* *supra*.

A technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. *Marcadier v. Chesapeake Ins. Co.* 12 U. S. 8 Cranch, 39, 3 L. ed. 481.

In a case of mixed character, no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. *Ibid.*

The mere retardation of the voyage, by any of the perils insured against, not producing a total incapacity of the ship eventually to perform the voyage, cannot be admitted to constitute a technical total loss which will authorize an abandonment. *Ibid.*; *Smith v. Universal Ins. Co.* 19 U. S. 6 Wheat. 173, 5 L. ed. 235.

During the existence of such detention as amounts to a technical total loss, a vessel may be abandoned; but an offer to abandon, made after the vessel is restored uninjured and ready to proceed on her voyage, although the cargo is lost, is nugatory. *Alexander v. Baltimore Ins. Co.* *supra*.

So long as memorandum articles have not lost their original character, but remain *in specie*, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the articles. *Hugg v. Augusta Ins. & Bkg. Co.* 6 U. S. 7 How. 595, 13 L. ed. 594.

according to the rules and usages of Boston, should amount to a total loss. What, then, is the extent of this exception? The natural construction is that it leaves the insurer liable for all total losses, but it makes no distinction between absolute and constructive total losses; and, in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature. The clause in the contract gives no intimation that it is any particular kind of a total loss, whether absolute or technical. It simply excludes all kinds of liability for a partial loss. By the natural construction of these provisions, it would seem that if the goods insured were placed by one of the perils insured against in that situation in which the assured has a right to abandon, and he does abandon, he has sustained a total loss not within the exception." This case is cited in *Pierce v. Columbian Ins. Co.*, 14 Allen, 320, where Mr. Justice Gray says: "And by the American law, if goods other than memorandum articles are injured by perils of the sea to more than half their value, it is a constructive total loss, and authorizes an immediate abandonment and recovery against the insurers." It is argued that the fertilizer insured should be treated as if included in the common memorandum clause, and that memoranda articles are not subject to constructive total loss and abandonment. We cannot admit either proposition. The distinction between tin plates and memoranda articles was considered in *Kettrell v. Alliance Ins. Co.*, *supra*. The common memorandum clause by which certain enumerated and described goods are made free from average, unless general, or the ship be stranded, has been in use for nearly 150 years, and is intended to apply to goods of a perishable nature; and to meet the difficulty of proving whether a loss accrued from the inherent quality of the article or from a peril

insured against, it is printed into the policy in suit in these words: "Not from any partial loss in salt, grain, pease, beans, fish, fruit, whether preserved or otherwise, hides, hops, vegetables or other goods which are perishable in their own nature, or on the freight thereon, unless it amounts to 7 per cent on the whole aggregate value of such articles, and happen by stranding." As *Kettrell v. Alliance Ins. Co.* is directly in point, there is no occasion for considering whether a different rule will be applied to articles of a perishable nature included in the common memorandum clause, and whether such articles are liable to constructive total loss and abandonment. In England there seems to be no difference between memoranda articles and other goods in that respect. *Roux v. Sulador*, 8 Bing. N. C. 266; *Rosetto v. Gurney*, 11 C. B. 176; *Anderson v. Royal Exchange Assur. Co.* 7 East, 88; *Davy v. Milford*, 15 East, 559; *Adams v. Mackenzie*, 13 C. B. N. S. 442; *DeMattos v. Saunders*, L. R. 7 C. P. 570.

Whether in this Commonwealth there can be no total loss of a memorandum article if any part of it arrives at the port of discharge *in specie*, or whether a special rule will apply to such articles, and there may be a constructive total loss and abandonment of them, if, as may have been the fact of the case at bar, the damage is such that the expense of landing and restoring the goods will equal or exceed their actual value, or whether the general rule in regard to other cargo will apply, and damage to the amount of one half of the insured value with abandonment will constitute a total loss, we express no opinion. See *Marcardier v. Chesapeake Ins. Co.* 13 U. S. 8 Cranch, 89 [8 L. ed. 481]; *Moreau v. United States Ins. Co.* 14 U. S. 1 Wheat, 219 [4 L. ed. 75]; *Wallerstein v. Columbian Ins. Co.* 44 N. Y. 209; *Pool v. Protection Ins. Co.* 14 Conn. 47.

Judgment on the verdict.

SOUTH CAROLINA SUPREME COURT.

MILLER *et al.*, *Appts.*,
v.

SOUTH CAROLINA R. CO., *Respnt.*

(.....S. C.....)

1. Gen. Stat., § 1513, requiring a railroad company, in order to relieve itself from liability for loss of goods delivered to it

NOTE.—Freight transportation, contract made by freight agent.

The general freight agent has the right to make contracts for transportation beyond the terminus of the road. *White v. Missouri Pac. R. Co.* 2 West. Rep. 155, 19 Mo. App. 400; *Grover & B. S. M. Co. v. Missouri Pac. R. Co.* 70 Mo. 672; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Williams v. Vanderbilt*, 28 N. Y. 217; *Hutchinson, Carr.* 111, § 145.

Authority of a local freight agent to contract for transportation beyond the company's line must be specially shown, or must be implied by the course of dealing. *Turner v. St. Louis & S. F. R. Co.* 3 West. Rep. 612, 20 Mo. App. 632; *Grover & B. S. M. Co. v. Missouri Pac. R. Co.* *supra*; *Burroughs v.* 2 L. R. A.

for transportation over its own and connecting roads, to produce a receipt therefor from the corporation to whom it was its duty to deliver the goods in the regular course of transportation, includes a steamship company among the corporations from whom receipts must be produced, when such company happens to form one of the common carriers in a through line of transportation agreed on by the parties, although the Statute does not in terms mention steamship lines.

Norwich & W. R. Co. 100 Mass. 23; *Burtis v. Buffalo & S. L. R. Co.* 24 N. Y. 274; *Walt v. Albany & S. R. Co.* 5 Lans. 477; *Missouri Pac. R. Co. v. Stultz*, 15 Am. & Eng. R. R. Cas. 97.

Where such contracts are in writing and purport to cover the entire transaction, evidence as to the terms of a prior verbal contract is inadmissible. *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634; *Long v. New York Cent. R. Co.* 50 N. Y. 76; *Belger v. Dinsmore*, 51 N. Y. 166; *Collender v. Dinsmore*, 55 N. Y. 200; *Hinkley v. New York Cent. & H. R. R. Co.* 56 N. Y. 429; *Turner v. St. Louis & S. F. R. Co.* *supra*.

Where a common carrier receives goods marked to a place beyond his line, he is bound, under an

2. Delay on the part of a railroad company to which goods were delivered for transportation over its own and connecting roads and which have been lost in transportation, in producing upon request a receipt for the goods from the carrier to which it was the company's duty to deliver them and which was a steamship company, which delay was caused by its production by mistake of the receipt of the first railroad company beyond it in the line of transportation, is not such "willful failure and refusal" to deliver the receipt as will deprive the company of the benefit of a statutory provision permitting the initial carrier to relieve itself from liability for loss by the production of such receipt, where from the terms of the Act it was very doubtful whether or not the receipt of the steamship company would suffice and the Act had never been judicially construed.

3. Testimony of the agent of a steamship company as to the receipt by the company from a connecting carrier of certain goods for transportation is not "merely oral" when he says that he recollects the receipt of the goods by referring to his receipts which are shown him upon the witness stand and which he identifies as the originals and records of his office.

4. Gen. Stat., § 1513, providing that an initial carrier may exempt itself from liability for goods lost or injured in transit by producing a receipt showing that the goods were delivered to a connecting carrier in due course of transportation, does not require the receipt to be in any particular form; such written evidence of the receipt of the property by the connecting carrier as will shift the liability to account for the property to the latter is sufficient.

(October 4, 1890.)

implied contract, to carry to the place of destination. *Wabash, St. L. & P. R. Co. v. Jageman*, 2 West. Rep. 863, 115 Ill. 407; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Illinois Cent. R. Co. v. Johnson*, 34 Ill. 389; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88; *Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175; *Erie R. Co. v. Wilcox*, 84 Ill. 239.

The words in a carrier's contract, "to be forwarded to East St. Louis station on its line," stating "St. Louis" as destination, do not constitute a special contract to carry to East St. Louis only, although that is the end of the carrier's line. *Wabash, St. L. & P. R. Co. v. Jageman*, *supra*.

Where a contract acknowledges the receipt of the goods in good order, addressed to consignees at a point beyond places at which it has stations, delivery will be considered complete when the connecting carrier shall have received notice that the company is prepared to deliver to such carrier said goods for further transportation; it is not a contract to deliver at a point beyond its line. *Harris v. Grand Trunk R. & New Eng. Rep.* 623, 15 R. I. 371. See *Waite v. New York Cent. & H. R. Co.* 110 N. Y. 635.

The fact that goods as delivered by the first carrier to the second are loaded in a car belonging to a certain road, which runs to the place of destination, other than the road of the second carrier, does not imply notice to such second carrier that the goods are to be shipped over the road of the car in which they are loaded. *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590.

Liability of railroads over connecting lines.

In transportation of goods over connecting lines of railroad, where there is no special contract, each road is only liable to the extent of its own line and for safe carriage and delivery to the next road. 9 L. R. A.

A PPEAL by plaintiffs from a judgment of the Common Pleas Circuit Court for RICHLAND County in favor of defendant in an action brought to recover from it the value of certain property delivered to it for transportation and never received by the consignee. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Lyles & Haynesworth for appellants.

Messrs. Brawley & Barnwell for respondent.

McGowan, J., delivered the opinion of the court:

This action was brought to recover from the defendant Company damages for the loss, alleged to be \$650, of certain cotton and paper stock (whatever that may be) shipped by them upon defendant's railroad, to be delivered to plaintiff's own order at Buffalo, in the State of New York. The proof was that the property was delivered to the defendant corporation at Columbia, S. C., and that "the connecting lines to Buffalo" were the steamship company from Charleston to New York City and thereon by the New York Central & Hudson River Railroad. It did not clearly appear what became of the property, but for the purposes of this case it may be assumed, as found by *Judge Norton*, that "the goods were somewhere on the road delayed, and substituted with worthless stuff, and therefore did not reach their destination, and were a total loss to the plaintiffs." Assuming this, the question was whether the defendant Company, "the initial corporation" in the connecting lines to its destination,—Buf-

Savannah, F. & W. R. Co. v. Harris (Fla.) May 18, 1890.

The common-law obligations of a railroad company to a connecting company are the same as to reception, transportation and delivery of freight, as those existing between a railroad company and an individual shipper. *Shelbyville R. Co. v. Louisville, C. & L. R. Co.* 22 Ky. 541.

Draymen calling themselves a transfer company are not to be considered as a connecting common carrier at a junction of two railroads connected by a Y. They are simply the agents of such railroad for performing the act which, by its contract to deliver to the connecting carrier, it was itself bound to perform. *Missouri Pac. R. Co. v. Young*, 25 Neb. 651.

Joint liability.

The giving of a through bill of lading by a carrier contracting to carry goods, the making of through freight charges, the furnishing of one car for the whole distance, and the act of the agent at the end of the route (being the agent of another company than the receiving company) in receiving the whole freight money,—sufficiently show joint liability on the part of the two carriers for failure to deliver the goods according to the contract made by the receiving carrier. *International & G. N. R. Co. v. Tidale*, 4 L. R. A. 545, 74 Tex. 8.

An arrangement between a despatch company, St. Louis, Mo., and sundry railroad companies whose lines terminated at New York, whereby the latter separately agreed to carry all goods for the transportation of which the former should contract, does not involve joint liability upon the part of the railroad companies nor make them partners, either *inter se* or as to third persons. *St. Louis Ins. Co. v. St. Louis, V. T. & L. R. Co.* 104 U. S. 148, 26 L. ed. 379.

falo, N. Y.,—was liable in damages for its loss, or had, under the Act upon the subject, discharged itself by delivering the property to the corporation to whom it was its duty to deliver the same in the regular course of transportation. The plaintiffs proved the following receipts or bills of lading, under which the goods described in the complaint were received by defendant, marked "P" and "Q:"

Exhibit P. South Carolina Railway, Columbia, S. C., Oct. 8, 1887. Received of Miller Bros. for transportation, as per marks and directions as herein given, subject to the conditions stated on the back of this receipt, and to which by acceptance shipper assents, the following described bales of cotton:

Marks.	Number of Bales.	Consignee and Destination.
K. V. X. Frt. pre	(8) Three B C. paid to Buffalo.	On J. A. Schreck, Buffalo, N. Y.
Rate 50 ct.	per 100 lbs. to New	York.

To be shipped *via* S. C. at through rate of — per bale. D. McQueen.

Per W. H. Casson, Jr.

The conditions of this receipt are: (1) That the South Carolina Railway Company shall only be accountable for the property named in this receipt while upon its own road. (2) That, acting as forwarders only, they are released when the same is by them delivered to con-

necting railroads or steamship lines by which it is to be carried to its destination. (3) And it is further stipulated and agreed that the South Carolina Railway, or any connecting lines, does not assume any marine risks, and that no liability will be assumed for the wrong carriage or wrong delivery of cotton marked with initials, numbered or imperfectly marked. (4) It is further stipulated and agreed that in case of loss or detriment, or damage done to or sustained by the cotton herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that Company shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage; and the carriers so liable shall have the full benefit of any insurance that may have been effected upon or on account of said cotton. (5) And it is further agreed that the amount of loss and damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said cotton, at the place and at the time of shipment under the bill of lading.

Notice: In accepting this bill of lading, the shipper, or other agent of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions. In witness whereof the agent hath affirmed on the face of this bill of lading. This receipt to be presented without alteration or erasure.

Liability of first carrier under shipping contract.

Railway corporations, unless forbidden by their charters, have the power to contract for shipments the entire distance over any connecting lines. The contracting company is liable upon the other lines as upon its own. *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693. *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 23 L. ed. 827.

The rules of one of the connecting roads other than the contracting railroad cannot influence or affect the contract, although part of the goods were put on board on such connecting road. *Ibid.*

A carrier not being bound at common law to carry except on his own line, if he contracts to go beyond he may confine himself in carrying to the particular route he chooses to use, and may select his own agencies. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 23 L. ed. 291.

An agreement of a carrier to be liable for transportation over connecting lines will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. *Michigan Cent. R. Co. v. Myrick* ("Myrick v. Michigan Cent. R. Co.") 107 U. S. 102, 27 L. ed. 325.

A receipt which says that freight is consigned to the order of M, and that B, at a place beyond the carrier's own line, is to be notified, does not of itself make a contract to carry to such place. *Ibid.*

A railroad company entering into a contract with connecting lines for carrying cattle, the contract providing that its liability shall cease at its terminus, is not liable as a member of a partnership or as a joint contractor, for injuries to the cattle on a road other than its own. *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256.

Liability of railroad company for goods to be transported beyond its line.

There is no common-law responsibility devolving upon any carrier to transport goods over other than its own lines. *Michigan Cent. R. Co. v. Myrick*, 9 L. R. A.

rick ("Myrick v. Michigan Cent. R. Co.") 107 U. S. 102, 27 L. ed. 325.

Such liability depends upon a special contract, express or implied. In the absence of a special contract, a railroad company receiving goods for transportation beyond its own line is liable only to the extent of its own route, and for the safe storage and delivery to the next carrier. *Ibid.*; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 818, 21 L. ed. 297; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 23 L. ed. 679; *Hunter v. Southern Pac. R. Co.* 75 Tex. 195.

The mere fact that it received goods marked for a place beyond its own terminus does not import an agreement to transport to the destination named, as a common carrier. *Hunter v. Southern Pac. R. Co.* *supra*.

A carrier is not responsible for damage to goods on a connecting line, where the bill of lading specially limits the carrier's liability to its own line. *Grand Trunk R. Co. v. McMillan* (Can. Sup. Ct.) 43 Am. & Eng. R. R. Cas. 463.

When goods are received by a carrier to be transported beyond the terminus of its line, and delivered at a particular place and to particular persons at such place or destination, without more, a contract is implied that the carrier will cause such goods to be carried to the place of destination safely, without damage or hurt; and it will be liable to the consignor for failure to perform its contract, for any damages which may arise therefrom to the party injured; and this rule is not changed by Ga. Code, § 2064, providing that each company shall be responsible only to its own terminus, and that the last company shall be responsible to the consignee, and that such shall settle among themselves the question of ultimate liability,—overruling *Baugh v. McDaniel*, 42 Ga. 642. *Falvey v. Georgia R. Co.* 75 Ga. 597.

The liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the suc-

Exhibit Q. South Carolina Railway Co. v. Columbia, S. C., Oct. 8, 1887. No. 16. Received of Miller Bros. for transportation, etc. (as in above receipt):

Marka.	Number of Bales.	Consignee and Destination.
W. I. D.	(3) Three B paper stock.	O nfy
T. I. C.	(5) Five B paper stock.	J. A. Schreck,
Rate 58	Weight 4,658 lbs. at. per 100 lbs. to Buffalo.	Buffalo, N. Y.

To be shipped via S. C. at through rate of — per bale. D. McQueen,
Per W. H. Casson, Jr.
Conditions same as in Exhibit P.

Witness says, referring to Exhibits P and Q, that "O | nfy" means "Shipped to the order of shipper, with directions to notify party named." On September 14, 1888, Messrs. Lyles & Haynesworth, plaintiffs' attorneys, addressed a letter to the defendant Company, requesting that they would deliver "the receipt" taken by said Company from the connecting line to which they delivered the cotton. If they did so deliver it. It seems that the matter was referred to Mr. Warring, "general claim-agent of the Company," and that he, thinking that the receipt required was that of the first "connecting railroad," replied immediately that he would write to New York and get the receipt from the New York Central & Hudson River Railroad, as requested. On October 5 ensuing he again wrote, saying that he had succeeded in getting the receipt (inclosing the papers) which would show that the goods in question were delivered by the railway and steamship companies to "the connecting railroad in New York." The plaintiffs' attorneys, however, returned the papers as defective in form, and as being "mere copies;" and, pending explanations as to the

objections made, commenced this action on February 16, 1889. No further reference, however, to these papers need now be made, as the circuit judge refused to admit them in evidence, for the reason that, as he construed the Statute (§ 1513, Gen. Stat.), the steamship company was the first connecting line with the South Carolina Railway Company, and in order to discharge that Company it was necessary to show that the property had been delivered to the steamship company. A motion was made for a nonsuit, but that being refused, the defense called as a witness E. P. Warring, who testified as follows:

I am claim-and-trace agent for the South Carolina Railway Company. (Witness is shown papers marked "A" and "B," being duplicate receipts of the New York Central & Hudson River Railroad; but Mr. Lyles admits that the signatures on those papers are what they purport to be.) I obtained these papers from N. Y. & H. R. R. Co.'s office in New York City. (Witness is shown paper marked "C," which is as follows, and says:) I obtained this paper from Edgerton, agent for the New York & Florida Steamship Line, commonly known as the "Clyde Line:"

Charleston, October 4, '87. The following specified goods were received by Clyde Str Delaware on Oct. 1, '87, from S. C. Ry.:

Say K. V. X.	8 Bales Cotton.
W. I. D.	
T. I. C.	8 P. Stock.
(C.) [Signed]	A. Cudworth, for Str.
	Copy of receipt now in our possession.
	J. E. Edgerton, Clyde S. S. Co.
	Per M. B. Paine. Feb. 13, '89.

There is no arrangement between the South Carolina Railway and the steamship line or connections that one company shall be liable for the losses of the other.

ceeding carrier and an acceptance by him. Pratt v. Grand Trunk R. Co. 95 U. S. 43, 24 L. ed. 336.

Liability for delay in delivery of goods.

A custom of a transportation association as to its manner of obtaining service from railroad companies not known to the shipper will not affect its liability for delay. Little v. Fargo, 43 Hun, 233.

Excuse for delay in transportation.

Where the employes of the company were ready and willing to manage the train and carry forward the freight, but were prevented by mob violence from performing this duty, the delay in transportation and delivery was excused. Pittsburgh, Ft. W. & C. R. Co. v. Hazen, 84 Ill. 26; Pittsburgh, C. & St. L. R. Co. v. Hollowell, 65 Ind. 183; Lake Shore & M. S. R. Co. v. Bennett, 6 Am. & Eng. R. R. Cas. 391; Indianapolis & St. L. R. Co. v. Juntgen, 10 Bradw. 206.

In respect to liability of a railroad company for delay in transportation and delivery of goods, all that can be required of it is exercise of due care to forward and deliver promptly. Geismar v. Lake Shore & M. S. R. Co. 3 Cent. Rep. 839, 108 N. Y. 563.

When misconduct of men acting unlawfully, such as incendiaries, mobs, etc., delays the running of trains, the only duty resting upon the carrier, if not otherwise in fault, is to use reasonable diligence to overcome the obstacles interposed, and forward the goods. *Ibid.*

Lawless acts of employes, adverse to the inter- 9 L. R. A.

ests and contrary to the orders of the employer, cannot be imputed to it as having been done by its agents and servants. *Ibid.*

A common carrier is not responsible for a depreciation of the value of goods resulting solely from a delay in their transportation, which could not have been avoided because of a mob of rioters, under Tex. Rev. Stat., art. 277, declaring the duties and liabilities of carriers to be the same as at common law except where otherwise provided. Gulf, C. & S. F. R. Co. v. Levi, 8 L. R. A. 323, 78 Tex. 337.

All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination. Wilbert v. New York & E. R. Co. 12 N. Y. 245; Blackstock v. New York & E. R. Co. 20 N. Y. 43.

A railroad company is not excused from delivery to a connecting carrier by a clause in its charter that the company shall be responsible for goods on deposit at its depots awaiting delivery only as a warehouseman and not as a common carrier. Michigan Cent. R. Co. v. Mineral Springs Mfg. Co. 63 U. S. 16 Wall. 318, 21 L. ed. 297.

Liability of connecting carriers. See note to Adams Exp. Co. v. Harris (Ind.) 7 L. R. A. 214.

Rights of connecting carriers. See note to Croscan v. New York & N. E. R. Co. (Mass.) 8 L. R. A. 768.

Connecting lines of railroads. See notes to Fox v. Boston & M. R. Co. (Mass.) 1 L. R. A. 705; Washington v. Raleigh & G. R. Co. (N. C.) 1 L. R. A. 390.

Mr. Lyles objects to the admission of this paper in evidence. His honor rules that the receipts are not admissible at this moment, because the long delay must first be explained.

Witness Warring continues: "I suppose Mr. Lyles wanted receipt of connecting line, and I thought it would be best to get the receipt of the next 'railroad line,' though further off than the steamship company. I had no idea of refusing a proper receipt. Would have been easier to get receipt from the steamship company in Charleston. There was no 'willful refusal' to deliver receipt," etc. Mr. Lyles objects.

Alfred Cudworth called: "At the time mentioned I was receiving clerk for the New York & Charleston Steamship Company." When asked whether, as agent of the steamship company, he received these goods (Mr. Lyles objects. Only "receipt in writing" admissible) witness answered that he recollected the receipt of the goods, by referring to his receipts. Says paper dated October 4, 1887, is original, in his handwriting "I have record of three bales of cotton marked 'K. V. X.', three bales of paper stock marked 'W. I. D.' and five bales marked 'T. I. C.' No weights. They are 'checked off as received.' They are records of my office. Duplicates were furnished to the South Carolina Railway Company." Cross-examined. "The letters N. Y. & C. W. & S. N. Co. mean the lighter company. The goods were conveyed to the steamship by lighter. The lighter company is considered a part of the South Carolina Railway. I cannot tell from those papers whether or not I received cotton or paper stock shipped to the order of Miller Brothers. Notify J. A. Schreck, Buffalo." By the court. "Does the lighter company transport for any other road than the South Carolina Railway?" Answer. "No. The lighters carry goods from the railway to the steamship, and from the steamship to the railway. (Mr. Lyles objects to the admission of the paper 'C' in evidence. Objection overruled, and he excepts.)"

The circuit judge, who heard the case without a jury by consent, gave judgment for the defendant Company, and the plaintiffs appeal, upon the following grounds: "(1) Because his honor allowed the witness Warring to testify as to his reasons for not sending the receipt of the connecting line, to which it is claimed the goods were delivered, and to his not knowing what receipts were wanted. (2) Because he allowed the witness Cudworth to testify orally to the delivery of the goods by the South Carolina Railway Company to the steamship company. (3) Because he allowed the memoranda in the handwriting of the witness [Cudworth], dated the 4th day of October, 1887, to be offered in evidence. (4) Because he found that said goods were delivered by the defendant to the steamship company," etc.

This is purely a case of law for damages, in which the parties waived trial by jury, and we must therefore consider the decision of the circuit judge as a verdict, which, as to the facts found, is not reviewable by us. But it is urged that the judge committed error of law in admitting certain testimony of the witnesses Warring and Cudworth, in reference to the provisions of section 1518 of the General Stat-

9 L. R. A.

utes, which, among other things, provides as follows: "In case of the loss of or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads, the initial corporation or corporations first receiving the same shall in every case be liable for such loss or damage, but may discharge itself by the production of a receipt in writing for the said article or articles from the corporation to whom it was its duty to deliver said articles in the regular course of transportation; in which event the said connecting road or roads shall be severally so liable, but may, in succession and in like manner, discharge itself or themselves therefrom; provided, however, that if either or any of the said railroad corporations should willfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefits of such exemption in any action against the said railroad corporation to render it liable for such loss," etc.

This Act is comparatively recent, and has never received authoritative construction. It is a part of the "General Railroad Law" of the State, and, as there is in it no mention whatever of steamship lines of transportation, or of any other but "railway lines," it is contended that steamship lines, not being expressed, or even in contemplation, cannot be brought under the requirements of the Act. But as it seems to us, the object of the enactment being manifestly to provide a proper remedy for the shipper in what is called "through transportation," by making each link, each carrier in the line, liable for its own negligence or conduct causing loss or damage to the property, the Act to promote this intent should be construed liberally, so as to include a steamship company which happens to be one of the common carriers in a through line of transportation agreed upon by the parties. If not, there would be no remedy in a case like this; for it is quite clear that it could not be "the duty" of the South Carolina Railway Company to deliver property to a railroad company beyond seas, in the City of New York. Besides, in this case, it was one of the conditions upon which the defendant corporation received the property that it should only be liable for the property while upon its own road; "that acting as forwarders only, they are relieved when the same is by them delivered to connecting railroads or steamship lines, by which it is to be carried to its destination," etc. We agree with the circuit judge that it was necessary, in order to discharge itself from liability, that the defendant corporation should show that the property was delivered to the steamship company at Charleston.

It will be observed, however, that at the time of this transaction the Act had not been so construed. When the evidence of delivery was demanded by the plaintiffs, they did not indicate whether they wished the receipt of the steamship company or of the "railroad corporation" first in the line of transportation. According to the express terms of the Act, it was so very doubtful whether "the receipt" of the steamship company would suffice to discharge the defendant that the delay in produc-

failure or refusal" which the proviso of the Act declares shall exclude all benefit from its provisions.

As to the testimony of the witness Cudworth. Without now undertaking to decide whether there are circumstances under which parol testimony may be admissible to prove the delivery of property by one carrier corporation to its next connecting line, we think the testimony of Cudworth as to the receipt of the property by the steamship line cannot be said to be "merely oral." He said he "recollected the receipt of the goods by referring to my receipts." Being shown the paper dated October 4, 1887 (Exhibit C), he said: "That is the original, in my handwriting. These [describing the property] are checked off as received. They are records of my office. Duplicates

the Act requires the receipt spoken of to be in any particular form. The intention was to require the delivering company, in order to discharge itself, to produce such written evidence of the receipt of the property by the connecting company, to which it is delivered, as will shift the liability to account for the property to that company. As it seems to us, the paper of date October 4, 1887, and signed by Alfred Cudworth, "for steamer," sufficiently identifies the property received, and is substantially such "receipt in writing" as to be a discharge to the Railway Company.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Simpson, Ch. J., and McIver, J., concur.

NORTH CAROLINA SUPREME COURT.

Lewis HOBBS

ATLANTIC & NORTH CAROLINA R. CO., Appt.

(.....N. C.....)'

A railroad company is not liable for injuries resulting to one of its locomotive firemen by reason of the negligence of the engineer upon the same engine, unless the company exposed the fireman to unusual and unnecessary risks or retained the engineer in its service, knowing that he was unfit or incapable, since the engineer and fireman are fellow servants within the rule exempting the employer from liability for injuries resulting from the negligence of fellow servants.

(October 20, 1890.)

A PPEAL by defendant from a judgment of the Superior Court for Craven County overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Reversed.*

The facts are stated in the opinion.

Mr. W. W. Clark for appellant.

Messrs. H. R. Bryan and C. R. Thomas, Jr., for appellee:

The complaint is sufficient if it alleges the injury by defendant Company, and the question, whether the servant receiving the injury and servant causing the injury were fellow servants, is for the jury under the instruction of the court.

Pierce, Railroads, p. 884, note 1, and cases cited; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576, 17 Am. & Eng. R. R. Cas. 564.

The question who is a fellow servant has never been decided conclusively. Each case is governed by its special merits and circumstances.

The fact that a co-employé had authority from the common master to discharge his fellow servants does not itself constitute him a vice-principal.

● L. R. A.

Webb v. Richmond & D. R. Co. 97 N. C. 387.

The history of the fellow-servant rule begins with the cases of *Priestly v. Fowler*, 8 Mees. & W. 1, in 1837, and *Hutchinson v. York, N. & B. R. Co.*, 5 Exch. 843, 1850, in England, and *Murray v. South Carolina R. Co.*, 10 Rich. L. 227, and *Farwell v. Boston & W. R. Co.*, 4 Met. 49, in 1841 and 1842, in the United States.

Until these cases, the doctrine of *respondent superior* was applied without exception. This doctrine is crystallized into the maxim, "*qui facit per alium facit per se*," and it has been said the doctrine is founded in natural justice. Ever since the rule was enunciated it has been burdened by exceptions and limitations. The courts of Illinois, Georgia, Kentucky, Tennessee, Virginia and West Virginia, have advanced the doctrine of consociation, or different department limitation of the rule.

Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302.

Courts of great learning have held strenuously to the doctrine that where the negligent servant is of superior authority to the injured servant, or where one is placed by the employer in a position of subordination and subject to the orders and control of the other, and such inferior servant, without fault and in the discharge of his duty, is injured by the negligence of the superior servant, the master is liable in damages for the injury.

Notes to *Chicago, M. & St. P. R. Co. v. Ross*, 17 Am. & Eng. R. Cas. 514-519.

The superior-servant limitation in general is favored by text-writers and adopted by southern and western courts, and by the United States Supreme Court.

McKinney, Fellow Servants, p. 112, and cases cited in notes 1, 2; Thomp. Neg. 1023, § 84; Shearm. & Redf. Neg. §§ 1, 2; Wharton, Neg. § 229; Beach, Contrib. Neg. § 110; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787; Pierce, Railroads, p. 866, and cases cited in note 3; *Louisville & N. R. Co. v. Collins*, 2 Duval, 114; *Louisville & N. R. Co. v. Brooks*, 88 Ky. 129.

In our own State the fellow-servant rule,

first decided in *Ponton's Case*, 6 Jones, L. 245, and adverted to in *Hardy v. North Carolina Cent. R. Co.* 74 N. C. 784, and 76 N. C. 5, has been in later cases limited in its application.

Dobbins' Case, 81 N. C. 448; *Coules' Case*, 84 N. C. 309; *Kirk's Case*, 94 N. C. 625; *Patton v. Western N. C. R. Co.* 96 N. C. 455; *Hagins v. Cape Fear & Y. F. R. Co.* 106 N. C. 537; *Miscours' Pac. R. Co. v. Perego*, 86 Kan. 424.

The engineer was a superior agent, the fireman a subordinate, as well by the rules of the Company as alleged, as by virtue of their respective positions.

The rule is not applied when the injured servant was, without proper notice of the increased risk, put by a superior agent to do a service outside of, or more dangerous than, the employment for which he was engaged.

Pierce, Railroads, p. 378, note 1, and cases cited. See also *Cooley, Torts*, pp. 563, 564, citing *Mann v. Oriental Print Works*, 11 R. I. 152.

The master is liable for abuse of authority of superior servant.

Wood, Mast. and Serv. § 425, p. 810, last clause of § 438, §§ 439, 440, pp. 864-866, and cases cited; also, § 446, p. 880, citing *Laning v. New York Cent. R. Co.* 49 N. Y. 521, and other New York cases; also, especially, § 448, pp. 883-886; *Harper v. Indianapolis & St. L. R. Co.* 47 Mo. 537; *Louisville & N. R. Co. v. Collins*, 2 Duval (Ky.) 114.

Clark, J., delivered the opinion of the court:

In this case, as in *Hagins v. Cape Fear & Y. F. R. Co.*, 106 N. C. 537, 590, it is set out in the complaint that the injury to the plaintiff, who was a fireman, as in that case a brakeman, was caused by the negligence of the engineer. This case must be governed by that. While it is not always easy to draw the line between what constitutes a fellow servant and what a superior employé, or vice-principal, the relation between a brakeman or fireman and the locomotive engineer is well settled to be that of fellow servants. It was so held in the first case on the subject (*Murray v. South Carolina R. Co.* 1 McMul. L. 385), and has been repeatedly and uniformly so ruled since. *Jordan v. Wells*, 3 Woods, 527; *Bull v. Mobile & M. R. Co.* 67 Ala. 206; *Nashville, O. & St. L. R. Co. v. Handman*, 18 Lea, 428; *Henry v. Lake Shore & M. S. R. Co.* 49 Mich. 495; *Paulmier v. Erie R. Co.* 84 N. J. L. 151; *Nashville & O. R. Co. v. Elliott*, 1 Coldw. 611; *Jones v. Yeager*, 2 Dill. 64; *Caldwell v. Brown*, 53 Pa. 453; *East Tennessee, V. & G. R. Co. v. Rush*, 15 Lea, 145; *Alabama & F. R. Co. v. Waller*, 43 Ala. 459; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 837; *Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637.

And there are many others. In *Dobbin v. Richmond & D. R. Co.* 81 N. C. 446, it is held that, to make the company liable, the negligent employé must be something more than a mere foreman over other hands; and in *Kirk v. Atlantic & O. A. L. R. Co.*, 94 N. C. 625, *Smith, Ch. J.*, says: "The operation of the principle [of non-liability of master for negligence of fellow servant] is not altered by the fact that the servant chargeable with negligence is a servant of superior authority whose lawful directions the other is bound to obey."

3 L. R. A.

The same view is held in *Webb v. Richmond & D. R. Co.*, 97 N. C. 387, by the present chief justice, although in the latter case the negligent servant had authority to employ and dismiss the injured employé. The principle above quoted from *Kirk v. Atlantic & O. A. L. R. Co.* is fully sustained by *Wharton, Neg.* § 220; *Wood, Mast. and Serv.* § 437; *Cooley, Torts*, pp. 543, 544; *Shearm. & Redf. Neg.* § 100; *Pierce, Railroads*, 386; *Wright v. New York Cent. R. Co.* 25 N. Y. 564, and cases cited.

It is not necessary to draw the line in this case, as the relationship of the parties here falls clearly on the side of their being fellow servants. There is no allegation here that the Company exposed the plaintiff to unusual and unnecessary risks, or that, knowing that the engineer was unfit or incapable, they retained him in their service. Indeed, the services appear to have been those incident to the scope of plaintiff's employment as fireman, and the injury was caused by negligence of the engineer, his fellow servant. The allegations in the complaint that, "as such fireman, the plaintiff was under the direction and control of the locomotive engineer," and that "engine, with train of freight cars attached, were managed, controlled and conducted by said engineer and other agents and servants of defendant Company," in no wise distinguish the case from the ordinary one of fireman and engineer. The doctrine that a master is not liable to an employé for the negligence of a co-employé rests upon the principle that a man, as a rule, is no more liable for the wrongs done by another than he is for his debts. There are some exceptions to the rule, among them, for instance, that passengers injured by the negligence of servants of a common carrier can recover damages of the carrier, because of the breach of the contract of safe carriage, and so where a stranger is injured by the acts of a servant within the scope of his employment. This last is upon the ground of public policy, and also because, as to the stranger, the servant is the agent of the master. An effort to make a further exception so as to make the common master liable to a servant for an injury done him by the negligence of a fellow servant first came before the courts in England, in 1837, in the case of *Priestley v. Fowler*, 8 Mees. & W. 1, in which *Lord Abinger* (*Sir James Scarlett*), in a very able opinion, pointed out the inconveniences, and often the great injustice, which would be produced if the master were held responsible. The principle laid down was that a servant, on entering upon his employment, contracted with a view to the ordinary risks of such employment; and further that it was public policy that it should be so, since, if, for injury to a servant by negligence of his fellow, he could not hold the master liable, servants would be prompted by their own interests to observe want of skill or care on the part of their fellows, and promptly report the same. This principle was also laid down, without any knowledge of the Westminster decision, by the Supreme Court of South Carolina in *Murray v. South Carolina R. Co.*, 1 McMul. L. 385 (1841), and applied to railroad corporations (the case was that of a fireman injured by the negligence of an engineer), and

followed by the able opinion of Shaw, *Ch. J.*, in *Farwell v. Boston & W. R. Corp.*, 4 Met. 49. It was applied to the railroads in England, in 1850, in the case of *Hutchinson v. York, N. & B. R. Co.*, 5 Exch. 848. Since then the same ruling has been made in a long line of decisions so that Gray, *J.*, in *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478 [27 L. ed. 1008] well says that "the rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants, in the course of his employment." There are modifications where the fellow servant is acting as principal, or *alter ego*, also when the master furnishes machinery which he knows, or, with care, ought to have known, to be defective, or retains an unfit or incompetent servant, who does the injury, or exposes the servant to unusual risks, not contemplated by the scope of his employment. But the present case, as we have seen, does not come within any of these. Notwithstanding that the general rule of non-liability of the master is so well settled, it is still frequently urged that, as to railroads, there should be an exception made. But whatever may be argued in favor of or against the propriety of such exception, the courts have not felt authorized to make it. The change, wherever it has been made, has come by legislative enactment. In Georgia, the common law has been repealed by sections 2083 and 3036 of the Code, which provide that when an employé of any railroad company is injured by another employé without any default or negligence on his own part, the company is liable for damages, as to passengers, for injuries caused by want of due care and diligence. Similar provisions have been adopted in several other States (McKinney, *Fellow Servants*, §§ 100-109), and in their courts are to be found the decisions which are in conflict with ours. Wherever the common law has remained, as in this State, unchanged by statute, the holdings of the courts are in substantial conformity to ours. The common-law rule has also been very much modified in England by statutory enactment (the Employers' Liability Act of 1880, commonly known as the "Gladstone Act"); and that fact must be considered with reference to all the later English decisions. The demurrer should have been sustained.

Per Curiam:

Error.

STATE OF NORTH CAROLINA, *Appt.*,

W. M. BAGWELL *et al.*

(...N. C....)

An indictment for reading and publishing the contents of a letter without authority, to be sufficient under Acts 1889, chap. 41, § 2, must charge that the letter opened and read was sealed or that its contents were published knowing it to have been opened and read without authority.

(November 24, 1890.)

9 L. R. A.

APPEAL by the State from a judgment of the Superior Court for Iredell County quashing an indictment charging defendants with reading and publishing a letter without authority. *Affirmed.*

Statement by Davis, J.:

This is an indictment charging the defendants with reading, publishing and making known the contents of a letter without authority, in violation of chapter 41, § 2, of the Acts of 1889, tried before Bynum, *J.*, at the August Term, 1890, of the Superior Court of Iredell County. The indictment charges that the defendants, on or about the 10th day of July, 1890, did "unlawfully, willfully and without proper authority take into their possession a certain letter written by Emma L. Rankin, to S. C. Rankin, on or about June 20, 1890, which said letter was duly received by the said S. C. Rankin through the United States mail at the postoffice in Mooreaville, N. C., on or about the 24th day of June, 1890," and that the said defendants "did, on or about the 12th day of July, 1890, unlawfully, willfully and without authority, read, publish and make known the contents," etc., "of the said letter, against the form of the Statute," etc. Before the jury was impaneled, the defendants moved "to quash the bill of indictment upon the plea that the bill fails to charge an offense under the Statute, and particularly for that it fails to describe the letter in question to have been 'a sealed letter,' and fails to charge the alleged reading and publishing to have been done with knowledge that said letter had been opened without proper authority." After hearing the argument of counsel, his honor quashed the indictment, and the State appealed.

Messrs. Theodore F. Davidson, Atty-Gen., and R. H. Battle for the State.
Mr. W. M. Robbins for appellee.

Davis, J., delivered the opinion of the court:

The following is the Act under which the defendants are indicted: "Any person who willfully and without authority opens and reads, or causes to be opened or read, a sealed letter or telegram, or publishes the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor," etc. Acts 1889, chap. 41, § 2.

This indictment is for an offense created by statute, and it not only fails to follow the language of the statute descriptive of the offense, but, by the most liberal construction, it cannot be made to charge that the defendants opened or read a "sealed letter or telegram," or that they "published the whole or any portion of such letter or telegram, knowing it to have been opened and read without authority;" and these are necessary words, descriptive of the offense, without which the indictment fails to charge any offense under the Statute. *State v. Deal*, 93 N. C. 803; *State v. Hall*, 93 N. C. 571; *State v. Aldridge*, 86 N. C. 680; *State v. Watkins*, 101 N. C. 702, and cases there cited.

It is insisted for the State that the letter was "received through the United States mail," and the material charge here was the unlawful publishing and making known its contents,

without authority. We do not see how this can aid the indictment. The Statute does not make it an offense to open, read and make public a letter received through the United States mail, but it must be a "sealed letter,"

and opened or read without authority, or published, "knowing it to have been opened or read without authority." This is not charged, and the indictment was properly quashed. *There is no error.*

IOWA SUPREME COURT.

J. H. CLARK, Trustee, *Appt.*,
v.

A. J. HIRSCHL and Mary Burrows, *Appellees.*

(....Iowa....)

A member of a mutual benefit association may by writing signed by him surrender his benefit certificate, and direct the payment of the benefit to new beneficiaries, and direct a new certificate payable to them, although the writing, mailed to the association just before his death, did not reach it until after that event, and though the original certificate remains with his wife, to whom it is payable and who refuses to surrender it, the application having directed payment to her subject to such future disposal as he might thereafter direct.

(October 20, 1890.)

APPEAL by plaintiff from a decree of the District Court for Scott County in favor of defendant Mary Burrows in a proceeding instituted to determine the rights of the parties to the proceeds of a benefit certificate. *Reversed.*

Statement by **Rothrock, Ch. J.**:

This is an equitable proceeding, the object of which is to determine the rights of the parties to the proceeds of a benefit certificate, issued by the Iowa Knights of Pythias Insurance Association upon the life of William Burrows, deceased. The plaintiff claims the said proceeds as trustee for the mother and other relatives of the deceased, and the defendant Mary Burrows claims that she is the lawful beneficiary of the fund, and that it should be paid to her. The insurance association made no contest as to the validity of the certificate, and, by agreement of all parties, the money due from the association was paid to A. J. Hirschl, Esq., and by proper pleadings Clark, the trustee, and said Mary Burrows presented their respective claims to said proceeds. The district court held that Mary Burrows was the lawful beneficiary, and ordered the proceeds to be paid to her. J. H. Clark, trustee, appeals.

Messrs. C. W. Haller and G. H. Koch, for appellant:

The agreement in this case is contained in the application and the approval of the appli-

cation, and these should be read in the light of the charter and of the by-laws.

May, Ins. 2d ed. § 48; Bacon, Benefit Societies, 1st ed. § 278; 2 Parsons, Cont. 7th ed. 611; 8 Am. & Eng. Encyclop. Law, 841.

The certificate is merely evidence of the contract.

The agreement is in every way a lawful and binding contract. Burrows had the right to change the beneficiary.

Mitchell v. Grand Lodge, 70 Iowa, 860; Niblack, Mutual Benefit Societies, 1st ed. §§ 171, 201, 202; *Barton v. Provident Mut. B. Assn.* 1 New Eng. Rep. 856, 68 N. H. 535; *Union Mut. Assn. v. Montgomery*, 14 West. Rep. 877, 70 Mich. 587.

The change in beneficiary was properly made.

Miller v. Mutual Ben. L. Ins. Co. 81 Iowa, 216.

The rule that a member of a mutual company is bound by the rules thereof, does not apply to mere regulations in regard to the transaction of business.

Walsh v. Aetna L. Ins. Co. 80 Iowa, 188.

When the right to change the beneficiary is given to the insured, and the exercise of this right is not limited to any particular method, any method may be adopted.

Lamont v. Grand Lodge, 81 Fed. Rep. 177; *Masonic Mut. Ben. Soc. v. Burkhart*, 9 West. Rep. 92, 110 Ind. 189; *Stephenson v. Stephenson*, 64 Iowa, 524; *Highland v. Highland*, 109 Ill. 866; *Supreme Council v. Priest*, 46 Mich. 429; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Swift v. Railway Pass. Ben. Assn.* 96 Ill. 809; *Eckel v. Renner*, 41 Ohio St. 282; *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 12 West. Rep. 535, 68 Mich. 116.

The direction was made and mailed in due time.

May, Ins. 2d ed. §§ 46-49; 8 Am. & Eng. Encyclop. Law, 856.

Equity will aid a change of beneficiary defectively executed.

Grand Lodge v. Child, 14 West. Rep. 454, 70 Mich. 163.

The beneficiaries named in this case are proper beneficiaries.

Lamont v. Grand Lodge, *supra*; *Mansely v. Knights of Birmingham*, 115 Pa. 895; *Bloomington Mut. Ben. Assn. v. Blue*, 8 West. Rep. 642, 120 Ill. 121, 128; *Masonic Mut. Ben. Soc. v. Burkhart*, *supra*; *Martin v. Stubbings*, 126 Ill. 387.

The benefit fund may be made payable to a trustee.

Ex parte Houghton, 17 Ves. 258; *Smillie v. Quinn*, 90 N. Y. 492; *Herkimer v. Rice*, 27 N. Y. 163; *Wyman v. Wyman*, 26 N. Y. 255; May, Ins. 2d ed. § 8.

NOTE.—Mutual benefit association; mode of changing beneficiary in certificate. See notes to *Schondfeld v. Turner* (Tex.) 7 L. R. A. 189; *Milner v. Bowman* (Ind.) 6 L. R. A. 95; *Garner v. Germania L. Ins. Co.* (N. Y.) 1 L. R. A. 266.
9 L. R. A.

William Burrows was a member of the Iowa Knights of Pythias Association, and Mary Burrows was his wife.

On the 7th of October, 1882, Burrows took out a policy of insurance upon his life in the association for \$2,000 payable on his death to Mary Burrows, his wife.

The contract required the association to pay the insurance to the person named in the certificate of membership, unless the insured should change the name of the beneficiaries, and the manner in which this should be done formed a part of the contract.

Stephenson v. Stephenson, 64 Iowa, 534.

As the proposition for a change was not received by the company until after the death of the insured, and was never acted upon by the company, no change in the beneficiary was ever made.

Moore v. Pierson, 6 Iowa, 279, 292; 1 Parsons, Cont. 6th ed. 482.

The paper was not intended for a will; a paper signed by the insured, and called his last will, should not be allowed to change the beneficiary in a policy.

Wendt v. Iowa Legion of Honor, 72 Iowa, 682.

The first application to the company for a change in the beneficiary was made only after the death of the insured, and after the interest of the original beneficiary had become vested by such death.

Ireland v. Ireland, 42 Hun, 212; *Hellenberg v. District No. 1 of I. O. of B. B.* 94 N. Y. 580; *Foster v. Gile*, 50 Wis. 608; *Kentucky Mas. Mut. L. Ins. Co. v. Miller*, 13 Bush, 489.

Bothrock, Ch. J., delivered the opinion of the court:

1. The insurance was effected in October, 1882. The contract of insurance was made upon an application, of which the following is a copy:

I, the undersigned, desire to become a member of the Iowa Knights of Pythias Insurance Association, and hereby certify that I will true answers make to all questions, and, to the best of my knowledge and belief, will not conceal or omit to state anything regarding my health, past or present, affecting the expectancy of my life, and agree that any untrue or fraudulent statements made in this application, or to the medical examiner, or any concealment of facts by me made, or my suspension from my lodge, or voluntarily severing my connection with this association, shall forfeit all right, claim and interest, and all right, claim and interest of my heirs, executors, administrators and assigns, in and to all benefits and privileges of the association. I direct that all benefit to which I may be entitled from the association be paid to Mary Burrows, related to me as wife, subject to such future disposal of the benefits as I may hereafter direct.

[Signed] William Burrows.

[Signature of applicant.]

The benefit certificate issued by the association was in these words:

No. 142. Duplicate. \$2,000.
Iowa Knights of Pythias Ins. Association.
Benefit Certificate.

This certifies that Knight William Burrows is a member of the Iowa Knights of Pythias
-9 L. R. A.

lodge, and upon condition that the statements made by him in his application for membership in said association, and the statements certified by him to the medical examiner, were true at the time of making thereof, and that they be made a part of this contract, and upon the further condition that the said member complies in the future with the laws, rules and regulations now enacted, or which may hereafter be enacted, to govern said association, then the said Iowa Knights of Pythias Insurance Association hereby promises and binds itself to pay out of the funds of said association to Mary Burrows [wife] a sum not exceeding two thousand dollars, in accordance with and under the provisions of the law governing said association, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate: provided that said member is in good standing in said association at time of death. In witness whereof, the Iowa Knights of Pythias Insurance Association has hereunto affixed its seal, and caused this certificate to be signed by its president, and attested and recorded by its secretary at Marshalltown, Iowa, this 7th day of October, A. D. 1882.

[Signed] Bryan A. Beeson, President.

E. H. Hibben, Secretary. [Seal.]

William Burrows died at the City of Davenport, in this State, on the 28th day of April, 1888. On the 21st day of said month he executed an instrument in writing, in these words:

I hereby surrender the benefit certificate issued to me, William Burrows, by the Iowa Knights of Pythias Insurance Association, and direct a new one to be issued to me, payable five hundred (500) dollars to Elizabeth Burrows, related to me as mother, and five hundred (500) dollars to my sister, Mrs. Gill, the balance to pay my legal debts; and the balance to John Sandry, wife, two children, and nephew, Frank McCoon, share and share alike. All in trust to Joseph H. Clark to be carried out as directed. Witness my hand and seal April 21st, 1878.

[Signed] William Burrows.

Signed by William Burrows in presence of D. C. Garrett, C. O. Anderson, E. L. Raff.

There is no controversy about the execution of this paper, and, although it appears that Burrows was quite feeble at the time he signed the same, there is no evidence that it was not his voluntary act, or that those who were present and prepared the paper, and witnessed the signature, used any influence or persuasion to induce him to sign it. They were present at his request for the purpose of aiding him in carrying out his desire to change the beneficiary in the certificate. One of said persons testified as a witness as follows: "I got home that morning from a three weeks' absence. Mr. Burrows sent for me, and said he wanted to change his policy to his mother and sisters, and wanted to know whether or not I could do anything for him. He said he had one policy he expected to leave to his wife, and the other policy he would rather have changed. He said his mother and sisters were as much entitled to it as his wife, on account of the treatment he had had lately. He said he was afraid to stay in the house after the policy was changed. I said I did not know much about it, but would go

and see Clark. I went to Clark, and we went to Heinz & Hirschl to see about having the policy changed." Another testified as follows: "I was summoned to the sick-bed of Wm. Burrows, and he urged me to assist in making this change; that he had long intended to make the change, but his wife had prevented him from doing it, and he wanted me to help him with it, which I promised I would do, and when the paper was brought, there were some minor changes to be made." It further appears in evidence that the said paper was placed in the mail at Davenport, on the evening of the 23d day of April, 1888, inclosed in an envelope, addressed to the said insurance association at Marshalltown. This is not absolutely certain. But it was mailed at some time between the day of its date and April 26. We think the preponderance of the evidence shows that it was mailed on the 23d, and that it was sent in the mail on the evening of that day. And it appears from the evidence that a letter, mailed at Davenport in time for the evening mail, will, in due course of transmission, reach Marshalltown at about 10 o'clock the next morning. And this conclusion is not inconsistent with the testimony of the president and secretary of the association. They testified that the paper was not received until the 27th. But they both state that for some time previous to that date they had both been absent. They do not state that the mail addressed to the association was taken from the postoffice on the 24th, the 25th and 26th of that month. A letter was inclosed with the paper, of which the following is a copy:

Heinz & Hirschl, April 23, 1888.
202 W. 2d Street, Davenport, Iowa.

E. H. Hibben, Esq., Marshalltown, Iowa.

Dear Sir: We inclose assignment, pertaining to transfer of benefit certificate issued to Wm. Burrows, and affidavit in relation thereto. We inclose one (\$1) dollar, 50 cents being intended for the transfer. You can return the change in postage-stamps. Please make the change at once, transfer at once, and advise us accordingly. Yours respectfully.

At the time the instrument by which it was sought to change the beneficiary was signed by said Burrows, his wife was in possession of the certificate. She was requested to surrender it. She refused to do so in the most positive terms, saying that she would burn it up and destroy it rather than deliver it up, and that she would see Clark, the trustee, "in hell, before she would give him the paper." Immediately after the transaction was completed, the persons who assisted Burrows in making the transfer removed him to Mercy Hospital in Davenport, where he remained until he died. It does not appear that deceased left any children surviving him. At the same time that the paper in question came into the hands of the officers of the association at Marshalltown, they also received a notice of the death of Burrows, and no action was taken by the association in regard to a change of the beneficiary. The printed articles of incorporation and laws of the association contained the following, among other, provisions: "The association shall furnish each member thereof with a benefit certificate, signed by the president, and duly attested by

the secretary, and said certificate shall contain the agreements on the part of the association and member. The fee for changing a beneficiary certificate shall be fifty (50) cents. They (the board of directors) shall have power to make such rules and regulations for their government, i. e., payment of claims, reception of proof of death, and transaction of general business, as a majority may see fit, not conflicting with these laws."

The benefit certificate was a printed form in blank, and on the back of it was printed these words: "I do hereby surrender the within benefit certificate, and direct that a new one be issued to me, payable to _____, related to me as _____."

2. The foregoing is a statement of the facts necessary to be considered in determining which of the claimants is entitled to the fund in the hands of the trustee. It will be observed that, by the very terms of the benefit certificate, the application is made part of the contract between the insurer and the insured. The obligation of the association was to pay the amount due to the wife of Burrows, subject to such future disposal of the benefits as he might thereafter direct. If the contract contained no other requirement, we think that it is quite plain that this direction to make payment to some one other than Mary Burrows might be made by assignment, or by any direction in writing which would protect the association in making payment of the loss to the person designated by the insured. It is insisted, however, that, as the certificate requires that it shall be surrendered to the association before payment, and that the member bound himself to comply with the laws, rules and regulations then enacted or thereafter to be enacted governing said association, no transfer was made, because the certificate was not surrendered, and the laws, rules and regulations of the society have not been complied with. The requirement that the certificate should be surrendered upon payment of loss must receive a reasonable construction. Suppose it should appear upon the death of a member that the certificate had been lost or destroyed. No one would claim that the insurer could escape payment by reason of the failure to surrender the certificate. And it is to be observed that there is no requirement in the contract that the certificate shall be surrendered in order to effect a change of the beneficiary. It does not even provide that it is necessary to notify the association of the change at the time it is made. By the very terms of the contract, the change of the beneficiary is a mere direction to the association, which it is bound to obey. The "disposal of the benefits" may be made by the mere direction of the insured. This act does not require the assent of the association. It is not a new contract between the insurer and the insured. If the association receives notice of the change in the beneficiary before it has been in any way prejudiced, it would seem that it would be bound to obey the direction. These views appear to us to be founded on sound reason. We look in vain for any law, rule or regulation enacted by the association with which Burrows failed to comply. It is true that the blank on the back of the certificate indicates that the manner of conducting the business of the association was

to surrender the first certificate, and issue another to the new beneficiary, and the evidence shows that this was the practice of the company. But this was a mere regulation for the convenience of the company, of which its members had no notice. It was no part of the constitution or by-laws of the association; and rules or regulations adopted by the officers of the company, in regard to the transaction of business, and which do not enter into the constitution of the company as provisions of its charter or by-laws, are not embraced in the certificate. They are such rules as fix the rights of members of the company, and are parts of the laws of the institution which are to be regarded as parts of the contract. *Walsh v. Etina L. Ins. Co.* 30 Iowa, 133, and authorities there cited.

The case of *Stephenson v. Stephenson*, 64 Iowa, 534, is in no sense in conflict with the views we have expressed. In that case the by-laws, which were made part of the contract, made specific provision as to the manner of changing the beneficiary. It is there said that "the manner in which this should be done formed a part of the contract of insurance."

We have set out the facts attending the execution of the paper by Burrows, and the time of its reaching the association, with more particularity than may have been necessary. In our opinion, the fact that Burrows died before

the association received the instrument is not a material question. Under this contract Burrows could have changed the beneficiary by an assignment on the certificate, or by a separate paper, and it was complete, at least so far as Mary Burrows was concerned, when it was delivered to Clark, the trustee. Notice to the insurer of the assignment was not necessary, unless required by the contract of insurance. See *Bliss, Ins. § 333*, and *May, Ins. §§ 388, 396*, and authorities cited.

Where a policy is assignable, or where a benefit certificate authorizes a change of beneficiaries, which is the same thing in effect as an assignment, notice of the assignment is not necessary to its validity, unless required by the contract of insurance. The execution of the instrument by Burrows, directing that the money be paid to his mother and brothers and sisters, operated as an equitable assignment. The consent of Mary Burrows was not necessary to effect the object, and she could not defeat it by refusing to deliver the certificate when it was demanded. She had no vested right in the paper, nor in the insurance. If it had been procured from her by fraud, and a new certificate issued to another beneficiary, she would have had no right to complain. *Brown v. Grand Lodge of A. O. of U. W. (Iowa)* 45 N. W. Rep. 884.

The decree of the District Court will be reversed.

NEW YORK COURT OF APPEALS.

Harriet H. VILAS, Admr., etc., of Samuel F. Vilas, Deceased,

Peter BUTLER, George B. Chase, *Appt.*, Delaware & Hudson Canal Co., *Respt.*, et al., Sarah L. J. Whiting, Exrx., etc., of John N. Whiting, Deceased, Intervenor, *Appt.*

(.....N. Y.....)

1. Relief from a judgment rendered against a person upon the unauthorized appearance of an attorney in his name is to be sought through a direct application to the court by motion in the action in which such appearance was entered, in the ab-

sence of special circumstances which may render such remedy inadequate or incomplete.

2. An unauthorized appearance by an attorney on behalf of a nonresident of a State in a suit against the latter in a court of such State is not binding upon the defendant, and if the suit is brought and carried to judgment without either personal service of process upon the nonresident or his having been within the jurisdiction of the court during the pendency of the proceedings he may attack the judgment for want of jurisdiction.

3. Delay of about seven years on the part of a nonresident defendant against whom a judgment has been rendered upon the unauthorized appearance of an attorney in his

NOTE.—Unauthorized appearance of attorney; effect of.

The court has the inherent power to determine by what authority an attorney appears, either to prosecute or defend, in the name of another, whether the person for whom the attorney assumes to act be a natural or an artificial person. *Weeks, Attorneys*, 196; *King of Spain v. Oliver*, 2 Wash. C. C. 429; *American Ins. Co. v. Oakley*, 9 Paige, 496, 4 N. Y. Ch. L. ed. 789; *Williams v. Uncompahgre C. Co.* 13 Colo. 474.

As a general rule, when a suit is commenced or defended, or any other proceeding is had therein, by one of the regular licensed solicitors, it is not the practice of the court to inquire into his authority to appear for his supposed client. *American Ins. Co. v. Oakley*, *supra*; *Cleveland v. Hopkins*, 55 Wis. 389.

Where there are no circumstances of suspicion, or facts indicating fraud, and no evidence of bad character discrediting the appearance, the courts

do not require a respectable and responsible attorney to exhibit his authority to appear. *Hamilton v. Wright*, 37 N. Y. 505, 5 Trans. App. 6.

A defendant for whom an attorney has entered an unauthorized general appearance may, on motion and a special appearance, have such general appearance stricken out and the decree *pro confesso* entered on such appearance vacated. *Woods v. Dickinson*, 7 Mackey, 301.

Remedy of party in such cases.

If the adverse party has acquired rights, or been subjected to costs by proceedings in the name of a party who afterwards denies the authority of the solicitor or attorney, the courts permit the proceedings to stand where the solicitor or attorney is responsible, leaving the injured party to seek redress against the solicitor or attorney. *Requa v. Holmes*, 19 How. Pr. 442; *Armstrong v. Craig*, 19 Barb. 391.

If a party for whom an attorney appears, or as-

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name, after receiving notice of the judgment, before applying to have it set aside, is not such laches as will preclude his obtaining relief where the parties opposing it acquired their rights with full knowledge of the facts and have made no prejudicial change in their situation because of such laches, while the judgment has been reversed as to defendants in the action situated similarly to the nonresident defendant, who is applying for the relief.

(December 2, 1890.)

APPEALS by defendant Chase, and by intervenor Whiting, from orders of the General Term of the Supreme Court, Third Department, affirming orders of the Clinton Special Term denying motions to vacate a certain judgment and to set aside an unauthorized appearance of an attorney. *Reversed.*

Statement by Andrews, J.:

These are appeals from orders of the General Term of the Third Department affirming orders of the Special Term denying motions to vacate a judgment of the Special Term in this action against George B. Chase for the sum of \$52,803.78, rendered June 4, 1880, and also the judgment of the General Term affirming said judgment, rendered July 21, 1883, and to set aside and vacate an appearance in said action for said Chase by John N. Whiting, as his attorney therein.

One motion is made by Chase to vacate the judgments on the ground that the appearance by Whiting was unauthorized. The other motion is made by the sole executrix, devisee and legatee of John N. Whiting, now deceased, to permit the appearance by him to be withdrawn, and also to set aside and vacate the judgment on the ground that his appearance was made upon the representation of John B. Page, one of the defendants, that he was authorized by Chase to employ an attorney to appear for him, and that the appearance was made in good faith, although without actual authority.

The action was commenced June 24, 1875. The defendant Chase was at the time, and has ever since been, a nonresident of this State, and he was never served with process in the action nor was any jurisdiction ever acquired over him therein, unless by virtue of the appearance of Whiting.

sumes to act, denies his authority and applies to the court for relief, before the adverse party has acquired any rights or suffered any prejudice, the court may correct the proceeding and compel the attorney who acted without authority to pay the costs to which the party was subjected in consequence of his interference. *Cleveland v. Hopkins*, 55 Wis. 339.

When the proceedings are in court, and the attorney does an unauthorized act for a party prejudicial to him, the party must have relief against such act, if the attorney is irresponsible. The relief is given in the action, and care is taken to preserve the rights of the other innocent party, and as to third persons. *Leet v. McMaster*, 51 Barb. 242.

Relief from judgment entered on unauthorized appearance.

Where the judgment recovered was regular between the parties to it, the settled practice of the court is opposed to setting it aside for the mere reason that the appearance was in fact unauthorized.

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The facts upon which the action was based are very complicated. They are set forth in the report of the case, on appeal to this court, in 106 N. Y. 440. In general terms it may be stated that the action was brought to enforce an alleged lien in favor of Samuel F. Vilas, upon the railroad rolling stock and property, formerly of the Plattsburgh & Montreal Railroad Company, but which had become vested in the Delaware & Hudson Canal Company as lessee under a perpetual lease. The several corporations which from time to time had succeeded to the rights, property and franchises of the Plattsburgh & Montreal Railroad Company were made defendants in the action, as were three individuals, viz.: John B. Page, Peter Butler and George B. Chase. The individual defendants were joined as parties upon the theory that in certain dealings between themselves and parties interested in the property upon which the lien was claimed, they had bound themselves to pay the lien debt, in case the lien should be established, which obligation incurred, as was claimed by Vilas, to his benefit, and was enforceable in his favor, although he was not a party to the transaction.

Briefly stated, the transaction relied upon to establish the personal liability of the individual defendants was this: Page, Butler and Chase, on the 18th of September, 1867, after the foreclosure and sale of the Plattsburgh & Montreal Railroad and the purchase thereof by the first-mortgage bondholders, but before a conveyance had been made pursuant thereto, entered into an agreement with the holders of the bonds by which they became the owners thereof and substituted to the rights of the original bondholders, and which agreement provided for the organization of a new corporation to which the property should be conveyed. The judgment in the foreclosure suit left open the question as to the title of Vilas to certain rolling stock of the Plattsburgh & Montreal Railroad Company, which he claimed under an execution sale, and that question, although in litigation in the foreclosure action, was undecided when the agreement of September 18, 1867, was made. If Vilas should establish his title in the foreclosure action, then by an arrangement, made as early as 1858, between the parties to the foreclosure and the receiver, Vilas was to have a lien on the property for an

Upon this subject the rule is uniform in courts both of law and equity. *Powers v. Trenor*, 3 Hun. 5, 5 Thomp. & C. 233; *Adams v. Gilbert*, 9 Wend. 499; *Kenyon v. Schreck*, 52 Ill. 386. See, however, *Anderson v. Hawke*, 1 West. Rep. 627, 115 Ill. 38; *Griggs v. Gear*, 3 Ill. 2; *Higgins v. Curtiss*, 52 Ill. 22.

A judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared without authority, cannot be attacked for want of jurisdiction in any collateral proceeding, and is binding upon such defendant. *Brown v. Nichols*, 42 N. Y. 22.

Although the attorney appeared without authority, courts of law hold the record conclusive to uphold the validity of the judgment, leaving the defendant to his remedy against the attorney for damages if solvent, or in equity if insolvent. *Carpentier v. Oakland*, 30 Cal. 446; *Ward v. Barber*, 1 E. D. Smith, 423; *Allen v. Stone*, 10 Barb. 551; *Wilson v. Wilson*, 1 Jac. & W. 457; *Wade v. Stanley*, 1 Jac. & W. 674.

amount fixed, with interest, representing the value of rolling stock purchased by him, which was in possession of the receiver. In view of this contingency the agreement of September 13, 1867, provided: "The purchasers [Page, Butler and Chase] are to assume the prosecution of that suit [the Vilas litigation in the foreclosure action] and to abide its result and judgment; and if there should be any recovery in said Vilas' favor, the purchasers agree to indemnify the said parties of the first part and said Platt, as receiver, against the same."

The Vilas branch of the foreclosure suit was finally determined in his favor in 1873, and his title was sustained (54 N. Y. 814), but no personal liability was adjudged against the receiver or the vendors of the bonds. It was mainly upon this clause in the agreement that Vilas relied in the present action to sustain the contention that the individual defendants were personally liable for his debt.

The plaintiff, on the trial of the present action at special term, had judgment in his favor establishing his debt at the amount of \$52,803.78, and adjudging that the individual defendants were, as between themselves and the corporate defendants, primarily liable therefor, and judgment was rendered against them for that amount, with a subsidiary judgment subjecting the railroad and property of the Plattsburgh and Montreal Railroad Company in the possession of the defendant the Delaware & Hudson Canal Company to a lien for the same debt. The general term having affirmed this judgment, an appeal was taken therefrom by all the defendants, except Chase, to this court, and here the judgment was reversed as to the defendants Page and Butler, and affirmed as to the corporation defendants. The substance of the decision was that the individual defendants had incurred no personal liability, but that the property was chargeable with a lien for the debt due to Vilas. Chase not having appealed to this court, the judgments of the special and general terms as against him stood in form unreversed, charging him with a very large indebtedness from which the other individual defendants, standing under the same liability and no other, had been relieved.

The moving papers show: first, that when the action was commenced Chase resided in Massachusetts, and was and ever since has been a nonresident of this State; second, that he was never served with process in the action, and had no knowledge or information whatever as to the existence of the action or of any judgment against him until February, 1881, when an action on the judgment of the special term, rendered June 4, 1880, was brought by Vilas against him in the courts of Massachusetts; third, that he never, directly or indirectly, authorized Whiting to appear for him in the action, he neither knew Whiting nor had ever seen or heard of him prior to the commencement of the suit in Massachusetts, nor did he give any authority to Page to employ any attorney to appear for him.

The explanation of the conduct of Whiting is furnished in the affidavits. He was employed by Page to defend the action, and entered his appearance for Chase by his direction, believing him to have authority to act for his co-defendants. The affidavits show that the

relations between Page and Chase were at that time very hostile, and so continued.

Relief was denied by the special and general terms merely on the ground of laches on the part of Chase in making the application.

The following is a brief statement of the facts presented bearing upon the point of laches: As has been stated, the first notice or knowledge Chase had of the suit was in February, 1881, when the action on the judgment was commenced in Massachusetts. He immediately employed an attorney, who went to New York and saw Whiting, who informed him of the circumstances under which he had appeared for Chase. At this time the case had been appealed by Whiting to the general term in the name of all the individual defendants, and the appeal was then pending. The agent of Chase informed Whiting that Chase had never authorized an appearance for him in the action, and notified Whiting that Chase gave him no authority to prosecute the appeal to the general term taken in his name, and that if he went on with it he would do so without authority from Chase. Chase put in an answer in the Massachusetts suit, which, among other things, averred that the New York court never had or acquired jurisdiction of his person or property so as to render a valid judgment against him. The case stood for trial for about the period of two years, the defendant meanwhile urging it on, when the plaintiff applied to be nonsuited and a nonsuit was granted. The affidavit of Mr. Dabney, the attorney for Chase in the Massachusetts suit, states that the attorneys for the plaintiff in that case understood that the defense was that Chase had not been served and that Whiting's appearance for him was unauthorized, and that the attorneys for Vilas informed him that they were nonsuited because they could not induce Page to go to Boston to testify in that case; and there is no denial of these facts. In 1883, after the judgment of the special term in this action had been affirmed by the general term, Mr. Whiting wrote to Chase, asking him if he desired an appeal on his behalf to be taken to the Court of Appeals, and Chase replied that he did not recognize the right or authority of Mr. Whiting to appear for him in the action, and therefore did not wish any appeal to be taken for him. The moving affidavits charge, upon facts stated in connection therewith, that both Vilas and the Delaware & Hudson Canal Company were informed, soon after the judgment was rendered at special term, that Chase claimed that he was never served, nor authorized any appearance in the action, and the opposing affidavits make no averment or denial on the subject. The judgment of the Court of Appeals was rendered in October, 1887. Subsequently the Delaware & Hudson Canal Company, the lessee of the property charged with the lien, paid the amount thereof, and took from the plaintiffs an assignment of the judgment against Chase, "upon the assumption," as stated in the affidavit of their attorney, "that it might recover back (the amount paid) from George B. Chase under the judgment of the general term."

It appears that both Page and Whiting died in 1885. Page was insolvent, and the estate of Whiting was insufficient to respond in damages to the amount of the judgment against

Chase. This proceeding was commenced in January, 1888. The general term, in its opinion, states that, "in view of the laches of Chase and of the death of Page and Whiting, Chase should not have this remedy by special motion, but should be left to his action, in which he can be cross-examined should he testify."

Other facts are referred to in the opinion.

Mr. Peter B. Olney, for appellants:

Whiting's appearance for Chase was unauthorized. Whiting is dead and his estate is unable to respond in damages to Chase. Whiting undoubtedly acted in good faith; the court, therefore, will relieve his estate from the liability by setting aside his appearance and vacating the judgment against Chase.

Denton v. Noyes, 6 Johns. 296; *Brown v. Nichols*, 42 N. Y. 26; *Ellsworth v. Campbell*, 81 Barb. 185; *Blodget v. Conklin*, 9 How. Pr. 442; *Ferguson v. Crawford*, 70 N. Y. 256.

Chase, being now and at all times a nonresident of this State, is not subject to the rule obtaining in this State, that a party is bound by the unauthorized appearance of an attorney. Therefore, as a matter of right, he is entitled to have his motion granted.

White v. Coulter, 59 N. Y. 620; *Yates v. Guthrie*, 119 N. Y. 420; *Norlinger v. De Mier*, 54 Hun, 276; *Kamp v. Kamp*, 59 N. Y. 212.

The remedy of Chase was by a motion or direct application, in the action in which the unauthorized appearance was put in, to set aside said appearance and vacate the proceedings had by reason thereof.

Brown v. Nichols, 42 N. Y. 81; *Ferguson v. Crawford*, 70 N. Y. 256; *Denton v. Noyes*, 6 Johns. 296.

Mr. Edwin Young for respondent.

Andrews, J., delivered the opinion of the court:

We understand that it has become the settled practice in this State that relief against a judgment rendered against a party upon the unauthorized appearance of an attorney in his name, is to be sought on a direct application to the court by motion in the action in which the unauthorized appearance was entered. This was the remedy adopted in the leading case of *Denton v. Noyes*, 6 Johns. 297, and in every subsequent case of a like character in this State which has come to our notice. *Grayzebrook v. McCreedie*, 9 Wend. 437; *Adams v. Gilbert*, Id. 499; *Campbell v. Bristol*, 19 Wend. 101; *American Ins. Co. v. Oakley*, 9 Paige, 496, 4 N. Y. Ch. L. ed. 789; *Hamilton v. Wright*, 87 N. Y. 502.

In *Brown v. Nichols*, 42 N. Y. 81, which was the case of a creditor's bill founded on a judgment rendered against the defendant's intestate, the defendant sought to impeach the judgment by proof that the defendant was not served with process, and that an appearance entered for him in the action by an attorney was unauthorized. The court overruled the defense, holding that the authority of the attorney to appear could not be questioned collaterally, but pointed out the remedy, Earl, J., saying: "I think a party should always seek relief for an unauthorized appearance in the suit in which it has been put in, where the

rights and equities of all parties can be best protected."

In *Ferguson v. Crawford*, 70 N. Y. 256, *Rapallo, J.*, referring to the rule established in *Denton v. Noyes*, and to the cases following it, said: "For reasons of public policy the court holds the appearance good, leaving the aggrieved party to his action for damages against the attorney, granting relief against the judgment only in a direct application." See also *Sperry v. Reynolds*, 65 N. Y. 188.

The jurisdiction of a court of equity to set aside a judgment at law obtained by fraud or on other grounds of equitable cognizance has been often asserted, and is unquestioned, and it is not necessary now to deny that under special circumstances where the question of the unauthorized appearance is complicated with fraud or the rights of purchasers, or the circumstances are such that the court can see that the right to or measure of relief cannot properly be determined on motion, having regard to all interests affected, resort may be had to a bill in equity or now in this State to an equitable action.

There are several cases in other courts, where jurisdiction in equity by original bill to set aside a judgment entered on an unauthorized appearance by attorney, has been entertained. But all of them are marked by peculiar and special features such as those to which we have adverted. *Shelton v. Tiffin*, 47 U. S. 6 How. 163 [12 L. ed. 887]; *Harshey v. Blackmarr*, 20 Iowa, 161; *Wiley v. Pratt*, 23 Ind. 628.

In *Critchfield v. Porter*, 3 Ohio, 518, the Supreme Court of Ohio dismissed a bill filed for relief against a judgment rendered on an appearance of an attorney, without authority, on the express ground that the remedy should be sought by application to the court in which the judgment was rendered. It seems to us that upon considerations both of principle and policy, relief, except in special cases, should be sought on motion in the action. It is the established rule, where courts of law and equity are separated, that equity will not grant its aid where there is a plain and adequate remedy at law.

Under our system of procedure relief on motion is administered upon equitable as well as legal principles. In ordinary cases where relief is sought against a judgment, on the ground that the appearance of an attorney was unauthorized, the rights of the parties can be as fully presented and as carefully adjudged on a motion as in an action. If the facts are controverted and the court is not satisfied upon the affidavits and papers presented as to what the real facts are, it may refer the matter for the purpose of taking further evidence, and may require the parties to submit to an oral examination or cross-examination. Code Civ. Proc. § 1015.

The court on a motion possesses, indeed, all the substantial powers in conducting an investigation which formerly appertained to the chancellor. The remedy by motion is more convenient, prompt and less expensive than by action. The unbroken practice, which seems to have prevailed in this State, to seek relief in cases like this by motion and not by action, has almost the force of law, and ought, we think, to be followed unless special circumstances ex-

ist which may render that remedy inadequate or incomplete. No such special circumstances existed in the present case, and we are therefore of opinion, notwithstanding the observations of Grover, J., in his dissenting opinion in *Brown v. Nichols*, that the order below cannot be sustained on the ground that it was discretionary with the court to remit the appellant to a remedy by action.

In disposing of this appeal it must, we think, be assumed, upon the papers presented on the motions, that the appellant Chase was neither served with process in the action, nor authorized Mr. Whiting to appear for him, and also that he had no knowledge that such an action had been brought, nor any notice thereof until February, 1881, after the rendition of the judgment of the special term. These facts are specially and particularly alleged in the moving papers, and are in no respect controverted by the opposing affidavits. The other circumstances are also consistent with the claim made. Chase was a nonresident of the State during the whole period of the litigation. That he was never served with process is conceded. Mr. Whiting, on the occasion of the interview with Mr. Dabney, the attorney employed by Mr. Chase, after he had been notified of the judgment rendered against him, admitted that he was not retained by Mr. Chase personally, and that he appeared for him by direction of Mr. Page, one of the co-defendants. Mr. Chase did not know Mr. Whiting, and never saw him prior to the rendition of the judgment. He swears that he had no knowledge that Vilas made any claim against him. He knew that Vilas claimed title to rolling stock of the Plattsburgh & Montreal Railroad Company, which if established in the foreclosure action would, under the agreement between him and the receiver, be converted into a lien on the property. In the present action Vilas claimed that Page, Butler and Chase were jointly liable to him for the lien debt, but this claim was adjudicated adversely to him by the judgment of this court (106 N. Y. 440). There is no suggestion that Vilas ever asserted any personal claim against Chase except by and through the complaint in this action. The relations between Chase and Page at the time of the alleged retainer by the latter of Whiting to appear for Chase were hostile and so continued. But Page had an interest, in case the claim of Vilas for a personal judgment against the individual defendants should be established, that Chase should be bound by the judgment. The Delaware & Hudson Canal Company (the real party opposing these motions) not only omitted to controvert any of the statements in the moving papers on the subject of the unauthorized appearance, but made no request for a reference to ascertain the facts, nor that it might be afforded an opportunity to cross examine Chase or the other affiants on the subject.

The main question of law respects the relief, if any, to which Chase is entitled against the judgment by reason of the unauthorized appearance of Mr. Whiting. It is obvious that the court acquired no jurisdiction to render a personal judgment against Chase, unless the appearance, although unauthorized, conferred jurisdiction, or unless the authority of the attorney to appear is conclusively presumed from

the fact of appearance. The case of *Denton v. Noyes*, *supra*, held that a domestic judgment rendered by a court of general jurisdiction against a party who had not been served with process, but for whom an attorney of the court had appeared, though without authority, was neither void nor irregular. The doctrine of the prevailing opinion in that case encountered a vigorous opposition from one of the judges at the time, and it is not too much to say that the reasoning upon which it rests has frequently been criticised by judges and the justice of the rule denied. But it has been followed and must be regarded as the law of the State. *Hamilton v. Wright*, 37 N. Y. 502; *Brown v. Nichols*, 43 N. Y. 26.

The courts in this State, while holding that strictly domestic judgments rendered against a party not served, but for whom an attorney appeared without authority, cannot be assailed on this ground when coming in question collaterally, nevertheless grant relief, on motion, either by setting aside the judgment absolutely, or by staying proceedings, and permitting the party to come in and defend the action. Where the attorney is insolvent, the judgment will be absolutely vacated, and set aside. *Campbell v. Bristol*, 19 Wend. 101.

In other cases the proceedings will be stayed, and the party permitted to come in and defend. The latter relief was granted in *Denton v. Noyes*, *supra*.

In the present case no relief whatever was granted, but the application therefor was denied absolutely. Even if the judgment against Chase is governed by the rule established in *Denton v. Noyes* (which, for reasons which will be stated, does not, we think, apply), then it would seem that the court erred in denying relief. It is shown by the affidavit of the son of Mr. Whiting, which is uncontradicted, that his father's estate, at the time of his death, in 1835, was entirely inadequate to pay the amount of the judgment against Chase. It is not expressly shown what the pecuniary condition of Mr. Whiting was in 1881, when the judgment against Chase was entered. But assuming that Mr. Whiting had sufficient pecuniary ability at that time to respond in damages for the amount of the judgment, that, we think, is not controlling, to prevent relief on an application made after he became insolvent, provided it was made before the rights of the party procuring the judgment had changed to his prejudice. The party against whom the judgment was rendered would still be entitled, we think, to apply for and obtain relief by the vacation of the judgment. The plaintiff has no equity which entitles him to claim that the party injured should have been prompt to pursue and obtain a remedy by action against the attorney for damages, and thereby enable the plaintiff to have the benefit of the judgment. Moreover, the judgment of the court in 106 N. Y. in the present action conclusively determined, as between the plaintiff and the defendants Page and Butler, that the latter had never assumed any personal obligation for the lien debt. If this judgment was not technically an estoppel of record as to the same question arising between the plaintiffs and Chase, on the ground that he was not a party to the appeal, nevertheless it furnishes a strong reason for

granting him absolute and final relief on this application, even if the estate of Mr. Whiting was solvent, instead of granting limited relief by a stay of proceedings merely with a right to come in and defend the action, thereby subjecting Chase to the trouble and expense of a new trial which could have but one result.

We have so far considered the case upon the assumption that it is governed by *Denton v. Noyes* and the cases following it. But we are of opinion that a radical distinction exists between the cases hitherto decided and the present one, which prevents the application of the principle, that in the case of a domestic judgment strictly, a party not served, but for whom an unauthorized appearance was entered by an attorney, cannot on these grounds assail the judgment for want of jurisdiction. The distinction adverted to lies in the fact that in the cases hitherto decided in this State arising on domestic judgments, the judgment rendered was against a citizen of the State, who was within the jurisdiction, while in the present case the defendant in the judgment was at all times a nonresident and out of the jurisdiction.

It is well settled that in an action brought in our courts on a judgment of a court of a sister State, the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or, where an appearance was entered by an attorney, that the appearance was unauthorized, and this even where the proof directly contradicts the record. *Starbuck v. Murray*, 5 Wend. 148; *Shurman v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272; *Rapallo, J., Ferguson v. Crawford*, 70 N. Y. 287.

The same rule is held elsewhere, and is in consonance with the constitutional obligation under the Constitution of the United States as to the faith and credit to be given by one State to the judgments of other States. *Gilman v. Gilman*, 126 Mass. 26; *Wright v. Andrews*, 120 Mass. 149; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457 [21 L. ed. 897]; *Knowles v. Logansport Gas Light & Coke Co.* 86 U. S. 19 Wall. 58 [22 L. ed. 70].

There is, undoubtedly, a logical difficulty in applying a different rule, as our courts do, in an action upon a domestic judgment where the only thing giving color of jurisdiction over the person is an unauthorized appearance by an attorney. The different rule in the two cases has been supposed to rest on the unreasonableness of compelling a party against whom judgment has been rendered in another State on an unauthorized appearance by an attorney to go to the foreign jurisdiction to attack it (see *Dillon, J., in Harshey v. Blackmarr*, 20 Iowa, 161). The same reason, in justice, would seem to apply in case of domestic judgment against a nonresident of the State, and, besides, it may be said that a nonresident, not served with process and for whom an unauthorized appearance had been entered in the foreign jurisdiction, would be much less likely to become apprised of the pendency of the action than if he had been a resident.

In *Norlinger v. DeMier*, 54 Hun, 276, the General Term of the Supreme Court, in the First Department, *Barrett, J.*, writing the opinion, set aside an unauthorized appearance en-

tered for a nonresident defendant on the precise ground that the rule in *Denton v. Noyes* did not apply in such a case.

Bofurtha v. Goodrich, 3 Gray, 508, was the case of an unauthorized appearance by an attorney for Bofurtha, a nonresident of Massachusetts, in an action brought in the latter State. The court reversed the judgment on writ of error, *Shaw, Ch. J.*, saying: "It would certainly be very strange if an inhabitant of another State could thus be bound by a judgment given and recorded by a court having no jurisdiction, without any act or default of such party."

In *Wiley v. Pratt*, 28 Ind. 629, the court, in a case of a domestic judgment where the party had not been served, but for whom an unauthorized appearance had been entered, adopted substantially the English rule, as announced in *Bayley v. Buckland*, 1 Exch. 1, that where a defendant had been served, and an unauthorized appearance entered, the judgment would not be set aside, but if he had not been served it would be. *Ray, Ch. J.*, after stating what he conceived to be the true rule, but excepting from it the case of a domestic judgment against a nonresident not within the jurisdiction, said: "Where the defendant has not been within the jurisdiction of the court, it would not be just to compel him to come under that jurisdiction, and establish his defense to the action, in order to claim relief from a judgment obtained without notice, and therefore the relief granted here must be absolute immunity from the judgment."

We are bound under our decisions to follow the doctrine of *Denton v. Noyes* in cases where it is strictly applicable. It is as to such cases *stare decisis*. But we are not disposed to extend the doctrine of that case to cases fairly and reasonably distinguishable, and the fact that a defendant against whom a judgment has been obtained here, upon an unauthorized appearance by an attorney, and who was not served, was a nonresident during the pendency of the proceedings, does, we think, constitute such a distinction as renders the rule in that case inapplicable.

Upon the point made by the Delaware & Hudson Canal Company, that the defendant Chase is precluded from relief by his laches, but little need be said. The Delaware & Hudson Canal Company acquired its interest in the property of the Plattsburgh & Montreal Railroad Company in 1872. It took from Page his individual guarantee against the claims of third persons on the property, including the claim of Vilas. Neither Butler nor Chase were parties to the guaranty. In 1881, soon after the judgment against Chase was rendered, it was apprised of his claim that he had not been served in the action and that the appearance of Whiting was unauthorized. When Vilas sued Chase on the judgment in Massachusetts, the latter promptly disavowed the jurisdiction of the court to render the judgment. Vilas, after the lapse of about two years, suffered a nonsuit, inferribly because he was unable to establish the jurisdiction, and he took no further proceedings to collect the judgment, but, after the final decision in this court, he assigned the judgment against Chase to the Delaware & Hudson Canal Company, on being paid the

company. The company took the assignment with full notice of the equities of Chase. The delay of Chase has not, so far as appears, changed the situation of either Vilas or the Delaware & Hudson Canal Company to the prejudice of either, and, under such circumstances, the plea of laches, as was said in *Platt v. Platt*, 58 N. Y. 646, will not be readily listened to and ought not, we think, to be listened to in this case to uphold a judgment which, as was held by this court on the appeal of the co-defendants of Chase, standing in the same position with him, had no legal foundation.

We think the motions in this case should have been granted and the judgment and appearance vacated.

The orders of the Special and General Terms should therefore be reversed and the motions granted, with costs.

All concur.

Charles MAYER *et al.*, *Respts.*,

v.

Alfred S. HEIDELBACH *et al.*, *Appts.*

(....N. Y.....)

1. A purchase for value and in good faith by a third person of a foreign bill of exchange from the one by whose direction it was drawn, and who promised to pay for it, but who failed to do so, will cut off the drawer's right to stop payment on the draft because of the non-receipt by him of the purchase price.
2. The actual and absolute extinguishment of a pre-existing debt in consideration of a transfer to the creditor of negotiable paper will constitute the transferee a holder for value so as to be protected against prior equities therein.
3. Where a depositor in a bank, having sufficient funds standing to his credit, tenders to it his check upon it in payment for negotiable paper which it has for sale, and the bank accepts the check, charges it against the deposit, files it as a voucher and delivers over the paper purchased, the purchaser is a holder for value, as the antecedent debt is *pro tanto* extinguished.

(Earl, J., *dissents*.)

(October 21, 1890.)

APPEAL by defendants from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment of the Trial Term in favor of plaintiffs in an action upon a foreign bill of exchange which had been drawn by defendants and sold to plaintiffs, after which defendants stopped payment of it. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Simon Sterne and John K. Cheevey*, for appellants;

Defendants are the drawers and plaintiffs the payees of the drafts in suit. As between the

NOTE.—As to how far check is payment, see *Goshen Nat. Bank v. Bingham*, 7 L. R. A. 506, and *note*, 118 N. Y. 349.

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Daniel, Neg. Inst. § 174; *Randolph*, Com. Paper, §§ 1, 558, 1876; *Astley v. Johnson*, 5 Hurlst. & N. 187; *Puget de Bras v. Forbes*, 1 Esp. 117; *Bell v. Spotts*, 50 How. Pr. 162.

The Harrisons were the agents of Mayer & Co., and because such is the case it becomes wholly immaterial whether or not the Mayers paid the Harrisons for the drafts.

Horstmann v. Baltzer, 38 Hun, 867; *Meeker v. Claghorn*, 44 N. Y. 352; *Foster v. Perach*, 68 N. Y. 401; *Butler v. Evening Mail Assn.* 61 N. Y. 634; *Jessup v. Steurer*, 75 N. Y. 613; *Kayton v. Barnett*, 116 N. Y. 625.

Even were it conceded that the Harrisons were principals, plaintiffs are not bona fide holders of the drafts in suit.

Defendants having parted with the manual possession of their drafts on condition of immediate payment, and such payment not having been made, defendants lost no title to the drafts, and rightfully stopped payment of them.

1 Benjamin, Sales, last ed. 839, §§ 334, 335; 2 Benjamin, Sales, 982, § 1126, *note*; *Muller v. Pondir*, 55 N. Y. 325, 337.

Plaintiffs are not purchasers for value of the checks or drafts in suit.

Farrington v. Frankfort Bank, 24 Barb. 553, 560; *Pratt v. Foote*, 9 N. Y. 463; *Weater v. Barden*, 49 N. Y. 286; *Moore v. Ryler*, 65 N. Y. 438; *Stalker v. McDonald*, 6 Hill, 93; *Coddington v. Bay*, 20 Johns. 637; *Huff v. Wagner*, 63 N. Y. 215; *Lawrence v. Clark*, 36 N. Y. 123; *Pratt v. Coman*, 37 N. Y. 440.

The transaction between plaintiffs and Harrison's Bank was in law and in fact the taking by plaintiffs from said Bank of the foreign check in suit at most in nominal payment of an antecedent debt due from the bank to plaintiffs.

National Bank of the Republic v. Millard, 77 U. S. 10 Wall. 152, 155, 19 L. ed. 897, 899; *Weaver v. Barden*, 49 N. Y. 290; *Coddington v. Bay*, *supra*; *Cloyes v. Cloyes*, 36 Hun, 145; *Muller v. Pondir*, *supra*; *Barnard v. Campbell*, 55 N. Y. 456, 58 N. Y. 73.

Mr. James C. Foley, for respondents:

Where the drawer of a bill of exchange places it in the hands of a third person, with the indicia of title, and he delivers it to the payee named in the bill, and receives payment from the payee, at the time of delivery, the payee or purchaser acquires good title to such bill as against the drawer, and can enforce it against him.

Munroe v. Bordier, 8 C. B. 862; *Daniel*, Neg. Inst. § 178; 2 Parsons, Bills and Notes, 181; *Poirier v. Morris*, 2 El. & Bl. 89; *Lentillon v. Vorwerck*, Hill & Den. Supp. 443; *Lally v. Colgate*, 10 Jones & S. 544; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; *Nixon v. Brown*, 57 N. H. 84; *Pickering v. Busk*, 15 East, 83; *Smith v. Clews*, 7 Cent. Rep. 680, 105 N. Y. 286. See also *First Nat. Bank of Corry v. Stiles*, 22 Hun, 839; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Goodwin v. Roberts*, L. R. 10 Exch. 337; *Rumball v. Metropolitan Bank*, L. R. 2 Q. B. Div. 194.

The plaintiffs' checks drawn against their ample deposits in Harrison's Bank, and, given to that bank in payment of the drafts in suit at the time the said drafts were delivered to

them, were a good and valuable consideration for such drafts, and equities, of which they had no notice, were thereby cut off.

Coddington v. Bay, 20 Johns. 637; *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 31, 26 L. ed. 67; *Phœnix Ins. Co. v. Church*, 81 N. Y. 226; *Philbrick v. Dallett*, 2 Jones & S. 388; *McQuade v. Irwin*, 7 Jones & S. 396; *New York Iron Works v. Smith*, 4 Duer, 877; *Gould v. Seges*, 5 Duer, 260; *Bank of St. Albans v. Gilliland*, 28 Wend. 311; *Stettheimer v. Meyer*, 33 Barb. 217; *Farrington v. Frankfort Bank*, 24 Barb. 554; *Mayer v. Mode*, 14 Hun, 155; *Day v. Saunders*, 37 How. Pr. 536; *Rome Sav. Bank v. Smith v. Krug*, 3 Cent. Rep. 832, 102 N. Y. 381; *Button v. Rathbone*, 118 N. Y. 666; *Daniel*, Neg. Inst. 831c.

If the pre-existing debt is extinguished, the transferee is protected against prior equities.

Just v. National Bank, 4 Jones & S. 274, 56 N. Y. 478; *Salina Bank v. Babcock*, 21 Wend. 499; *Waydell v. Luer*, 3 Denio, 414; *Phœnix Ins. Co. v. Church*, 81 N. Y. 218; *Grocers Bank v. Penfield*, 69 N. Y. 502; *First Nat. Bank of Parkersburg v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506; *Pratt v. Coman*, 87 N. Y. 442; *Farrington v. Frankfort Bank*, 24 Barb. 570; *Scott v. Betts*, Hill & Den. Supp. 370; *Newman v. Frost*, 52 N. Y. 424; *Schepp v. Carpenter*, 51 N. Y. 602, 2 Hare, Lead. Cas. 240.

That the acceptance by a bank of deposit of its depositor's check, in the regular course of business, actually discharges and cancels the deposits to the amount of the check is clearly established.

Pratt v. Foote, 9 N. Y. 463; *Mayer v. Heidelberg*, 22 Jones & S. 438; *Commercial Bank of Pa. v. Union Bank*, 11 N. Y. 214; *Kelly v. Second Nat. Bank of Erie*, 52 Barb. 834; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Briggs v. Central Nat. Bank*, 61 How. Pr. 250; *Auburn City Nat. Bank v. Hunsiker*, 72 N. Y. 257; *Oddie v. National City Bank*, 45 N. Y. 735; *National Bank of Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350; *Coates v. First Nat. Bank of Emporia*, 91 N. Y. 20; *Dykens v. Leather M'rs. Bank*, 11 Paige, 612, 5 N. Y. Ch. L. ed. 253; *Morse, Banks and Banking*, 238, 280, 307; *Eyles v. Ellis*, 4 Bing. 112; *Bridges v. Garrett*, 18 Week. Rep. 815; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *Peoples v. Merchants & M. Bank*, 78 N. Y. 269; *Levy v. United States Bank*, 4 U. S. 4 Dall. 234, 1 L. ed. 814; *National Bank of Gloversville v. Wells*, 79 N. Y. 493; *Briggs v. Central Nat. Bank*, 61 How. Pr. 250; *Smith v. Essex County Bank*, 22 Barb. 627.

As Harrison's Bank was a principal in the transactions, a consideration good as between the plaintiffs and that bank will cut off prior equities.

Paddon v. Taylor, 44 N. Y. 875; *Clothier v. Adrian*, 51 N. Y. 322; *Stephens v. Board of Education*, 79 N. Y. 183.

On a sale of personal property, a condition that title shall not pass to the vendee until the property is paid for is not available against a bona fide purchaser from such vendee.

Smith v. Lynes, 5 N. Y. 42; *Comer v. Cunningham*, 77 N. Y. 894; *Wast v. Green*, 86 N. Y. 556; *Crocker v. Crocker*, 31 N. Y. 507; *Dove v. Kidder*, 84 N. Y. 128; *Michigan Cent. R. Co.* 9 L. R. A.

v. Phillips, 60 Ill. 190; *Brundage v. Camp*, 21 Ill. 830; *Saltus v. Everett*, 20 Wend. 276; *Buck v. Grimshaw*, 1 Edw. Ch. 140, 6 N. Y. Ch. L. ed. 89.

The title of the bona fide holder of negotiable paper for value is entirely independent of the title of his vendor.

See *Miller v. Rice*, 1 Burr. 453; *Dutchess County Mut. Ins. Co. v. Hatchfield*, 78 N. Y. 228; *Goodman v. Harvey*, 4 Ad. & El. 870; *Arboun v. Anderson*, 1 Q. B. 498; *Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 934; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Murray v. Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857; *Chrysler v. Renois*, 43 N. Y. 209.

Finch, J. delivered the opinion of the court:

Whether the draft of the defendants upon their foreign correspondent was sold by them to the plaintiffs, who were named as the payees therein, or to Harrison's Bank, which gave the order for the exchange and promised to pay for it, became a material inquiry upon the trial because of the failure to pay the purchase money. Very much was possible to be said in behalf of either inference, and it was said. Upon the argument, no circumstance or suggestion was omitted which could affect a wavering balance; but the very thoroughness of the discussion served to strengthen our conviction that the question was one of fact, a problem of conflicting inferences, properly submitted as such, and controlled by the finding of the court. That finding established that the sale was to Harrison's Bank, and that the credit, if any, was given to that firm, although the draft, by their direction, was made to the order of the plaintiffs, for whom the Harrisons bought it and to whom they sold it. Some question is made over the evidence leading to that result, and about the title of Harrison's Bank to the exchange, assuming that firm to have been the vendees. Proof was offered, and received under objection, of an alleged custom of dealers in foreign exchange to sell only upon a cash payment, and deliver the drafts conditionally upon an expected remittance of the price, the purpose being to justify the act of the defendants in stopping payment when the vendees failed to remit in accordance with their promise. The court was asked to find the existence of such a custom and refused, and the defendants took an exception. So far as any custom was proved it was immaterial. Some of the evidence indicated a usage in the City of New York among sellers of foreign exchange of delivering the drafts before the next sailing day of the steamer, and expecting payment on that day; but so far from such custom making the delivery conditional until payment the evidence indicates the contrary. It shows a habit of exacting the cash, except where the standing of the purchaser made a credit until the sailing day prudent and safe; and no single instance of stopping payment of the delivered drafts was shown. What there was of the usage seems quite inapplicable to sales out of the city, and to country banks, or inland dealers, and was not such as to raise a presumption of knowledge on the part of Mayer & Co. In all their dealing, nothing had ever occurred tending to bring home to them knowledge of a usage

which seems to have been local in its character. But beyond that, the plaintiffs have been found to be purchasers for value, and in good faith, from Harrison's Bank of the drafts in controversy, and if that be true the equities between the original parties are cut off and become immaterial, and so the correctness or error of that finding has been the principal subject of inquiry upon this appeal.

The respondents rely upon two propositions which have thus far prevailed: *first*, that the actual payment and absolute discharge of an antecedent debt is a valuable consideration for the transfer of commercial paper, and cuts off prior equities; and, *second*, that the acceptance by a bank of deposit of the check of a depositor over its counter actually cancels and discharges the deposit to the amount of the check. I have no doubt as to the soundness of the first proposition. It was explicitly conceded in *Bay v. Coddington*, 5 Johns. Ch. 57, 1 N. Y. Ch. L. ed. 1008, affirmed, 20 Johns. 687, which originated the difference between the courts of this State and the concurring views of the federal courts and those of England. While it was in that case ruled that the transfer of negotiable paper as collateral security merely for an antecedent debt did not make the creditor a holder for value within the rule cutting off prior equities, it was yet asserted that such result followed where, among other things, some existing debt was satisfied thereby. And that, I think, was a natural and logical conclusion from the reasoning upon which the decision rested. The argument was that the holder of the paper merely as collateral lost nothing by its failure, since his debt all the time remained, his original position was unchanged and he had simply failed to get an added security, himself parting with nothing. It is apparent that the reasoning falls whenever, as a result of the new contract, the original debt has been actually extinguished, when the paper received has been both transferred and accepted as payment, and the debt has been discharged within and by force of the acts and concurring intention of both parties. And so we have steadily decided. *Bank of St. Albans v. Gilliland*, 23 Wend. 811; *Youngs v. Lee*, 12 N. Y. 551; *Philbrick v. Dallett*, 2 Jones & S. 888; *Gould v. Segee*, 5 Duer, 260; *Brown v. Leavitt*, 81 N. Y. 118; *Phanix Ins. Co. v. Church*, 81 N. Y. 218; *Button v. Rathbone*, 118 N. Y. 666.

These cases, and many more like them, however differing in their facts, and although the earlier ones have been more or less criticised, yet agree, as I read them, in the doctrine that, where the pre-existing debt is actually and absolutely extinguished in consideration of the negotiable paper transferred, the transferee is protected against prior equities. In asserting that as the result of the decisions in this State and elsewhere, the federal court, in *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 81 [26 L. ed. 67], and Mr. Daniel, in his text-book on Negotiable Instruments, §§ 831, 832, are fully and fairly supported by the line of adjudged cases.

But the real and more difficult proposition secondly asserted by the respondents springs up at this point, and requires us to consider when the antecedent debt is absolutely extinguished, and what proof sufficiently establishes that

fact; for the debt, though extinguished in form, may prove to be discharged conditionally and not absolutely. The answer depends upon the authorities, from which we ought not to depart, but which have been very differently construed by the respective counsel. The respondents rely upon *Pratt v. Foote*, 9 N. Y. 468, followed in *Commercial Bank v. Union Bank*, 11 N. Y. 203, and a line of subsequent cases which more or less have been controlled by it. That case declared that the acceptance by a creditor from his debtor of a new security or obligation for an old debt, and the acceptance by a bank of a check drawn upon itself in payment of a note, were entirely different transactions; that the former is the mere substitution of one executory agreement or obligation for another, and there is no extinguishment of the precedent debt unless there is an express agreement to accept the new obligation or security as a satisfaction of the old; but that when the bank upon which a check is drawn accepts it upon its own debt the same act of acceptance pays the check to the payee and the debt to the bank, and the transaction is the same in effect as if the money was first paid to the payee of the check and instantly repaid to the bank in exchange for the paper bought. This view of the transaction necessarily implies that what is done between the parties sufficiently proves a payment and extinguishment of the bank's debt, without any added evidence of an express agreement to that effect, or any further or other act. We must not fail to observe that other and additional circumstances bearing upon the intent of the parties may change the inference; but the case cited decides that, where the bank accepts its customer's check for a note due to it, and charges the check to the proper account, and turns it into a voucher by cancellation, the debt is extinguished on both sides. It is argued at very considerable length that the check accepted by the bank in the case cited was that of a third person, and not the check of the maker of the note, and that the same thing is true of all the cases relied upon by the respondents. That is true to some extent and in some qualified sense. In the case cited, the check offered and accepted was the check of Scudder, who was first indorser upon the note, and contingently liable thereon, and who evidently drew his check to discharge that liability. While the check was tendered by Foote, the maker, it was nevertheless that of one of the parties to the note, and tendered and accepted in payment thereof.

In *Youngs v. Lee*, 12 N. Y. 552, the creditor surrendered an old note not yet due in exchange for a new note with an indorser, and was held to be a holder for value because the debt was extinguished. Many of the cases to the same purport were reviewed in *Phanix Ins. Co. v. Church*, 81 N. Y. 218, and it was there intimated that the common understanding and usage attending the dealing with banks might well affect the inference to be drawn. I do not find that the doctrine of *Pratt v. Foote* has ever been questioned or overruled. The payment in that case was held to be absolute, and not conditional. The check was tendered in payment of the note, and accepted as such, and the transaction in that manner closed. So here,

the check was tendered in payment for the draft purchased, and accepted and canceled as payment. There can be no doubt that such was the concurring intention of both parties to the contract which they executed, and the inference would hardly be more certain if the intention had been framed in words, and taken the shape of an express agreement. I have become convinced that the form of the transaction should not control and modify its substance. If the Harrisons, on presentation of the check, had paid the money, and the creditor had instantly paid it back in exchange for the draft purchased, there would have been no question about the right of the purchaser. How can we insist that the right is modified because the formal delivery and return of the money was omitted, the substantial result remaining the same? I have examined the numerous authorities cited, but question the wisdom of dwelling upon them, since they vary in many respects from the precise facts before us. I prefer to hold upon the authority of *Pratt v. Foote*, strengthened, as I think it is, by the suggestions of *Phanix Ins. Co. v. Church*, that where the depositor in a bank, having sufficient funds standing to his credit, tenders his check to that bank in payment for negotiable paper which it has for sale, and the bank accepts the check, and charges it against the deposit, and files the check as its voucher, and delivers over the paper purchased, the holder of that paper is a holder for value, because the antecedent debt is *pro tanto* actually and in fact extinguished. The facts of the transaction show that to have been the concurring intention, to exhibit a contract executed and completed, and left in no respect executory or conditional; and, while the check may be regarded as a request to charge in account, it is a request to a bank of deposit which operates upon the amount of the deposit, and effects the actual payment intended on both sides. The position of the depositor is materially changed by the transaction. Before his purchase he had its amount on deposit, payable to him on demand,

but after his purchase no such deposit remained subject to his check or payable to him at all. If he had held the bank's note for the deposit, and surrendered that in exchange for the paper bought, it is conceded that he would have been a purchaser for value. But the note itself would be only a voucher, or evidence of the debt. And why should a surrender of that voucher have greater effect than delivery of the check? Because the depositor has no note, but, as is the customary method, allows the bank to keep both sides of the account, and so has no voucher to surrender, must we give no force to the delivery of the check and its acceptance by the bank which equally cancels so much of the deposit, and equally serves as the bank's voucher for the payment? We cannot say that the depositor has parted with nothing in consideration of the paper received, when, in the customary mode of dealing with banks, he has drawn out his deposit and appropriated it to his new purchase; for what he has for a voucher, or evidence of the bank's debt to him, is simply the bank's credit on its books, and when, by his own act, he destroys and cancels that credit, he parts with the voucher he had as effectively as if, holding the bank's note, he had parted with that. In view of the customary methods which obtain between banks and their depositors, the inference of actual payment and extinguishment of the debt where the check is accepted, charged in account, canceled upon the file iron, and filed as a voucher, is proper to be drawn. It seems to be not even essential to be able to say that the debt extinguished could not be revived under any form of remedy. *Phanix Ins. Co. v. Church, supra*.

The question of good faith on the part of plaintiffs was one of fact, which has been found in their favor. It is our duty, therefore, to sustain the decision of the courts below.

The judgment should be affirmed, with costs.

All concur, except *Ruger, Ch. J.*, not voting, and *Earl, J.*, dissenting.

OREGON SUPREME COURT.

STATE OF OREGON, *Rept.*,

v.

M. TAMLER *et al.*

(....Or....)

*1. In an indictment for selling spirituous liquor without a license, under the Act of

*Head notes by BRAX, J.

NOTE.—Indictment; exception in statutory definition of crime to be negatived.

In charging statutory offenses in indictments, if there is an exception in the enacting clause,—*i. e.*, all parts of the statute defining the offense,—the indictment must in general negative the exception. *People v. Fairbanks (Utah) July 12, 1890; People v. Farman (Utah) July 12, 1890.*

Where a statute declares an act done, in the absence of certain circumstances, to be a crime, an indictment charging the commission of such a

9 L. R. A.

1890, it is not necessary to allege in the indictment that such sale did not take place within an incorporated town or city.

2. A motion asking the court to direct an acquittal in a criminal case on account of the failure of proof on the part of the State, unless such failure is a total one, must specify wherein it is claimed such proof fails.

(November 10, 1890.)

crime must negative the existence of such circumstances. *United States v. Feiderward, 31 Fed. Rep. 490.*

But if the exceptions are contained in separate clauses of the statute they may be omitted in the indictment; and the defendant must show that his cause comes within them to avail himself of the benefit. *United States v. Nelson, 29 Fed. Rep. 202.*

If a penal statute contains an exception which is imbedded in the very clause by which the offense is described, a pleading designed to charge the offense

convicting them of unlawfully selling spirituous liquors. *Affirmed.*

Statement by Bean, J.:

The defendants were jointly indicted, tried and convicted of the crime of selling spirituous liquors without first having obtained a license therefor, as provided in the Act of 1889. The charging part of the indictment is as follows: "M. Tamler and Joseph Petty are accused by the grand jury of the County of Multnomah, State of Oregon, by this indictment of the crime of selling spirituous liquors in this State in less quantities than one gallon, without having first obtained a license from the County Court of the County of Multnomah for that purpose, committed as follows: That said M. Tamler and Joseph Petty, on the 5th day of July, A. D. 1889, in the County of Multnomah and State of Oregon, did unlawfully and willfully sell spirituous liquors in this State, namely, whisky, in less quantities than one gallon, to wit, about one gill of whisky, to one Timothy Malloy for ten cents, the said M. Tamler and Joseph Petty not having first then and there obtained a license from the County Court of Multnomah County for that purpose, namely, for the purpose of selling that quantity of liquor, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. Dated at Portland, in the county aforesaid, this 15th day of July, 1889."

Messrs. Sears & Beach and Ed. Mendenhall for appellants.

Mr. T. A. Stevens, Dist. Atty., for the State.

Bean, J., delivered the opinion of the court:

The bill of exceptions in this case contains several assignments of error, but, upon the argument, they were all abandoned by counsel

of the court to sustain defendants' motion for a judgment in favor of the defendants on the ground of the insufficiency of the evidence to justify a verdict made at the close of the testimony of the State. The appellants contend that the indictment is insufficient, in that it does not allege that the sale therein charged was not made within an incorporated town or city. The contention is that, as section 11 of the Act of 1889 provides that "nothing in this Act shall be so construed as to apply in any manner to incorporated towns and cities of this State," it is necessary that the indictment should negative this section. The general rule on this subject is that where the exception or proviso is stated in the enacting clause it is necessary to negative them in order that the description of the offense may in all respects correspond with the Statute, but where such exception or proviso is contained in another or subsequent section of the Statute it is a matter of defense; and need not be negated in the indictment. 1 Bishop, Crim. Proc. §§ 681, 683; *Mills v. Kennedy*, 1 Bail. L. 17.

While this seems to be the general rule, there is much diversity of judicial utterances, as to the proper application, and to attempt to reconcile the authorities would be a useless, if not hopeless, task. When the exceptions or provisos are a material part of the description of the offense, it is necessary to negative them in the indictment. The indictment must contain such averments as show affirmatively an offense; and, where the exceptions or provisos are a material part of the description of the offense, the indictment must aver that the act charged does not come within the exception or proviso. The exceptions should be negated only when they are descriptive of the offense, or a necessary ingredient of its definition; but, when they afford matter of excuse merely, they are matters of defense, and therefore need

must show that the defendant's act was not covered by the exception. *State v. Peters*, 51 N. J. L. 244.

Where the exception is so incorporated with the language defining the offense that the offense cannot be accurately described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. *United States v. Cook*, 84 U. S. 17 Wall. 168, 21 L. ed. 538.

Where the exception is not incorporated with the clause defining the offense, or connected with it by words of reference, as it is not a constituent part of the offense it is a matter of defense, and must be pleaded or given in evidence by the accused. *Ibid.*

Examples.

In a warrant, under N. C. Code, § 2020, for failing to do service on a public road, it is necessary to negative the payment of \$1 by the defendant in the discharge of his liability to do service on the day specified in the notice, as the exceptive provision is in, and a part of, the clause of the Statute creating the offense. *State v. Pool*, 106 N. C. 608.

Where the indictment charges the false pretense to be that a certain bank was solvent and able to pay its debts, an allegation in the indictment that the bank was not solvent and able to pay its debts is a sufficient negative of the pretended facts. *Com. v. Wallace*, 5 Cent. Rep. 530, 114 Pa. 406. 9 L. R. A.

An indictment, under 2 Utah Comp. Laws 1888, § 4488, p. 586, providing that every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable precaution appears, or when the circumstances show an abandoned and malignant heart, commits an assault, is punishable, etc.,—must negative the existence of just cause or excuse. *People v. Fairbanks (Utah)* July 12, 1890; *People v. Farman (Utah)* July 12, 1890.

An indictment for embezzlement, under the Statute excepting persons under the age of sixteen years from its provisions, sufficiently negatives the idea that defendant is under sixteen years of age by an averment that she was not within the age of eighteen years; as the greater includes the less. *State v. Wilson*, 101 N. C. 730.

When indictment need not negative exception in statute.

As a rule, an exception in a statute by which certain particulars are withdrawn from the operation of its enacting clause defining a crime, concerning a class or species, constitutes no part of the definition of such crime, whether placed near to or remote from such enacting clause; and an indictment charging a person with the violation of such statute need not negative such exception. *Nelson v. United States*, 30 Fed. Rep. 112.

An indictment for perjury is not defective in failing to negative in express terms the truth of

not be negated in the indictment. The offense defined in the Act of 1889 is that of selling spirituous, vinous or malt liquors in certain prescribed quantities, without first having obtained a license in the manner prescribed by law. The provision of section 11 is no part whatever of the description of the offense, nor a necessary ingredient of its definition, but is simply a limitation in the application of the provisions of the Act. The description of the offense of selling liquor without a license is full and complete without reference to the provisions of this section; and, since it forms no part of the definition thereof, it is mere matter of excuse or defense, and need not be negated in the indictment.

As to the remaining point urged by counsel for appellants, we are of the opinion that the record before us does not properly present the same for our consideration. The record discloses the fact that, after the State had rested, "counsel for defendants moved the court for a judgment in favor of the defendants on the ground of the insufficiency of the evidence to justify the verdict." This motion being overruled, an exception was duly taken, and this ruling is now assigned as error. This motion no doubt was intended to follow the practice provided in civil cases where the plaintiff fails to prove a case sufficient to be submitted to a jury, but we have already held in *State v. Jones*, 18 Or. 256, that such practice is not applicable to criminal cases; but the proper practice is to ask the court to direct an acquittal. But, treating this as a motion to direct an acquittal of the defendants, we still think it is insufficient to raise the question argued by counsel in this court. As this is an appellate tribunal, constituted to revise and correct the errors committed by the trial court, it is only when that court has acted, and the act is claimed to be error, and disclosed by the record, that such error becomes the subject of our power and duties. The motion in this case is a general one, and only challenges the general sufficiency of the

evidence; that is, says, in effect, there is a total failure of evidence upon a motion of this kind. The only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. In a motion asking the court to direct an acquittal, where it is claimed that the evidence is insufficient to prove the crime charged, it ought to specify the particulars in which it is claimed the evidence is insufficient, unless there is a total failure of proof, otherwise the attention of the trial court will be directed to the evidence as a whole,—that is, whether there is any evidence upon which a verdict may be founded,—and wholly omit to consider the particular matter in which the alleged insufficiency consists, and which is relied upon in this court, and perhaps subsequent research may have suggested.

It is true, unless there is some evidence upon which a jury can found a verdict for the party producing it, such verdict ought not to stand, nor will it, under a motion of this kind, when the evidence considered as a whole reveals a total failure of proof, or want of any evidence upon which to found a verdict. But where there is some evidence tending in a general way to prove the offense charged, but its alleged insufficiency lies in some particular matter or specific objection which requires to be designated or specified to make apparent in what particular that insufficiency consists, and to attract the attention of the court to it, it ought, as a general rule at least, to be specified in the motion of nonsuit, to be entitled to consideration in this court. The evidence in this case tends to show that three and one-half miles from Portland, on the MacAdam road, there is a place known as the "Blue House;" that it is fitted up as a saloon, with bar and other fixtures, with glasses and bottles on the shelves; that it is known as a "saloon;" that defendant Petty usually had charge of the place in the forenoon, and sometimes defendant Tamler in the afternoon, and the general reputation was

the testimony where it charges particularly, specifically and in detail, that what defendant so testified to as true was not done as she said. *State v. Murphy*, 101 N. C. 697.

An indictment alleging every element of the offense need not negative a defense which is based on a separate statutory provision and is not within any exception or proviso of the statute defining the offense. *Fahey v. State*, 27 Tex. App. 144.

Need not negative matters of defense.

An indictment need not negative facts which are matters of defense. *People v. West*, 44 Hun, 162.

That a sale of liquor in a prohibited district was upon prescription of a physician is a matter of defense, exclusively within defendant's knowledge, and therefore need not be negated in the indictment. *State v. Emery*, 98 N. C. 768.

Where the purpose of a statute is not to impose the stamp of criminality on an entire class of actions, but upon only such actions of that class as are committed by particular persons or in a particular way, it is not necessary in the indictment to negative the excusatory cases excepted, whether they be or be not given in the same clause with that prohibiting the general offense. *People v. Fairbanks* (Utah) July 12, 1890; *People v. Farman* (Utah) July 12, 1890.

In complaints for selling liquor to be used as a
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beverage, authority to sell for other purposes need not be negated. *State v. Duggan*, 3 New Eng. Rep. 137, 15 R. L. 412.

An indictment for keeping fermented cider need not negative an intention to sell out of the State. *State v. Perkins*, 1 New Eng. Rep. 1, 63 N. H. 368.

Exceptions in distinct clauses or statutes.

When a statute contains provisions and exceptions in distinct clauses, it is not necessary to state, in an indictment thereunder, that the defendant does not come within the exceptions, or to negative the provisos contained therein. *State v. Turner*, 106 N. C. 601.

An information for taking or catching fish between the dates prohibited by Vt. Stat. 1884, No. 72, in a pond in which, by No. 245 of the same statutes, catching with hook and line is permitted, need not negative the taking of the fish in that way. *State v. Smith*, 41 Vt. 346.

Indictment under Act 1887, chap. 628, § 14, for selling wine, beer, etc., without license as innkeeper, need not negative the exception in the subsequent Act of 1890, chap. 856, permitting license for sale of beer to persons other than innkeepers. It is a matter of defense to show that defendant had a license to sell spirituous liquors under Act 1887, or to sell beer under Act 1890. *Jefferson v. People*, 1 Cent. Rep. 719, 101 N. Y. 12.

of July, 1889, defendant Petty sold to one Malloy a drink of liquor, which the witness supposed to be whisky, and that Malloy paid for the same; that neither Petty nor Tamler had a license to sell spirituous liquors. A witness by the name of Timothy Malloy was called, and testified in the case, and said he had purchased liquor at different times, and about July 5, 1890, in the saloon claimed to belong to defendants, and had paid for the same. A cursory examination of this testimony would naturally lead a court to think there was sufficient evidence to be submitted to a jury; and while there may be a failure in some particular, unless the particular instance in which the failure occurs is pointed out, it would probably escape attention. The contention of counsel on this appeal is that the evidence is insufficient in this: (1) there is no sufficient evidence of the value of the liquor alleged to have been sold by defendants; (2) no sufficient evidence that the sale was made to Timothy Malloy named in the indictment; and (3) there is no sufficient evidence that the liquor sold was spirituous liquor, as alleged in the indictment. These objections are technical in their character, and do not go to the general sufficiency of the evidence. If counsel for defendants relied upon the grounds urged here for asking the court below to direct an acquittal of his clients, he should have so stated, and thereby given the court an opportunity to have passed upon them, and, if the ruling was against him, preserve the same on the record, so we could be advised thereof. It is very possible that the grounds upon which the appellant now contends the motion should have been granted might have been obviated at the trial, had they been stated. We are not advised from the record what reason, if any, was assigned in the court below, why this motion should have been allowed, nor what question the court actually did decide. We have repeatedly held that error is never presumed, but must be made to affirmatively appear; and, in a case of this kind, the motion should direct the attention of the court and opposite counsel to the precise point made, and the grounds thereof. In other words, as was said by Field, J., in *Kiler v. Kimbal*, 10 Cal. 267: "The party must lay his finger upon the point of his objection." To the same effect, *McGarrity v. Byington*, 12 Cal. 429.

"It is a wholesome rule," says Church, Ch. J., in *Schile v. Brokhahus*, 80 N. Y. 620, "that the attention of the court must be called to the precise point intended, otherwise an exception will not prevail."

In *Edwards v. Carr*, 13 Gray, 288, Shaw,

court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that if it had been brought to the attention of the judge and adverse counsel it might have been avoided by an amendment, or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matters of law, if well founded, either by a ruling in his favor or by an allowance of the exception, and the rights of both parties be secure." This court, in the case of *Kearney v. Snodgrass*, 12 Or. 311, has announced substantially the same rule. These rules have their foundation in a due regard to the fair administration of justice, which requires that, when an error is supposed to have been committed, there should be an opportunity to correct it at once before it has had any consequences. The law should not permit a party to make a general motion, as in this case, and lie by without making the particular grounds of his motion known to the court, and take the chances of success, on the grounds which the judge may think proper to put his ruling, and then if he fails to succeed with either court or jury, avail himself of an objection, which, if it had been stated, might have been removed. This works no injustice to a party, for if there be merit in his motion or objection, he has the full benefit of it, and if there be no merit he certainly ought not to succeed. In the midst of a trial at *non prius*, the judge is necessarily compelled to rule upon many questions of law without the opportunity for deliberation the importance of the questions demand, and it is but an act of justice to him that such rulings be not reversed, unless his mind was specifically drawn to the point upon which the reversal was asked and acted upon as deliberately as time and circumstances would admit. In this case, how can we say that the court below committed an error in overruling the motion, unless we knew upon what grounds he was asked to allow it? His attention was not called to the points upon which we are asked to reverse the judgment, nor was there any suggestion as to what counsel would have him hold. Had the court below been asked to sustain this motion upon the grounds argued before us, we cannot say how it would have ruled, and certainly, before we can be asked to reverse this judgment, it must sufficiently appear that the court committed some error justifying such reversal.

It follows, therefore, that the judgment below must be affirmed.

MINNESOTA SUPREME COURT.

James LAW, *Respt.*,

v.

John BUTLER, *Appt.*

(.....Minn.....)

*1. D. held a certificate of sale of school

*Head notes by GILFILLAN, Ch. J.

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lands, and with his wife was occupying the land as a homestead, and he made an assignment of the certificate to B., the wife not affixing her signature to the assignment; but they surrendered the possession of the land to B., who, and his assigns thereafter, continued in possession. Held, the assignment was void. Following *Barton v. Drake*, 21 Minn. 299, and *Alt v. Banzholzer*, 38 Minn. 511.

See also 26 L. R. A. 806.

2. That no act of the wife (unless amounting to an estoppel), except it amounted to affixing her signature, could make the assignment effectual.
3. That to make the assignment effectual by estoppel, the estoppel must operate as to both the husband and wife.
4. Facts considered, and held not to make an estoppel as to the wife (even if she could estop herself).
5. The assignment did not become operative upon the land afterwards ceasing to be a homestead.
6. A vendor's lien upon real estate is not, in general, assignable. Following *Hammond v. Peyton*, 34 Minn. 532.
7. Facts considered, and held not to show a subrogation of defendant, claiming under B., to a vendor's lien, claimed to have existed in the vendor or assignor of D.

(November 14, 1890.)

APPEAL by defendant from an order of the District Court for Dakota County denying his motion for new trial after a direction of judgment in favor of plaintiff in an action brought to determine adverse claims to a certain piece of real estate. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. C. D. O'Brien and John W. Pinch for appellant.

Messrs. John B. Sanborn and W. H. Sanborn for respondent.

Gillilan, Ch. J., delivered the opinion of the court:

Action under the Statute, to determine adverse claims to real estate, the plaintiff claiming to be the owner in fee. The answer alleges that the title was derived by patent from the State, the lands having been school lands; that the plaintiff fraudulently procured the patent to be issued to him, when, by reason of facts stated in the answer, defendant was entitled to it, and it ought to have been issued to him and not to plaintiff. The cause was tried below by the court, without a jury, and the court filed its findings of fact, and directing judgment for plaintiff. Defendant appeals from an order denying his motion for a new trial.

No assignment of error is made to the findings of fact, and they are to be taken as conclusive. They are briefly these: In December, 1863, the lands were school lands of the State, and were purchased by one Sackett for \$440, of which he paid \$60, and the land commissioner issued to him the usual certificate of sale. In April, 1871, Sackett assigned the certificate to one Scarborough for the consideration of \$1,600, for which he gave the former his promissory notes, and of which he afterwards paid \$600. In March, 1872, he assigned the certificate to one Dean for the consideration of \$1,600, of which the latter paid \$900 at the time, and for the remainder gave Scarborough his notes, which Scarborough, without Dean's consent, indorsed to Sackett to apply on his indebtedness to him. Dean, who was a married man, immediately went into possession of the land, and with his wife occupied it as a homestead until October, 1877, when he, his wife not joining with him, made an assignment to

Patrick Butler, the latter, as part of the consideration, giving his notes for \$800, which he afterwards paid to Sackett in payment of the said notes of Dean, and for the remainder gave his note to Dean for \$520, due December 31, 1878, which has been partly but not fully paid. The assignment was not delivered to Butler, but was deposited with one Phillips, to be held by him until the \$520 note should be fully paid, and then, but not before, to be delivered to Butler. Dean, with his wife, continued to occupy the land till the latter part of November, 1877, when they removed from it, and surrendered possession to Butler, and he and his assigns have ever since been in possession. In December, 1877, Butler assigned the certificate to Catharine Butler, and in May, 1888, she executed to defendant a quitclaim deed of the land. In July, 1887, Sackett executed to defendant a quitclaim deed of the land. In December, 1887, Dean executed to plaintiff a quitclaim deed of the land, and in February, 1888, the latter paid to the State \$394, the amount due on the certificate, and a patent for the land was thereupon issued to him. Until the patent issued, the legal title to the land remained in the State, and under the patent it passed to plaintiff. The certificate of sale gave to the rightful holder of it an equitable title to the land, with the right of possession. Where a patent issues to one, and another was equitably entitled to have it issue to him, the patentee is deemed to hold the legal title in trust for the party equitably entitled to it, and the latter may enforce a transfer of the legal title to him, and the judgment of the court may pass it to him. But the burden is on him who claims against the patent. He must show an equitable right to the legal title superior to that of the party to whom the patent issued. Had the assignment by Dean to Patrick Butler been valid, the latter would thereupon have become entitled to perform the conditions of the certificate of sale, and have the patent issue to him; and, without an actual assignment, had he acquired an equitable right to have the certificate assigned to him,—a right superior to that of the persons who procured the patent,—the court would enforce that right as against the patentee. We may lay out of account the deed from Sackett to Butler, for when it was executed Sackett, having previously assigned the certificate to Scarborough, had no interest, legal or equitable, to pass by the deed. On the other hand, the deed from Dean to plaintiff passed the former's interest, legal and equitable, and operated as a transfer of the certificate, unless he had previously assigned the certificate to Butler, or the latter had acquired an equitable right,—a right which the courts would enforce,—to have it assigned to him.

The case turns, therefore, on the character and effect of the transaction between Dean and Patrick Butler. Respondent claims that the assignment made by Dean, and deposited with Phillips, was a mere offer by the former, which he could withdraw at any time before Butler accepted it, by payment of the \$520 note, and that it created no fixed right in Butler. This is incorrect. Dean had agreed to assign the certificate to Butler, and the latter had paid \$800 of the consideration, had given the \$520

note, payable at a future day for the remainder, and went into possession, as is manifest, under the arrangement, of which the deposit with Phillips was a part. Were it not for the effect of the homestead right upon the transaction, and laying that aside for the present, he thereby acquired a right, which the courts would enforce, to have an assignment of the certificate, upon complying with the terms of the sale,—a right which he could lose only by something in the nature of a forfeiture.

The question, then, arises as to the effect of the homestead right on the transaction. That effect was the same, whether the assignment was completely executed, or the transaction was no more than an oral agreement to assign.

In *Wilder v. Haughey*, 21 Minn. 101, it was decided that an equitable owner of land (and such was Dean) may claim and hold the same as a homestead. Dean's right in the land, and his attempt to transfer that right, came within the rules of law governing homesteads and transfers of the land to which the right has attached. The Statute in force at the time of this transaction (Gen. Stat. 1878, chap. 68, § 2) declared that any mortgage or alienation of the land by the owner, if a married man, shall not be valid without the signature of the wife to the same. *Barton v. Drake*, 21 Minn. 299, decided that this applies as well to a contract to convey as to a conveyance. Of the States having statutes similar to ours, it is held in some that the conveyance is only voidable; in others, that it is not merely voidable, but absolutely void.

In *Barton v. Drake* this court held a contract to convey "wholly void,"—held it indeed so entirely ineffectual that the court declared it a nullity even after a judgment for specific performance in an action by the vendee against the vendor, the husband. See also *All v. Banholzer*, 39 Minn. 511.

The practical distinction between a deed voidable and one wholly void is that the former may be ratified,—that is, the maker of it may waive his right to avoid it, which he may do, either expressly, or by acts which assume its validity, or by acquiescence such as can be explained only on the theory that he is content to abide by the deed; while a deed wholly void is incapable of ratification. Of course the maker may estop himself from asserting the facts which render it void, but that is a different thing from ratification. The distinction is unimportant in this case, for one not a party to a voidable deed can hardly ratify it, and certainly a wife cannot make her husband's deed of the homestead effectual by any act (unless by estoppel) which does not amount to affixing her signature to it. To permit her to do so would be evading the Statute. Under the Statute, both the husband and wife must be bound by the conveyance or contract to convey or neither is. Neither of them acting alone can

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give it validity. So that, if it is to become effectual by estoppel, the estoppel must operate as to both.

Conceding, though it is not necessary in this case to decide it, that a wife may, by her acts, estop herself from asserting, as against her husband's conveyance, that the land was a homestead, we see nothing in the case that could be held to estop Mrs. Dean. She could not be estopped as to the law upon the facts that existed. It does not appear that Patrick Butler, in making the arrangement with Dean, relied on anything that she said or did, or any omission of hers to say or do anything; nor does it appear but that Butler knew that the land was a homestead, and that Dean had a wife, and that she did not sign the assignment; nor does it appear that she knew anything about the transaction until after it was fully made. The case looks like that of two men contracting for a transfer by one of them of his interest in the land constituting his homestead, ignoring the wife, without whose signature the transfer cannot be made.

The case of *All v. Banholzer* also disposes of the point which appellant seems to make, to wit, that the assignment or agreement to assign by Dean became operative upon the land ceasing subsequently to be a homestead. In that case the validity of a mortgage not signed by the wife was involved, and it was held immaterial that the wife had subsequently obtained a divorce. The appellant claims that at any rate defendant is entitled by subrogation to a vendor's lien. He seeks to work it out in this way: Sackett had a vendor's lien for the unpaid part of the purchase money on his assignment to Scarborough. Scarborough had such a lien, and it passed to Sackett when the former indorsed the Dean notes to him, so that Sackett became possessed of his own lien, and also that of Scarborough. How then the lien got from Sackett to him the appellant does not show; but it could have vested in him in only one of two ways: *first*, by Sackett's deed to him, which, as a vendor's lien is not in general assignable, could not be (*Hammond v. Peyton*, 84 Minn. 529); *second*, by passing to Patrick Butler, by subrogation, upon the arrangement between him and Dean, and then passing by virtue of Patrick Butler's assignment to Catherine Butler, and by her quitclaim deed of the land to defendant; and it could not be assigned by that assignment or deed. Though the lien had survived in Sackett or Scarborough, and had, by subrogation, passed to Patrick Butler, yet that does not help the appellant, as there are no circumstances that work a subrogation in his favor, and the lien could not be directly assigned to him. The appellant makes some other points in the case, but we do not see enough in them to call for particular notice in this opinion.

Order affirmed.

WISCONSIN SUPREME COURT.

Cameron GOFF, *Appt.*,
v.
STOUGHTON STATE BANK, *Resp.*

(.....Wk.....)

1. In a suit against a bank to recover the amount of a check or draft delivered to it, which the bank claims it paid plaintiff for when the draft was delivered, testimony in behalf of the bank that at the close of its business on the day the draft was delivered to it, its cash account and actual cash on hand balanced, and that this could not have occurred unless the amount of the draft had been paid to plaintiff on that day, is inadmissible, numerous transactions between the bank and other parties having intervened between the delivery of the draft and the making up of its cash account.
2. Where plaintiff, in a suit to recover the amount of a draft delivered to defendant, testified in his own behalf, when proving his side of the case, that he never received the money for the draft, he took upon himself the burden of proof that he had not been paid for the draft, and an instruction, requested by plaintiff to the jury, that the burden was upon defendant to prove that it paid for the draft, became unnecessary.

(November 28, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dane County, in favor of defendant, in an action brought to recover the amount of a draft alleged to have been delivered to defendant, which refused to pay for it. *Reversed.*

Statement by Lyon, J.:

On April 9, 1889, plaintiff delivered to the cashier of the defendant Bank, at its banking-house, a negotiable draft or check for \$38.50, drawn by a firm in Illinois upon the Merchants' National Bank of Chicago, payable to one Walters, and by him indorsed to the plaintiff. At the same time, plaintiff (who was a customer of the Bank, and one of its regular depositors) delivered his bank-book to the cashier, and requested that it be then balanced. The book was thereupon written up by a clerk, and delivered to the plaintiff. The amount of the draft was not entered therein to his credit. A few days later the plaintiff ascertained that he was not credited with the draft, and requested the cashier to give him credit therefor on his bank-book. The cashier refused to do so, claiming he had paid plaintiff for the draft. This action is to recover the amount of such draft. On the trial the plaintiff testified that the cashier did not pay him the amount of the draft. The cashier testified that he did so when the plaintiff delivered the draft to him. Testimony was introduced on either side which, it is claimed, tends to corroborate the statements of the plaintiff on the one hand, and those of the cashier on the other. The cashier and book-keeper, or clerk, of the Bank, testified, as witnesses in its behalf, that it was their business to make the cash-book of the Bank kept by the clerk, and the actual cash on hand kept by the cashier, balance each day, and they were

allowed by the court to testify, against plaintiff's objection, that on April 9, 1889, and on several days immediately before and after that date, the cash-book and actual cash substantially balanced; and, further, that these would not have so balanced on April 9 had the draft not been paid. The books of the Bank were not formally offered as evidence; yet, under like objection, these witnesses testified to their contents in some particulars, and to such balances. Further reference to the testimony will be found in the opinion. The jury returned a verdict for the defendant. A motion for a new trial was denied, and judgment for the defendant entered pursuant to the verdict. The plaintiff appeals from the judgment.

Mr. C. E. Estabrook, with Messrs. Luse & Walt, for appellant:

The court improperly admitted the books of account of the defendant Bank to prove payment for the draft.

Winner v. Burman, 28 Wis. 568; *Inales v. Prall*, 28 N. J. L. 457; *Juniata Bank v. Brown*, 5 Serg. & R. 281; *Cass of Potter*, 8 Johns. 211. The account books of a party are not evidence of a cash payment, or for money loaned.

Kelton v. Hill, 58 Me. 114; *Bassett v. Spofford*, 11 N. H. 127; *Rich v. Eldredge*, 42 N. H. 153; *Turner v. Twing*, 9 Cush. 515; *Townsend v. Townsend*, 5 Harr. (Del.) 125; *Pettit v. Teal*, 57 Ga. 145; *Low v. Payne*, 4 N. Y. 247; *Irvine v. Wortendyke*, 2 E. D. Smith, 874; 1 Phillips, Ev. *379, 885, and note; *Price v. Earl of Torrington*, 1 Smith, Lead. Cas. 7th Am. ed. 547; *Schwartz v. Allen*, 24 N. Y. S. R. 912.

The old rule only admitted such entries in evidence where the party was dead.

1 Phillips, Ev. 351, 352.

Nor could the evidence be used in case the party had other evidence.

1 Phillips, Ev. 379.

Later authorities, however, modify this rule so as to admit in evidence the entries provided the witness who made them testifies to their correctness at the time they were made and that he has no recollection at the time of the trial after referring to the entries.

Russell v. Hudson River R. Co. 17 N. Y. 134; *Guy v. Mead*, 23 N. Y. 462; *Harvey v. Cherry*, 76 N. Y. 444; *National Ulster County Bank v. Madden*, 114 N. Y. 280; *Kelosa v. Fletcher*, 48 N. H. 282; *Schettler v. Jones*, 20 Wis. 412; *Riggs v. Weiss*, 24 Wis. 645.

The entries, however, do not lose their character as hearsay evidence, and can only be admitted where the witness is not procurable.

1 Wharton, Ev. §§ 288-240; *Nicholls v. Webb*, 21 U. S. 8 Wheat. 326, 5 L. ed. 628; *Woolsey v. Bohn*, 41 Minn. 235.

The books of the Bank are not evidence of a deposit of money.

Philadelphia Bank v. Officer, 12 Serg. & R. 49; *Barnes v. Simmons*, 27 Ill. 513; 1 Greenl. Ev. §§ 474, 495; 2 Phillips, Ev. § 296, and note.

Account books are only evidence where they contain charges of one party against another.

Reed v. Jones, 8 Wis. 486-487; *Martin v. Scott*, 12 Neb. 42; *Masters v. Marsh*, 19 Neb.

466; *Sanford v. Miller*, 19 Ill. App. 586; *Putnam v. Goodall*, 81 N. H. 419.

When payment of a demand in suit is relied upon as a defense the burden of proof is upon the defendant.

7 Wait, Act. and Def. 396; *Bard. Law of Payment*, 298; *Koenig v. Kats*, 37 Wis. 157; *Fuller v. Green*, 64 Wis. 168.

Messrs. Bashford & O'Connor, for respondents:

There was no error in respect to the admission of the books of the Bank.

Reed v. Jones, 15 Wis. 40; *Winner v. Bowman*, 28 Wis. 563; *Folsom v. Apple River L. D. Co.* 41 Wis. 602; *Ourran v. Witter*, 68 Wis. 18; *Reynolds v. Sumner*, 12 West. Rep. 827, 126 Ill. 67; *Abbot, Tr. Ev.* 328; *Pendleton v. Weed*, 17 N. Y. 72; *Dewey v. Hotchkiss*, 30 N. Y. 497.

Under the testimony the presumption was that the draft was paid upon presentation.

Possession of a negotiable instrument is presumptive evidence of ownership.

Hungerford v. Perkins, 3 Wis. 267; *Dugan v. United States*, 16 U. S. 3 Wheat. 173, 4 L. ed. 862; *Norris v. Badger*, 6 Cow. 449; *Dean v. Hewitt*, 5 Wend. 257; *Palmer v. Gardiner*, 77 Ill. 148; *Jewett v. Cook*, 81 Ill. 260; *Garvin v. Winzell*, 88 Ill. 215; 2 *Randolph, Com. Paper*, § 776; 2 *Greenl. Ev.* §§ 527, 528.

The legal presumption is that where a note is transferred it is in the usual course of trade and before maturity.

Cook v. Helms, 5 Wis. 107.

Payment of a bill or note will be presumed from possession after maturity by the maker or drawee.

3 *Randolph, Com. Paper*, §§ 1475, 1476, 1648; *Conway v. Case*, 22 Ill. 127; *Kidder v. Horrobin*, 72 N. Y. 169; *Doty v. Janess*, 22 Wis. 319; *Poucher v. Scott*, 98 N. Y. 422; *Brembridge v. Osborne*, 1 Stark. 374.

The presumption that the payee would not part with the security without having received satisfaction is a reasonable one.

Lawson, Presumptive Ev. 844, 847; *Swain v. Etting*, 82 Pa. 486; *Somerville v. Gillies*, 31 Wis. 152.

Lyon, J., delivered the opinion of the court:

I. The controlling question of fact litigated on the trial was, Did the plaintiff deposit the draft for \$38.50 with the Bank to be passed to his credit, or did he receive the cash therefor when he delivered it to the cashier? Upon this question the testimony is in direct conflict, and would support a verdict either way. To corroborate the testimony of its cashier that he paid plaintiff in cash for the draft, the Bank was allowed to introduce testimony tending to prove that, at the close of its business on April 9, its cash account and actual cash on hand balanced, and that this could not have occurred unless the amount of the draft had been paid to plaintiff on that day. The admission of such testimony is alleged as error. It appears by the testimony of the cashier and book-keeper that no entry in respect to the draft was made in the books of the Bank when the plaintiff delivered the same to the cashier. It will be assumed, although the testimony is quite confused and unsatisfactory on the subject, that, when the accounts of the transactions of that day were made up after banking hours, the

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draft was entered in a book called the "remittance register," and posted from that book into the cash account. The entry in the remittance register is entirely consistent with either theory of the case. It would have been so entered whether the plaintiff was paid the cash therefor or not. The posting of the amount of the draft from such register into the cash account would have necessarily disturbed the cash balance for the day, if the money had not been paid out for the draft, provided all other transactions of the Bank on that day were accurately entered in the cash account. In that case cash would be credited with \$38.50, which had not been paid out, and there would have been a discrepancy to that amount between the cash account and actual cash, the latter being just the amount of the draft too large. Hence a very persuasive argument in support of the defendant's theory of the case can be based upon the alleged fact that the cash account and actual cash balanced on April 9. The testimony of such balance is therefore, or may be, important in the case, and, if improperly admitted, the error is material, and necessarily fatal to the judgment. But little testimony was given concerning specific items of the cash account, but the testimony went mainly to the absence of entries therein showing that the draft in question was to be passed to the credit of plaintiff, and to the general fact that the cash substantially balanced on that day. It appears affirmatively by the testimony of the cashier that the cash account contained no entry showing payment of the amount of the draft to the plaintiff. When asked if he had any record of such payment, he replied: "I have no record of it at all more than this: I paid it." We do not doubt that any entries or transactions of the parties, or either of them, in respect to the draft which pertains to the *res gesta* may properly be proved by either party, but under the circumstances of this case, as above stated, we do not think it competent for the defendant to prove its own acts in respect thereto, unless such acts are part of the *res gesta*. We can conceive of no other valid ground for the admission of such proof. The draft was delivered to the cashier early in the day, and numerous transactions between the Bank and other parties intervened before the cash was made up after the banking hours. When the entries were made in the cash book, and the cash was balanced, the plaintiff was not present, and had no knowledge of the processes by which such balance was reached. It cannot properly be said, therefore, that these processes pertained to the *res gesta*.

In *Sorenson v. Dundas*, 42 Wis. 642, *Ryan, Ch. J.*, said: "A meeting material to the issue took place between the parties. The court below permitted the respondent to testify in chief, in his own behalf, to an account of the meeting which he gave to strangers after it had ended and the parties had finally separated. This was not part of the transaction, but a subsequent narrative of it. Declarations are verbal parts of the *res gesta* only when they are contemporaneous. The respondent's narrative after the occurrence belonged no more to the *res gesta* than his evidence on the trial. It is too clearly inadmissible for discussion. 1 *Greenl. Ev.* § 110."

In the application of the rule, no difference is perceived between verbal and written statements of a party. We have here written statements made too late to be regarded as of the *res gestæ*. We think the case is ruled by *Sorenson v. Dundas*, and hence that the testimony under consideration was improperly admitted. For this error the judgment must be reversed.

II. The books of the Bank were not put in evidence, but, as we understand the case, the witnesses only resorted to certain entries therein, and to the general result deduced from all the entries, as memoranda for the purpose of refreshing their recollections of the transactions in question. We are not therefore called upon to determine whether such books would have been competent evidence for any purpose or to what extent and for what purposes they might be used as evidence, if admissible.

III. The court refused to instruct the jury, as requested by plaintiff, that the burden was upon the defendant to prove it paid for the draft. The plaintiff testified in his own behalf, when proving his side of the case, that he never received the money for the draft. He thus took upon himself the burden of proof showing prima facie that he had not been paid for the draft, and the instruction became unnecessary, assuming it to be correct as an abstract proposition of law. See *Spaulding v. Chicago & N. W. R. Co.* 33 Wis. 532.

The court instructed the jury that, in the absence of any other proof, the presumption would be that the draft was paid for when delivered to the Bank. This instruction was based upon an hypothesis not in the case, for there was other proof on the subject. It were better had the instruction been omitted. We determine no rule of presumption in the present case.

The judgment of the Circuit Court must be reversed, and the cause will be remanded for a new trial.

Louis E. P. SWEET, *Appt.*,

v.

OHIO COAL CO., *Respnt.*

(....Wis.....)

1. It is the duty of the employer to furnish his employe a reasonably safe place in which to work, and with reasonably safe appliances and apparatus; but the employer may conduct his business in his own way, although another method be less hazardous, and the employe takes the risk of the more hazardous method, if he knows the danger and enters on the employment.

2. Where an employe, when he enters upon his employment, knows or afterwards discovers that the machinery or appliances he is called upon to use are defective or dangerous, and he continues his employment without objection or complaint, he assumes the

risk of the danger then known or discovered, and waives any claim for damage against his employer in case it shall result in injury to him.

3. An employe, who works near a long, steep and irregular stairway, without railing, which he is called upon to go up and down, and which was intended for employes, is chargeable with knowledge of the obvious defects in the stairway, and cannot recover of his employer for damage to himself by reason of such defects.

(November 25, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Ashland County, entered upon a verdict directed for defendant in an action for damages for an injury to plaintiff through the negligence of defendant while plaintiff was in its employ. *Affirmed.*

The facts are fully stated in the opinion.

Mr. John F. Dufur, for appellant:

The court erred in not submitting the case to the jury.

Nadau v. White River Lumber Co. 76 Wis. 120; *Swoboda v. Ward*, 40 Mich. 420-424; *Rummel v. Dilworth*, 1 Cent. Rep. 905, 111 Pa. 843-851; *Engel v. Smith* (Mich.) July 2, 1890; *Wood, Mast. and Serv.* §§ 376, 388.

Messrs. Hayden & Young, with *Messrs. Dockery & Kingston*, for respondent:

The employer is not bound to adopt the safest known methods of conducting the business, nor such means the use of which would have prevented injury; and his failure to do so is not actionable negligence.

Stephenson v. Duncan, 73 Wis. 404; *Kelley v. Chicago, M. & St. P. R. Co.* 53 Wis. 74; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Houland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 230; *Sullivan v. India Mfg. Co.* 113 Mass. 896; *Ladd v. New Bedford R. Co.* 119 Mass. 412; *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 661.

The servant is bound to see patent and obvious defects in the machinery or other instrumentalities; and is deemed to assume the risk of danger thus known or discovered, and to waive any claim for damage against the master, in case it shall result in injury to him.

Thomp. Neg. 1008; *Dynen v. Leach*, 26 L. J. Exch. 222; *Brown v. Acerrington O. S. & Mfg. Co.* 8 Hurlst. & C. 511; *Seymour v. Mad-dox*, 16 Q. B. 332; *Assop v. Yates*, 2 Hurlst. & N. 768; *Senior v. Ward*, 1 EL & EL 385; *Wood-ley v. Metropolitan R. Co.* L. R. 2 Exch. Div. 884; *Sullivan v. India Mfg. Co. supra*; *Balle v. Detroit Leather Co.* 73 Mich. 153.

Cole, Ch. J., delivered the opinion of the court:

This is an action to recover damages for a personal injury caused, as it is alleged, by the negligence of the defendant Company. There is no dispute about the facts, which may be briefly stated as follows: The plaintiff was in the employ of the defendant from the 20th

NOTE.—Duty of employer to furnish employe with reasonably safe place in which to work and to provide safe machinery. See notes to *Myhan v. Louisiana Electric L. & P. Co. (La.)* 7 L. R. A. 173; *Hunter v. New York, O. & W. R. Co. (N. Y.)* 6 L. R. A. 9.

A. 246; *Lindvall v. Woods (Minn.)* 4 L. R. A. 798; *Brasil Block Coal Co. v. Gaffney (Ind.)* 4 L. R. A. 860; *Louisville, N. A. & C. R. Co. v. Buck (Ind.)* 2 L. R. A. 520; *Griffin v. Boston & A. R. Co. (Mass.)* 1 L. R. A. 603.

day of May until the 24th day of August, 1889, on its coal docks in Ashland. His usual work was to assist in shoving the railroad cars as the coal was put into them, and keeping the dock clear so that the cars could be shoved easier. There was a kind of tramway or upper dock about twenty-five feet above the lower dock on which the plaintiff worked, upon which upper dock there were three or four men employed. About the 1st of August, a stairway was built from the lower to the upper dock. This stairway was about 8 feet wide, and 27 feet long. Two long planks were used for stringers. Into the sides of the stringers, notches were sawed, and planks laid in and nailed. The steps were of irregular distances apart, being from 12½ inches to 18½ inches. The stairway was quite steep, and had no railing on the sides. The plaintiff testified that he was called upon to go up and down the stairs for different purposes; that he went up once carrying drinking water to the men at work on the upper dock, and once to assist in changing the cars from one track to another; but he had come down the stairs only once prior to the injury. On the day of the accident, the men on the upper dock called for drinking water, and the plaintiff took a pail of water up the stairway to them. He says: "I set down the pail at the head of the stairs, and started to go down, and, as I stepped from the third to the fourth step from the top, my leg struck on the step above that I was stepping from, and consequently threw it out. The calf of my leg struck somewhere in the neighborhood of 13 inches from my foot. It threw the foot off the step, and consequently I pitched forward and fell down to the main dock about 22 or 23 feet." That he sustained a serious injury from the fall is not disputed. The only act of negligence on the part of the defendant upon which responsibility for the injury is predicated is the construction of such a steep stairway without proper braces or a railing, with the steps so far apart and of irregular distances, which stairway was intended to be used by men employed on the dock. It is said, the stairway was defectively constructed, and was very dangerous. That the stairway was defectively made; that it was dangerous; that the defendant Company knew that it was not well constructed, and was dangerous,—are facts which must be deemed established on this appeal from the ruling of the trial court directing a verdict for the defendant. And the question is, Do these facts show that the defendant is liable for the injury? It appears to us they do not. The stairway was uncovered, exposed to the light of day, and its steepness and want of railing were such defects as would be noticed at a glance. Whatever imperfections existed in the construction of the stairway, its narrowness and the irregularity in the distances the steps were apart, were readily observable, and would be discovered the first time a person attempted to go up or to go down them. No person, in the exercise of ordinary observation or care, could fail to discover these peculiarities of the stairway, for

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they were plain and obvious to the senses. As the defendant's counsel says, there was nothing about the stairway latent or concealed which could or did occasion the injury. True, the plaintiff had had occasion to go up and down the stairway but once or twice, but that was sufficient to teach him it was steep and had no railing at the sides, and that the steps were at irregular distances apart. The first use of the stairway would impart to him a knowledge of these facts. It could not be otherwise, if he used his eyes, for the defects were so apparent. The plaintiff therefore was chargeable with knowledge of the defects in the construction of the stairway of which he complains. He must have seen these defects the first time he looked upon it, and he was working near and around the stairway sometime before the accident occurred. The correctness of this view cannot well be controverted. This court has often affirmed the rule that, if the employé, when he enters upon his employment, knows or afterwards discovers that the machinery or the appliances he is called upon to use are defective or dangerous, and he continues his employment without objection or complaint, he is deemed to have assumed the risk of the danger then known or discovered, and waives any claim for damage against his employer in case it shall result in injury to him. Some of these cases are cited on the briefs of counsel. See *Kelley v. Chicago, M. & St. P. R. Co.* 53 Wis. 74; *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 661; *Hobbs v. Stauer*, 62 Wis. 108; *Stephenson v. Duncan*, 78 Wis. 404.

It is certainly true that it is the duty of the employer to furnish his employé a reasonably safe place in which to work, and with reasonably safe appliances and apparatus. This rule of law is well settled, and has been acted upon in our decisions. At the same time it is equally well settled that the employer may conduct his business in his own way, although another method be less hazardous, and the employé takes the risk of the more hazardous method, if he knows the danger and enters on the employment. Here the plaintiff must have seen whatever defects existed in the construction of the stairway, for such defects were plain and obvious. If he had used his senses, he would have discovered them the first time he went up and down the stairway. He said he knew the stairway was steep, but he had made no measurement of the steps or of the distances between them; but, if the irregularities of the distances between the steps were considerable, he would have observed that at a glance. It was not necessary to measure the distances between the steps to ascertain the defect any more than it was to use a plumb-line to discover that the stairway was very steep. On the undisputed facts in the case, we think no actionable negligence on the part of the defendant Company was shown, and that it was not error to withdraw the case from the jury.

It follows from these facts that the judgment of the Circuit Court must be affirmed.

PENNSYLVANIA SUPREME COURT.

LINDEN STEEL CO., Limited, *Appt.*,
v.
IMPERIAL REFINING CO., Limited,
et al.

(.....Pa.....)

1. Under the Pennsylvania Act of June 16, 1836, a claim for a mechanics' lien on an oil refinery sufficiently describes the property, which states the name of the refinery, and describes the lot on which it is situated by metes and bounds, with the number of acres, and refers to a map attached which shows the exact location of the refinery, its tanks, buildings, stills, etc., with the various pipe connections as used in the refinery.
2. To support a mechanics' lien under the Pennsylvania Act of June 16, 1836, against an oil refinery, it is not necessary that every part and appliance of the refinery should appear in the claim, but there should be such reasonable certainty of the description as will clearly identify the subject of the lien.
3. An amendment of a claim for a mechanics' lien allowing leave to file an index explanatory of the map attached to the statement of the claim, is properly allowed.

(November 2, 1890.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Verango County, in favor of defendants, in an action brought to enforce a mechanic's lien. *Reversed.*

The plaintiff's mechanics' lien was filed July 9, 1888.

On September 14, 1888, Elias N. Ames filed an affidavit of defense, for the Titusville Iron Works and the Imperial Refining Company.

November 12, 1888, the plaintiff's attorneys entered a rule on the defendants to plead within fifteen days or judgment, and after the time had expired, in default of a plea, a judgment was regularly entered against the property of the Imperial Refining Company, Limited, covered by the lien.

December 18, 1888, the defendants' attorney filed an affidavit, assigning therein reasons for opening the judgment, which were in effect that they did not know of the rule to plead, and that the defendants had a meritorious defense to the plaintiff's lien, which was in the affidavit of defense already filed.

On the same day the court opened the judgment, and as soon as it was opened the defendants' attorney made a motion to strike from the record the lien-claim filed, for reasons appearing on the face of the claim. The court granted a rule to show cause, returnable to the second Monday of January, 1889.

The plaintiff on January 14, 1889, filed an amendment to the lien, or an index explanatory of the map attached to the lien.

The case was argued in February, 1890, and it appeared on the argument that on November 28, 1889, the defendants had filed a paper which he designated a demurrer; the rule to show cause and the alleged demurrer, at the suggestion of the court, were argued together. 9 L. R. A.

On March 8, 1890, the court made the following order: The demurrer is sustained and the rule made absolute. By the court.

Exceptions to the ruling and decision of the court were allowed.

The other facts appear in the opinion.

Messrs. Isaac Ash and P. M. Speer for appellant.

Messrs. Roger Sherman, Samuel Grumbine and H. McSweeney for appellees.

Clark, J., delivered the opinion of the court:

The appellees' contention in this case is that the buildings and structures composing the Imperial Oil Refinery are not sufficiently described in the statement of the lien as filed, and the question arises upon a motion to strike off the lien upon that ground, and upon a demurrer to the same effect. If the claim be insufficiently stated, the proper course is to move to strike it off (*Lehman v. Thomas*, 5 Watts & S. 262); or to demur (*Howell v. Philadelphia*, 38 Pa. 471). In the case now under consideration, under stress of a rule to plead, the appellees did both, and the court below, upon argument, made the rule absolute, and sustained the demurrer. By pleading to the *sci. fa.*, the objection would have been waived. (*Lybrandt v. Eberly*, 36 Pa. 347; *Howell v. Philadelphia*, *supra*.)

By the third clause of the 12th section of the Act of 16th June, 1836, it is required that a mechanics' claim shall set forth "the locality of the building, and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same." If there be enough in the description of the locality, and of the peculiarities of the building, to point out and identify it with reasonable certainty, it is a sufficient compliance with the requirements of the Act. (*Kennedy v. House*, 41 Pa. 39.)

The building or structures against which this lien was entered was an oil refinery, which is so peculiar in its construction that the ordinary forms or methods of description are inapplicable. A description of an oil refinery by "the size and number of its stories," would be absurd and wholly inadequate. The mechanics' lien creditor must therefore resort to "such other matters of description as shall be sufficient to identify the same."

In *Short v. Miller*, 120 Pa. 470, it was held that an oil refinery, although peculiar in its construction, is the proper subject of a mechanics' lien, under the General Act of 1836; and, as the claim in that particular case described the locality with reasonable certainty, enumerated the several structures, described their uses, gave the dimensions, height or capacity of each, and the materials of which they were constructed, the lien was held to be good.

So, in *Titusville Iron Works v. Keystons Oil Co.*, 180 Pa. 211, the claims enumerated the principal buildings and structures constituting the plant, described their uses, gave the dimensions, height or capacity of each, and the materials of which they were constructed, and

averred that the whole, taken together, constituted an oil refinery, the location of which was fixed by a particular description of the land upon which it was constructed. This description was also held to be sufficient under the Act of 1836.

In *Short v. Ames*, 121 Pa. 530, this form of description was not pursued. Indeed there was no sufficient identification of the buildings intended to be embraced. The description in that case was as follows: "Said buildings and oil refinery are situate in the County of McKean, and State of Pennsylvania, and is bounded and described as follows: [then follows a description of the land]; and having buildings and machinery erected thereon, consisting of boiler and boiler-house, tanks and tank-houses, stills, warehouse and barn, and donkey pumps, engines and fittings." This was radically defective. The description is all in such general form that it might, with equal propriety and accuracy, have been applied to almost any oil refinery. In the case at bar, however, the lien is filed against what is known as "The Union Refinery," located on a lot or piece of ground particularly described by metes and bounds, as well as by adjoining, containing twelve and one quarter acres. The buildings and structures are described, in general terms, as follows: "A large oil refinery, used to refine crude petroleum, and to manufacture gasoline," etc.: "which refinery has a capacity of 1,800 barrels and upwards per day; a map or plan showing the exact location of said refinery, its tanks, buildings, stills," etc., "being hereunto attached." The claim further sets forth that "all the steel plates, specifically mentioned in the itemized statement annexed hereto, and made part hereof, were made and furnished by the said Linden Steel Company, Limited, for the erection and construction of a material and essential addition to the refinery aforesaid of the Imperial Refining Company, Limited, to improve the same, and increase its capacity and efficiency; that the above-mentioned material and essential addition to said refinery, for and about the erection and construction of which said steel plates were furnished, consisted of one 600 barrel steam-still for steaming naphtha, said still being inseparably connected with said refinery, and being an essential part thereof, the relative location of said still, and of the various component parts of said refinery, being shown in the map or plan above referred to, in which said map or plan said still for and about the erection and construction of which said material was furnished, is colored red."

Referring to the map, which is made part of the claim, we find a complete description of the land, with the buildings and structures, composing the refinery, protracted upon a scale of forty feet to the inch. This map shows the size and relative locations of all the buildings, with respect to the lines of the land, the creek and the railroad, and with respect to each oth-

er. The pump-house, the boiler-house, the agitator, the condensers, the stills, shops, blacksmith's shop, water-tanks, oil tanks, the office, etc., drawn to this scale are not only represented by name, but the various pipe connections are fully exhibited in variously colored lines, representing the alkali, acid, air, water, steam and oil pipes, respectively, as they are used in the regular operation of the refinery. The structures not named are numbered, as if with reference to some explanatory paper, which, however, was not filed with the lien. Considering the peculiar structure of an oil refinery, we are of opinion that the draft contains a better description of it than was reasonably practicable by any other means, and we are clearly of opinion that the lien, as filed, with the accompanying map, must be held to contain "such matters of description as would be sufficient to identify the same." To support a mechanics' lien against an ordinary dwelling-house it is not necessary to describe it in every part, every room or apartment, or appliances connected with it. It is sufficient if it be described in such form, and with such reasonable certainty, as will clearly identify it to creditors, purchasers or others interested. An oil refinery is not a single structure, in the same sense as a dwelling-house. It consists of a variety of structures, peculiar in form, large and small, each adapted to some particular use in the process of refining oil, but the whole of these several and various structures, taken together, is but a single establishment, and is known and used as an oil refinery. It is not necessary that every part and appliance of the refinery should appear in the claim, but there should, as in the case of a dwelling, be such reasonable certainty of description as would clearly identify the subject of the lien. The claim further sets forth that the materials charged in the statement of claim were furnished upon the credit of the refinery, buildings, machinery, etc., thereof, and that notice thereof was not only given to the owner on the 28th of March, 1888, prior thereto, and afterwards, but the plaintiff's intention to hold the refinery for payment of said materials under the Mechanics' Lien Law "was expressly recognized, known and understood by all the parties hereto from the very beginning of the negotiations, which resulted in the furnishing of the said materials for the purposes aforesaid." We are of opinion that, so far as any question has been made, the claim in this case is sufficient that the effect of the amendment was merely to make the claim more precise, specific and particular, and should have been allowed. In this view of the case it is not necessary to consider the remaining assignments of error.

The order sustaining the demurrer, and making the rule absolute, is reversed; the demurrer is overruled and the rule discharged; the lien is reinstated, the amendment allowed, and a *procedendo* awarded, the appellees to pay the costs of this appeal.

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RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress and Development of the Law during the First Quarter of the Judicial Year, Beginning with Oct. 1, 1890, Classified as Follows:

- I. GOVERNMENTAL AND POLITICAL RELATIONS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. FIDUCIARY RELATIONS.
- V. DOMESTIC RELATIONS.
- VI. PROPERTY RIGHTS; CIVIL REMEDIES.
- VII. DAMAGES FOR TORTS.
- VIII. CRIMINAL LAW AND PRACTICE.

I. GOVERNMENTAL AND POLITICAL RELATIONS

Police Power; Personal Rights.

The police power properly includes the right to forbid the use of opium. (Wash.) 895.

A municipal ordinance, making it a misdemeanor for one having labor performed under a city contract to allow more than eight hours labor in one day, is void. (Cal.) 482.

The right to equal accommodations, under the Michigan Statute, is enforced in a case holding a restaurant keeper liable in damages for discrimination against colored persons. (Mich.) 589.

The wife and children of a Chinese merchant, who is entitled to come into the United States, may come with him without the certificate required by the Act of Congress of 1884, § 6. (U. S. C. C. Or.) 204. See also *infra*, VI., *Aliens*.

Discriminating between citizens of a State and those of other States in the matter of licenses for the sale of intoxicating liquors is not in violation of the constitutional right to equal privileges and immunities. (Ind.) 664; (Md.) 784.

The constitutional provision as to equality of privileges of citizens of different States does not prevent a discrimination between residents and nonresidents of a county in the amount of license fee required for purchasing a certain kind of goods to be shipped from the county. (Pa.) 866.

The validity, so far as it applies to interstate commerce, of a Statute fixing a license fee for the privilege of buying produce in a particular county to be shipped out of it, does not make the Statute invalid as to shipments to places within the State. (Pa.) 866.

A case which discusses very extensively the powers of municipal corporations in respect to markets holds, among other things, that restrictions as to the sale of meat, etc., must be reasonable as to times and places; that the grant of authority to regulate such sales is one of public power; and that the construction or rent of a building by a city for a market-house is not made illegal by the use of a portion of it for municipal courts, etc. (Fla.) 69.

Notice to an insane person of proceedings to
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adjudge him insane is not necessary to constitute due process of law, where a regular, practicing physician examines him; and any relative or other citizen may appear and have counsel if he chooses. (Iowa) 198.

Highways.

The use of ways commenced under an actual and recorded location is presumed to be co-extensive therewith. (Me.) 94.

Municipal Corporations.

The principle that a municipal corporation is not liable on account of defects in its streets, in the absence of express provisions of law, is applied to a case where trustees and street commissioners of a village have been guilty of negligence in repairing the streets. (Vt.) 868.

The negligence of municipal officers in respect to drains and sewers, which it is their duty to construct under the general laws, will not create a liability against the municipality. (Me.) 205.

All the towns whose duty it is to keep a bridge in repair are liable for a defect in a space between the end of the bridge as built and as ordered to be built, although the space was filled in by one of the towns only; and notice to the town in which the bridge is situated of such defect is notice to them all. (Vt.) 888.

The liability of a municipality on *ultra vires* contracts is well shown by a case which holds, among other things, that such liability may exist for money had and received, where want of power to borrow it arose simply from a failure to grant, and not from a prohibition to exercise it. (Ala.) 497.

Eminent Domain.

The fact that property can be taken by eminent domain only for a public use is illustrated by a decision that no more water can be taken, to the detriment of mill owners on a stream, for a public water supply than is required for public purposes; and that it cannot be used to run small motors for light manufacturing, even when the main, except in cases of fire, furnishes more than is needed for other public uses. The fact that the water was worth more for

stream is immaterial. (Vt.) 195.

The right of a railroad company to use lands taken by eminent domain does not permit it to allow the use of vacant portions of its depot grounds as a yard by a merchant, although the company's business is facilitated thereby; on the other hand, the owner of the fee is held to have no right of passage over such depot grounds except at a public crossing. (Tex.) 295.

The adoption of a new motive power in place of animal power on a street railway is not within a constitutional prohibition against "construction or operation of a street railroad" without consent of the local authorities. (N. Y.) 124.

A passenger railway, whose cars are drawn by a dummy steam engine, creates an additional burden in the highway, for which original owners are entitled to compensation. (Tenn.) 100.

The right to damages caused by the operation of a railroad under a constitutional provision requiring compensation for property "damaged" as well as that taken, is held to cover damages for diminution in the value of property by reason of noise, smoke and vibration caused by the operation of the road. (Tex.) 298.

Taxation.

A good case on the question of a nonresident's liability for taxes holds that the question of liability to assessment is jurisdictional and always open to investigation, and that a nonresident coming into a State for business purposes cannot be held liable for failure to examine assessment lists, when he had no just reason to suppose that he would be taxed. (N. Y.) 498.

A man in possession with his wife of lands of which his wife has the unrecorded and undisclosed title, the recorded title being in a third person, may be assessed for the taxes thereon. (Mass.) 118.

The constitutional requirement of uniformity of taxation does not prevent a tax upon certain occupations. (Neb.) 786.

A constitutional provision for *ad valorem* taxation does not apply to sidewalk assessments. (Ga.) 402.

A constitutional provision that property shall be taxed in proportion to its value does not preclude a license tax upon dogs as a police regulation. (Mo.) 852.

The exemption of property "used exclusively for charitable purposes" is held to extend to real estate of a corporation, the products of which are exclusively expended in training and furnishing persons for charitable work. (N. J.) 198.

Exemption from taxation of real estate so long as it is occupied for the purposes of a corporation will not extend to portions rented out to tenants, although the rents are applied to the uses of the corporation. (Ky.) 629.

An unusual case of taxation in several particulars is a case which decides that water-power appurtenant to land may be valued and taxed with it, but that the right to have canals through land of another person kept open will not exempt the latter from a tax on the land covered by the water, while, on the other hand, 9 L. R. A.

covered by a canal running through his property, the fee of which is in a third person, although he has the right for ninety-nine years to maintain buildings over the canal. (Mass.) 356.

Due process of law in case of a local assessment is secured, where an issue can be tried and determined on an attempt to collect the assessment. (Ga.) 402.

A license tax on purchases of produce to be shipped from the State is not a tax upon interstate commerce. (Pa.) 866.

A license tax on insurance agents representing companies not located within a city is void. (Ky.) 566.

Officers; Civil Service Reform

A test case on the New York Civil Service Reform Act decides that the Statute providing for a state board of three commissioners, only two of which belong to one political party, is not unconstitutional, either as disfranchising or depriving any citizen of rights, or subordinating local to state authorities; and that a test to determine the qualifications of an officer is not prohibited by a constitutional prohibition of any "oath, declaration or test." (N. Y.) 579.

Title to an office cannot be tried in replevin for property belonging to the office. (Mich.) 408.

An extensive discussion of the law concerning *de facto* officers is presented in a case holding that a judge assigned to a district where no other judge is acting, and acting by consent of the other judges under his own commission, although by appointment under an unconstitutional Act increasing the number of judges, is a *de facto* officer. (Nev.) 59.

An appointee, to succeed one who still claims the office after an illegal attempt at removal, is not a *de facto* officer. (Mich.) 408.

Jurisdiction.

The jurisdiction of a State for the regulation of fisheries extends over a bay within its borders, if the head-lands at the mouth are less than two marine leagues apart, although part of the interior of the bay may be more than a league from the land. (Mass.) 286.

The limit of the jurisdiction of state courts is a question presented by a case which decides that Indiana courts can punish violation of the state laws by selling intoxicating liquors upon boats anchored near the Indiana shore in the Ohio River, which is the boundary of the State, as the State Constitution gives concurrent jurisdiction over that river. (Ind.) 664.

A scow, on which intoxicating liquors are sold, anchored about half a mile from shore in Saginaw Bay, is not within any township in Michigan, and a sale of liquors thereon is not subject to the Statutes. (Mich.) 106.

The jurisdiction of a State to punish offenses against its Sunday Laws is held to extend to a steamboat pilot carrying passengers over navigable waters of the United States along the state border between different points in the State. (Ind.) 821.

The jurisdiction of courts over nonresidents is affirmed in a certain case for the rescission of notes payable to a resident and secured by a mortgage of land in the State to secure the

purchase price of land in a foreign country. (Cal.) 876.

The question is decided against the exercise of such jurisdiction in a cause of action connected with Indian lands. (Tex.) 849.

A decision that a suit by a foreign receiver may be entertained when it will not work injustice to citizens of the State or contravene the policy of its laws, applies the rule to a suit to collect assets of an insolvent corporation, where no domestic creditor appears. (Ala.) 601.

A legacy, amounting to \$20 only, was held too small to entitle a person to relief in equity. (Mass.) 200.

Also that a forged release of a legacy will not give jurisdiction to equity, as it will be no defense at law. *Id.*

Contempt of Court.

What constitutes contempt of court is discussed in a case holding that an affidavit for change of venue respectfully handed to the judge, stating that his wife had said she must see him and arrange to have the other party win the case, is not contempt, nor is a statement that the petitioner believes from the judge's rulings that he is prejudiced, if such belief is genuine. (Colo.) 566.

Voters and Elections.

The adoption by several States of the Australian ballot system makes a Montana decision relating thereto very important. It holds that the provisions of the Statute are mandatory, and that the name of no person can be

lawfully published or printed on the official ballot unless he was nominated in the statutory manner; also, that one whose name was thus published, although he was not legally nominated, cannot take the office, even if elected, although he could have announced himself as a candidate, and then have lawfully been voted for. (Mont.) 467.

The qualifications of a voter, fixed by the Constitution of a State, cannot be added to by the Legislature, and no additional qualifications can be fixed for registration. Furthermore, where the Constitution provides for registering of voters, a Statute providing for the registry of only a part is void, and so, also, is a Law imposing extra burden and hardship in the matter of registration upon persons absent from the State for six months or more, or who change their residence from one county to another within six months before election. (Ind.) 326.

Another election case holds that registration is not necessary in order to vote for a constitutional amendment unless it is prescribed by the Constitution, although an election for members of the Legislature was held on the same day, for which registration was necessary. (Nev.) 885.

A primary election is an "election" within a Statute prohibiting sale of liquors on election days. (Ind.) 170.

Two propositions to erect from one county two new ones, the boundaries of which conflict, cannot be submitted at one election. (Neb.) 882.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Assignments.

The rule that an officer cannot assign his unearned salary is applied by a decision that an assignment of a sheriff's fees for future public services is against public policy and void. (N. Y.) 704.

An assignment by a retired officer of the United States army of his unearned pay is also void, as against public policy. (N. J.) 231.

Negotiable Paper.

The somewhat vexed question as to the right to claim as a bona fide purchaser of negotiable paper taken for a pre-existing debt is re-examined in a case deciding that an absolute extinguishment of such debt is sufficient consideration to make the purchaser a holder for value. (N. Y.) 850.

Demand on principal will not bind an indorser of a note signed by one as "agent" without disclosing his principal. (Miss.) 832.

Oral Agreements.

A good illustration of the invalidity of contemporaneous parol agreements to modify a contract is shown in a case denying the validity of such agreement on the purchase of goods to advance the price of the goods and notify the trade thereof. (N. Y.) 548.

The invalidity of parol agreements to convey real property is well illustrated also by a decision that a wife's parol promise, on accepting a deed from her husband, who was intemperate, to reconvey it and again live with him as his wife, is not enforceable, unless she enters
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tained a fraudulent purpose not to perform the promise at the time it was made. (Ala.) 287.

A verbal agreement cannot create a lien on land in favor of a surety. (Ind.) 178.

The length of time which a contract may cover, without being subject to the Statute of Frauds as one "to be performed within a year," is well illustrated by a decision that a promise to support a minor thirteen or fourteen years old until he becomes twenty-one is not within the Statute. (U. S. C. C. Mo.) 129.

Banks.

Among the numerous recent cases as to the rights and liabilities arising out of bank collections, a case herein decides that neither the receiver nor creditors of a collecting bank, which transmitted a draft to another for collection, but became insolvent before receiving the proceeds, can demand them from the other bank. (Ky.) 553.

The right of a bank to pay the note of a depositor made payable thereat and charge it to the depositor's account, without notice to, or express authority from, him, is affirmed in an Indiana case directly conflicting with a Tennessee decision. 3 L. R. A. 273 (Ind.) 560.

Debts not matured cannot be set off by a bank against deposits of an insolvent. (Ky.) 106.

Validity of Contracts Generally.

The invalidity of contracts attempting to oust the jurisdiction of courts is illustrated by a case holding that by-laws of a mutual insurance association may lawfully require an appeal by

body conclusive. (Ind.) 501.

An agreement for separation between husband and wife is governed by the law of the State where it was made and partly performed, where they are temporarily staying, and not by the law of their domicile for causes arising there. (Me.) 118.

An agreement between husband and wife on separation for her separate support is not against public policy. *Id.*

The rule against stipulations to relieve from negligence is held applicable to stipulations against liability for unrepeatable telegrams. (Ark.) 744.

The right of a carrier by stipulation to fix the limit of liability to an agreed valuation of property is affirmed in two cases. (N. H.) 449, 458.

The rule that a contract to stifle competition is illegal is applied in a decision holding such a contract between rival railroad companies illegal. (Ind.) 754.

Another case relating to the invalidity of contracts against competition decides that contracts between railroad companies to prevent unhealthy competition are not necessarily void, and that a company which continues to operate another's road after a statute has made such contracts illegal cannot retain the proceeds when called to account, but that the other road is not *in pari delicto*, and is entitled to an equitable share of the earnings. (N. H.) 689.

An agreement to refrain from bidding at a judicial sale is not necessarily void, where the primary purpose is merely to protect rights and not to suppress competition. (N. Y.) 781.

The mere fact of an agreement to give a rebate to a shipper is held not to show an illegal contract by a carrier. (Ind.) 754.

Another case holds that the amount of a rebate from tariff rates charged other customers for precisely similar services is sufficient to show that a carrier's rates were unreasonable and constituted unjust discrimination. (Iowa) 764.

The principle that no recovery can be had on an illegal contract is held not to defeat a right to the purchase price of bottled beer sold with knowledge that it was to be used or sold in a house of ill-fame. (Minn.) 506.

No compensation, even upon *quantum meruit*, can be recovered for services under a contract for an entire consideration to act as clerk and bar-tender for a dealer in groceries, who also sold intoxicating liquors illegally. (R. I.) 110.

Another decision illustrating the same point is one holding that the mere knowledge of a lender of money that the borrower intends to use it in wagering contracts will not defeat a recovery. (Ind.) 657.

Champertry.

The old Law of Champerty is illustrated by a decision in which the assignment of a bare right to file a bill in equity for fraud is held void as against public policy, although assignor and assignee were tenants in common of the property affected by the fraud. (Nev.) 802.

A contract by one not an attorney to procure employment for an attorney for a share of the

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those not attorneys. (Cal.) 488.

Guaranty.

A guaranty of rent after the expiration of the lease at the same rate as before is discharged by a new arrangement between landlord and tenant which makes the latter tenant at will at a different rent from that fixed by the lease. (Mass.) 858.

Covenants.

A covenant to give one eighth of the mineral from certain lands with a grant of one eighth of the ore runs with the land. (Wis.) 561.

Another case holds, as an exception to the rule requiring privity of estate in case of covenants running with the land, that a covenant between adjoining owners fixing their rights to the waters of a stream runs with the land and binds their grantees, although the deeds do not refer to it. (Pa.) 810.

A covenant against incumbrances covers those unknown as well as those known; and an obligation to pay for part of a party-wall, if used, is an incumbrance. (Neb.) 687.

Expectancy.

The invalidity of a conveyance of an heir's expectancy is asserted in a case which holds also that it is not enforceable in equity after the heir comes into possession, unless the price paid was the full and fair market value, and the ancestor acquiesced. (Ind.) 477.

Fire Insurance.

The rule and measure of an insurer's liability is fixed by the Ohio Statute requiring the insurable value to be stated, and the Statute cannot be waived by the insured, or lost by any statement in the application, in the absence of intentional fraud. (Ohio) 45.

A carriage-house and stable are covered by insurance on a "dwelling and additions thereto, etc.," where they are in fact under the same shingle roof, and have a bedroom over them. (Mich.) 127.

A transfer of the equitable title to property carrying the beneficial interest avoids a policy under a condition that it shall be void for any change in title. (Ky.) 627.

A building is vacant or unoccupied within a condition of an insurance policy where a tenant moved out the day before new tenants were to come in, and they had already made some repairs, but nothing was left in it except two or three planes. (Ind.) 81.

An illustration of the estoppel of an insurer against enforcing a forfeiture is shown in a case in which the insurer accepted payments of premium after the destruction of the insured property. (Ind.) 817.

Marine Insurance.

Insurance of a ship's cargo "free from partial loss" does not change the law as to constructive total loss. (Mass.) 881.

Life Insurance.

An interesting question as to the right of a debtor to pay money for insurance on his own life is presented in a case holding that such a policy assigned to certain creditors is not fraudulent against other creditors. (Ind.) 660.

The "valid reasons" for which a member may be reinstated, after default in paying as

assessments for insurance are not to be arbitrarily determined by officers of the association; and they include failure to pay by reason of apoplexy, causing unconsciousness which continues until death. (N. Y.) 189.

The law as to the substitution of beneficiaries by members of benefit societies is well presented in a case holding that such substitution is complete when everything is done before the death of the member, except the formal matter of changing the certificate. (N. Y.) 584.

Another case as to change of beneficiaries holds that a writing directing the change mailed to the association may be effectual, although it is not received until after the member's death. (Iowa) 841.

Another case holds that a clause in the charter permitting a change of beneficiary will not prevent the making of a contract which will give a designated payee a vested interest. (N. Y.) 616.

Accident Insurance.

The interpretation of the term "accident" and similar words in insurance policies, which have been previously held to cover death by inhaling gas, by drowning, etc., is held to include death by the accidental taking of poison. (Ill.) 871.

On the other hand is a decision holding that death resulting from malignant pustule caused by contact with putrid animal matter containing bacteria is not accidental. (N. Y.) 617.

The loss of "two entire feet" within the meaning of an accident policy is held to have happened when the use of both feet is destroyed by paralysis caused by an accidental pistol wound in the back. (Wis.) 685.

Master and Servant.

An illustration of the rule that an employer is not liable for negligence of an independent contractor is made by a decision concerning negligence of one burning brush upon a railroad's right of way. (Ark.) 604.

The rule as to a servant's assumption of risk applies to an employé who goes up and down a long, steep and irregular stairway without a railing. (Wis.) 861.

A car inspector's negligence in permitting an unsuitable car of another company to go upon the road will render the employer liable for injury thereby to a brakeman. (Tex.) 708.

An engineer and fireman on a locomotive are fellow servants. (N. C.) 888.

Principal and Agent.

A conductor's contract to stop a train at a certain place against the rules cannot bind the company, where the passenger had been refused a ticket to that station and knew the train did not stop there. (Ala.) 888.

The right of a physician to recover for services to passengers injured by railway trains, on employment of the general superintendent of the railroad, is not affected by the fact that such employment is the business of another officer. (Ind.) 508.

Principal and Surety.

A surety's right to contribution for part payment, which is barred as to all but one of the payments, entitles him to the full amount of that, if it is less than the co-sureties' proportion

of the debt, and the barred payments are more than the others' proportion. (Wis.) 411.

The rule that a creditor is not obliged, at the surety's request, to pursue remedies against the principal, is illustrated by a decision that failure of the creditor to levy an execution, whereby judgment against the principal's property was lost, does not discharge the surety. (N. H.) 283.

Partnership.

A case about mining partnerships holds that a partnership for obtaining a lease of mining property and the extraction of ores therefrom will be construed as a mining partnership, unless there is a clear intention to form a general or commercial partnership; also, that a transfer of the interest of a partner will not dissolve the partnership. (Colo.) 455.

A partner is entitled to interest on advances and unwithdrawn profits by express agreement or understanding, and not otherwise. (Mass.) 424.

Sale.

On the dishonor of a check given for goods on a cash sale the vendor may retake them, even from an innocent sub-purchaser. (Minn.) 268.

A valuable case as to conditional sales decides that the vendor of property sold on condition of prompt payment, with the right to retake possession on default, in case of rescission and retaking possession, must return to the vendee all payments previously made above proper remuneration for the use of the property. (Ga.) 878.

Tender.

A deposit of the purchase price of land in a bank, after tender, without notice to the vendor or placing it at his disposal, where it is subsequently drawn out and used by the depositor, will not stop interest on the purchase price, if he is in possession receiving the rents and profits without paying rent, although at all times ready to pay the money on demand. (Mass.) 255.

A tender of money is not a good substitute for a tender of interest-bearing notes, which a purchaser at auction has agreed to give. (Ind.) 558.

Miscellaneous.

The vote of a corporation to pay a certain salary to an officer is not a contract until accepted by him. (Mass.) 117.

The doctrine of "substantial compliance" of building contracts is held not to apply when omissions or departures from the contract are intentional and so substantial as not to be remediable, even if the building remains on the land and the owner enjoys the benefit of it. (Minn.) 52.

A contract for "about 200 acres" will be rescinded where there was in fact only 185 acres, but both supposed there were 200, and the vendor so informed the purchaser. (N. H.) 50.

Ladies' jewelry packed in a man's trunk merely for transportation is not baggage for the loss of which he can recover. (Cal.) 481.

Describing the boundary line of a lot as the center of a party-wall is not an implied grant of a perpetual easement for such wall, so as to allow it to be rebuilt after being accidentally destroyed. (N. Y.) 185.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations.

The decision of the New York Court of Appeals on the celebrated *Sugar Trust Case* establishes the doctrine that corporations cannot enter into a partnership, either directly or indirectly, through the medium of a trust. (N. Y.) 83.

A steamship company forming one of a line of through carriers with certain railroads, although not mentioned in S. C. Gen. Stat., § 1518, is the same as a connecting road from which a receipt must be procured for goods transferred in order to relieve another carrier. (S. C.) 883.

The limitation of the power of corporations is illustrated by a decision holding speculative contracts of a savings bank *ultra vires*, and that it is not estopped to set up the defense when sued for commissions by brokers who made the contracts in their own names. (N. Y.) 708.

Although a corporation is forbidden to commence business until its stock is all paid in and certificate filed, it may recover on a contract made by it and fully performed before such payments. (Mass.) 889.

An exception to the general rule that "railroads" include street railways is made by a decision that the prohibition of Pa. Const., art. 7, § 4, against consolidation of competing railways, does not apply to street railways on parallel streets. (Pa.) 869.

The attempted transfer of corporate stock by the united action of trustees and stockholders, without any independent action of the trustees as such, is a corporate act. (N. Y.) 83.

Debts contracted, for which directors of a corporation are made liable, do not include damages *ex delicto*, or a judgment in tort. (R. I.) 187.

The bond of a corporation may be issued at less than par for either money or property. (N. Y.) 527.

A limitation as to the number of votes which a single stockholder can cast cannot be evaded, by another corporation holding the stock, by gratuitous transfer to individual directors. (Ala.) 650.

A shareholder in a corporation is not a trustee so as to defeat his right to vote on a measure in which he is interested. (N. Y.) 527.

The mode of proceeding to wind up an insolvent corporation is shown by a case holding that mutual insurance companies are subject to a Statute authorizing an injunction and receiver at suit of any creditor or stockholder, and that an independent action by the attorney-general will not be permitted if the same ends can be accomplished by his becoming a party to a pending action. (Wia.) 273.

Associations.

The usage of referring to the proper masonic officers the question of membership in a masonic lodge of an applicant to a benefit society is a part of the contract, making their decision conclusive. (Conn.) 428.

A decision of a voluntary association made in good faith, pursuant to its laws in respect to membership, is conclusive on the courts if it does not violate any law of the land. *Id.*

A strong case on the liability of members of a voluntary association is one which holds members of an unincorporated religious society personally liable for arrears of the pastor's salary, and for moneys advanced by him toward the erection of a church edifice. (Wia.) 564.

IV. FIDUCIARY RELATIONS.

Trusts.

A good instance of the liability of trustees for investments is presented in a case holding a trustee liable for loss by an investment of the trust funds in railroad stock which was of somewhat uncertain value, where he had already made very large investments of the trust property in the same stock. (Mass.) 279.

A trustee's inability to take advantage of his position is illustrated in a case which holds that one who undertakes, on behalf of subscribers to stock of a corporation, to collect subscriptions and apply the money to cancel corporate debts cannot acquire an interest in a judgment against the corporation hostile to those for whom he is acting. (Ind.) 792.

An agreement between persons having claims on different portions of one homestead, which must be entered by one person, that one of them should enter it and convey to the other his share, is enforceable against the one who obtains the title. (Iowa) 777.

Tenants in Common.

The relation of one of several tenants in common of a remainder in fee to the others makes a purchase by him at the tax sale inure to the benefit of all. (Ohio) 744.

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A tenant in common cannot acquire an exclusive right against his co-tenant to an interest in the land by purchase at a sale under an incumbrance created by one through whom they both claim. (Ind.) 176.

Attorney and Client.

An attorney's purchase of the subject matter of litigation from his client, or any speculative bargain in relation thereto, is presumptively invalid. (Me.) 90.

Executors and Administrators.

An administrator can maintain replevin in his own name for chattels belonging to the estate. (Mass.) 258.

A joint executor or administrator is not liable for assets coming into the hands of the other, or for the other's mismanagement, etc., to which he has not consented. (N. Y.) 223.

Bailment.

The duty of a bailee is illustrated by a decision that a safe-deposit company, on a demand by third persons under color of process for property held for storage, must ascertain whether the process requires a surrender of the property, and, if not, must resist the taking, and if unsuccessful in this take proper measures to reclaim it. (N. Y.) 428.

The taking of goods from a carrier by title paramount is a good defense against the consignee. (Minn.) 268.

Cases of eggs which can be identified, al-

though not distinguished by marks, for which a warehouseman gives a receipt, must be returned *in specie*, and other cases cannot be substituted for them. (R. I.) 260.

V. DOMESTIC RELATIONS.

Family.

Children who are strangers in blood are not members of a man's family so as to entitle him, as a bona fide house-keeper with a family, to a homestead exemption. (Ky.) 351.

The mere fact that a grandson renders services for his grandfather, with whom he lives while under age, does not imply a contract to pay therefor. (S. Dak.) 820.

Gift to Intended Wife.

A case having few precedents is that which holds that a man is entitled to recover gifts of money made to a woman to enable her to prepare for marriage with himself, where she fails to fulfill the engagement, although he attached no condition to the gift and did not expect the money to be refunded. (Vt.) 277.

Disability of Wife.

The disability of a married woman relieves her from liability for the negligence of a servant hired by her, although she is living apart

from her husband, who resides in another State. (R. I.) 155.

Liability of a wife on contracts of a partnership composed of herself and her husband is established by a New York decision, with three judges dissenting. (N. Y.) 593.

Marriage and Divorce.

The invalidity of a marriage because of the insanity of one of the parties does not extend to a case of mere vice or uncontrollable impulse or propensity, such as "kleptomania." (Minn.) 505.

A divorce for desertion will not be allowed to a husband who is not entirely blameless for the wife's act, and has acquiesced with apparent satisfaction in her absence. (N. J.) 696.

The infliction of grievous mental suffering is held by a carefully considered case, with two judges dissenting, not to constitute a ground for divorce, unless its actual or reasonably apprehended effect is injurious to body or health. (Cal.) 487.

VI. PROPERTY RIGHTS; CIVIL REMEDIES.

Aliens.

A nonresident alien whose widow is given rights in his property by Iowa Code, § 2442, is any alien not residing in the State. (Iowa) 126.

The right of alien heirs to take property purchased by an ancestor includes property devised to him. (N. Y.) 607.

Mortgagees, also, are held to be "purchasers" within the meaning of the Statute protecting purchasers from nonresident aliens. (Iowa) 126.

Custody of Corpses.

A comparatively novel case, fortunately, is one which deals with the right to the custody of a corpse and the superintendence of its burial, holding that the right belongs to the next of kin and not to the executor or administrator, and that courts have power to enforce such right. (Ind.) 514.

Games.

Property in game killed is held to be no such absolute title in the killer that he is deprived of property without due process of law by a prohibition against selling it. (Ill.) 188.

Photograph.

The right of a person to the negative of his own photograph, as against the photographer, is decided by the Supreme Court of Minnesota following a recent English decision. (Minn.) 58.

Crops.

One of those decisions that are almost without precedent, and yet relate to matters of the commonest sort, is that which holds a tenant in common, who has cut hay and other crops on the common property, entitled to maintain trover against the co-tenant who takes away the property. (N. Y.) 225.

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An application of law concerning emblements is made by a decision that a growing crop, sown pending the suit, passes by a decree of divorce giving land as alimony. (Ohio) 667.

Copyright and Trade-marks.

An unauthorized reprint of a foreign encyclopedia infringes the copyright on articles which an author has permitted to be used in the foreign work. (U. S. C. C. N. Y.) 488.

The invalidity of descriptive terms as trade-marks is illustrated by a case holding that the name "International Banking Co." is not a valid trade-mark for a banking firm. (N. Y.) 576.

The words "microbe killer" cannot constitute a trade-mark in their original meaning. (Tex.) 145.

Adverse Possession.

A case holding that a tax deed may constitute color of, title, although not properly acknowledged, is accompanied by an extensive note on the subject, *Color of Title*. (Iowa) 772.

The absolute title to property by adverse possession may be acquired free from the lien of a tax deed. (Neb.) 785.

The rule that no length of time will legalize a nuisance is held not to apply where the nuisance is a public one, and is simply an adverse use of property, which, under state statutes, can be acquired by disseisin. (Mass.) 510.

Possession.

One herding cattle on a range of uninclosed land, although asserting the right to do so, is not in possession so as to entitle him to notice of expiration of time to redeem from a tax sale. (Iowa) 767.

The improvements which a tenant can remove, in the absence of agreement, are only those the removal of which will not materially injure the premises, or leave them worse than he found them. (Neb.) 700.

Fences.

A prior survey is not the exclusive test of good faith in the location of a division fence, which is placed by mistake on another's land. (Ark.) 526.

Partnership Realty.

A partner's interest in land, which the firm is organized to deal in, is only an interest in the profits, and he has no title to the land. (Pa.) 421.

Real Estate Records.

The necessity of accuracy in the records of real property is well shown by a decision that the record of a judgment against William M. is not constructive notice against H. W. M., who was the same person. (Ind.) 471.

Registration of a mere voluntary deed binds a subsequent purchaser in the absence of actual fraud in the deed, otherwise not. (Ala.) 418.

Vested Rights.

Interests in a contingent remainder may be vested, subject to the happening of the contingency. (Mass.) 211.

Shelley's Case.

The rule in *Shelley's Case* is clearly discussed in a case which holds that it does not apply to a devise for life provided the devisee will live on and occupy the property, and giving it to his "lawful heirs" on his death or refusal to occupy the land. (Ind.) 165.

Cestui Que Trust.

The operation of the Statute making trust estates subject to the beneficiaries' debts is not defeated by a law giving one the income of property for life with power to dispose of the principal by will, although declaring that on an attempt to subject it to his debts, he shall receive no part of it, but the income be added to the principal. (Ky.) 599.

Decedents' Estates; Wills.

Although a deed by executors to the "estate" of a certain devisee does not convey the legal title to a devisee of such devisee, it may, in connection with probate proceedings for partition of the land, be held to set apart such land to such second devisee. (Fla.) 343.

The surplus proceeds of lands in auxiliary administration will not be distributed to heirs and devisees in that jurisdiction, but will be transmitted to the principal administrator in another State, in which the assets are insufficient to pay debts. (Iowa) 218.

The law as to charging legacies upon land is presented in several phases in a case holding, among other things, that a legacy was charged upon the whole residuary estate. (Ind.) 584.

The law as to interest on legacies is discussed in a case which holds that the date from which interest runs is to be determined by the law of testator's domicile; and that unjustifiable legal proceedings by a legatee, causing delay in payment, will not stop interest; and also that it must be computed at the legal rate, if at all. (Mass.) 244.

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are illustrated in a case holding that a person to be supported by a devisee of a farm need not reside on the farm; also that no demand for support is necessary in order to entitle her to cash payment for support not furnished in the past; also that a waiver of the right by living with her husband does not prevent its revival on the husband's death. (Wis.) 537.

The "issue" of a deceased legatee, who are given his share by a will, include his grandchildren, if their parents are deceased, as well as his children. (Mass.) 211.

A nuncupative will naming the domicile of witnesses sufficiently declares their residence. (La.) 829.

An instance of giving effect to testator's intention, which is imperfectly expressed, is shown in case of a will which, after providing for testator's burial, etc., gives "so much of my worldly estate" to a certain person, revoking all other wills. It is held that the intent was to give the whole estate. (U. S. C. C. W. Va.) 544.

On the remarriage of a widow, who has accepted a gift by will of the use of real estate so long as she remains a widow, testator's heirs at law are entitled to it, if it is not otherwise disposed of by the will. (Mass.) 573.

Life Estates.

Profits of a firm dealing in land after the death of a partner, including a rise in value because of the discovery of minerals, are income belonging to a life tenant of the estate of the deceased, and not to the remainderman. (Pa.) 421.

Reversioners are not affected by proceedings against a life tenant of which they had no notice, even if another reversioner was a party to the proceedings, if he had acquired interest adverse to them. (Mass.) 571.

Homestead.

The right to a homestead is decided to extend to premises used as a hotel; and also that a village lot may include two lots, as marked on the village map. (Mich.) 808.

A wife cannot make her husband's deed of their homestead effectual by any act (unless by estoppel) which does not amount to her signing the deed; and an estoppel to be effectual must operate as to both husband and wife. (Minn.) 586.

An acknowledgment by a widow is not a sufficient separate acknowledgment of a deed executed by her deceased husband to make it a valid conveyance of a homestead. (Ala.) 848.

Liens.

A house and lot held by a town for the use of the public school is not subject to a mechanics' lien, unless explicitly allowed by statute. (R. I.) 156.

A married woman's consent to the erection of a building on her land will not subject her interest to a mechanics' lien, where the consent was on the express agreement of her husband to pay the expense. (Conn.) 111.

A coal mine is an "improvement" within a provision giving a lien on buildings or improvements, etc., and coal cars in such mine are within a provision giving a lien for "materials." (U. S. C. C. Ala.) 67.

The sufficiency of a description in a claim

for mechanics' lien is upheld, where it describes an oil refinery by name, giving metes and bounds of the lot, and referring to a map showing location of the different structures. (Pa.) 868.

Mortgage.

A deed of trust without a seal is held valid as an equitable mortgage, when recorded. (W. Va.) 644.

A widow's previously acquired title is cut off by foreclosure of a mortgage on her husband's land, although she did not appear or answer, if she was made a party. (Ind.) 481.

Failure to renew a chattel mortgage will not defeat it as against creditors of one of the mortgagors, who had taken a second mortgage on sale of his interest and died before the time for renewal had expired. (Wis.) 688.

Tender of the amount of the debt, though after maturity, discharges the lien of a chattel mortgage. (Minn.) 55.

Fraudulent Conveyances.

A wife, although in possession, has the burden of proving that a transfer from her husband was not to defraud his creditors. (Neb.) 528.

Notice of a previous fraudulent conveyance will not prevent a subsequent purchaser from having it set aside. (Ala.) 418.

Payment of a debt by a grantor, who had conveyed property to defeat a creditor, will not render the deed valid. *Id.*

A judgment debtor cannot defeat his own fraudulent conveyance by purchasing through another the property conveyed under a subsequent judgment against himself. (N. J.) 96.

Way.

Neither of two adjoining owners has any interest in a common passway or their division line, which they have conveyed to each other for that exclusive use, so as to give him any right of action against a third person, having a right of way over it, for obstructions which do not impede the reasonable use of the way. (N. H.) 271.

Wharf.

The owner of a landing on a navigable river may prohibit its use for unusual purposes which would interfere with its ordinary use; but the presumption is that such landing is intended for the unloading of freight usually transported by craft on the river. (Ala.) 897.

Sale.

A sale of goods on which the title is not to pass until a resale does not make them subject to a levy by the purchaser's creditors, at least if credit has not been given him because of his possession. (Mich.) 270.

Receivers.

A case about the right to preferences out of the earnings of a receivership denies preference to a claim for locomotives sold to be paid for on delivery, but actually delivered without payment more than six months before the receivership, where the creditor had sued for the price and recovered part satisfaction. (Minn.) 140.

Remedies Generally.

One who attaches assets of his debtor in another State, knowing him to be insolvent, then sells his claim to a nonresident, is not subject 9 L. R. A.

to suit either to enjoin the further prosecution of the attachment suit, or the lending of his name for that purpose, or to recover the proceeds of his sale, although his action was taken to obtain an advantage over other creditors. (Mass.) 123.

Publication of summons against resident defendants, who can be found within the State, is not "due process of law" in actions *in personam*. (Minn.) 152.

The remedy of a passenger ejected for non-payment of fare, when he offered a ticket purchased for the journey, but which, by mistake of the ticket seller, was for the same trip in the other direction, is not in tort, but for breach of contract. (W. Va.) 182.

Right of Action or Defense; Parties.

The rule that no demand is necessary before action to recover property taken tortiously is held to apply, although defendant is an innocent purchaser. (S. Dak.) 817.

The right of a third person to sue on a contract is illustrated by a decision that a wife, not a party thereto, may enforce an agreement by a third person with her husband to maintain her. (Vt.) 517.

One of the members of a club for whose benefit, together with certain other persons, a policy of insurance was issued, and who were to share alike in the proceeds, can maintain a separate action for his share. (N. Y.) 704.

Individual inhabitants of a town have no such interest as to entitle them to become parties to a suit to authorize a compromise between the heirs and next of kin of a person and a town to which he had bequeathed property for a public charity. (Mass.) 748.

The inability of a stranger to the common title to question the rightfulness of the exclusive possession of one tenant in common against his co-tenants is illustrated in a case which decides that the validity of a partition cannot be attacked by a stranger, as a defense to a recovery by a tenant in common. (Fla.) 848.

Right to Recover Payments.

An exception to the rule against recovering back voluntary payments is shown in a case allowing a recovery of the excess of payments of interest above the legal rate. (Tex.) 292.

The rule against recovery of voluntary payments is illustrated by a decision denying the right to recover a bonus paid under protest by a stockholder to obtain an increase of stock. (Pa.) 681.

Damages.

The principle that damages needlessly incurred cannot be charged to another is illustrated by a decision that a landlord's breach of covenant to repair a leaky roof will not, after his refusal, render him liable for injury caused by the leak to goods voluntarily left by the tenant under the roof. (Ind.) 798.

The right to recover damages for mental anguish by failure to deliver a telegram, notifying a man that his wife was at the point of death, where he was thereby prevented from reaching her, is again affirmed by a decision, extensively reviewing the cases on the subject. (N. C.) 669.

Estoppel.

A married woman, as well as her husband, is held estopped to claim a vendor's lien by

third person to advance the purchase money to their vendee, under an agreement that he should have a first mortgage. (Ala.) 97.

A mortgagee's sale of the mortgagor's interest in the mortgaged property on execution will not estop him from enforcing the mortgage. (Colo.) 841.

Subrogation.

The limitation of a surety's right to subrogation is shown in a case denying the right where the principal's property was attached on an unsecured claim as well as on that secured, and the surety paid the latter. (N. H.) 282.

Judicial Notice.

A good instance of the power of courts to take judicial notice of facts known to people generally, is that in which notice is taken of the fact that primary elections have become an essential part of the political system. (Ind.) 170.

Evidence; Trial.

The right to compel a party to an action to submit to an expert surgical examination is not defeated by her delicacy and refinement of feeling, or the fact of nervous temperament, where she has already submitted to such examination by her own physician safely, and the nervousness can be safely allayed by the use of opium. (Ala.) 442.

with the cash account of a bank at the close of the day is not admissible on a question whether the bank paid a draft which was delivered to it during the day. (Wis.) 859.

The privilege of a defendant in a civil action to refuse to answer questions on the ground that the answers might criminate him may be considered by the jury in determining the question of his civil liability. (Ind.) 445.

Peremptory challenges may be taken after jurors have been sworn, but before anything else has been done. (Mass.) 391.

Limitation of Actions.

An action at law by a surety for contribution is governed by the Statute of Limitations applying to legal actions. (Wis.) 411.

The bar of the Statute of Limitations by an attempt to commence an action is held, under the New York Code, to include a commencement by substituted service. (N. Y.) 546.

Judgment.

The rule established by an earlier New York decision that relief from a judgment on an unauthorized appearance by an attorney must be sought by motion in the same court, is held not applicable to such a judgment rendered against a nonresident. (N. Y.) 844.

VII. DAMAGES FOR TORTS.

Negligence.

The rule requiring persons to use due care not to injure others is applied by a decision that one navigating public water is liable for negligently damaging a fishing net. (Wis.) 807.

The imputation of the parent's negligence to a child is again asserted by a Massachusetts decision, in which the child was plaintiff. (Mass.) 259.

The change in the law relating to the imputation of the negligence of a driver to one riding with him is clearly set forth in a case denying the doctrine. (Mo.) 157.

The presumption that a person will exercise ordinary care for his life is applied in a Wisconsin case, which is in conflict with an Indiana decision (8 L. R. A. 598), so as to authorize a recovery, where one was killed at a railway crossing. (Wis.) 521.

The duty of a person toward others who come upon his property is well illustrated in the case of mill-owners who are held liable for the burning of a child in hot ashes, which they had placed in an excavation in a pile of furnace ashes on which children were accustomed to play. (Ind.) 818.

In view of the great number of elevators that have recently come into use, a decision as to negligence in leaving the entrance to an elevator well unguarded is of general interest. It holds the owner of the building liable for injury to a mail carrier while delivering mail in boxes for tenants. (Mass.) 640.

Fires.

Negligence in the use of fire is discussed in a case deciding that fire cannot be rightfully used to remove combustible materials from a
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railroad right of way, if it would imperil adjacent property. (Ind.) 750.

Nuisance.

An illustration of a nuisance in carrying on business is given by the decision that the manufacture of sulphuric acid, by which noxious and offensive gasses are generated which affect the health of adjoining residents, must be held a nuisance. (Md.) 737.

The fact that people came into the neighborhood after the business was established is immaterial. *Id.*; (Mich.) 722.

Another case holds that a business may be a nuisance without driving owners from their dwellings, if it renders the enjoyment of life and property uncomfortable; also that the question of negligence is not involved, and that a Statute authorizing a corporation to manufacture gas will not affect their liability for maintaining a nuisance in such manufacture. (N. Y.) 711.

Still another case of a similar character decides that a business in a populous community is a nuisance, if it constantly produces odors, smoke and soot to such extent that they produce headache, nausea and other pains and aches among the inhabitants, and taint their food. (Mich.) 722.

Another case holds coal sheds upon land of a railroad company to be a nuisance, where their use makes grinding and grating noises and scatters dust and dirt, so as to destroy the comfort and injure the health of neighboring inhabitants. (Ill.) 726.

This case also holds that a private action may be maintained by a person thus injured, although the sheds may constitute a public nuisance. *Id.*

Unlawful Sale of Liquors.

A father is not a person aggrieved by a sale of intoxicants to his adult son, not a member of his family, so as to have a right to recover damages for such sale under Pa. Act May 8, 1854. (Pa.) 814.

Libel.

A publication stating that a breach-of-promise suit is threatened against a married man is libelous *per se*. (N. Y.) 631.

An article may be libelous though it reflects upon a whole family, and is not directed against any particular person. (Kan.) 606.

Sending a red envelope to a merchant through the mails, indorsed in red letters for return to

an organization for "collecting bad debts," constitutes a libel. (Wis.) 86.

Communications sent to members of such an organization are not privileged, where the object is not to protect, but to aid them in coercing payment. *Id.*

False communications to patrons of a commercial agency, who have no interest in the subject matter, are not privileged. (Mich.) 102.

The general manager of a commercial agency may be liable for a false publication as to the credit of a person, which was sent out to the patrons of the agency by his chief clerk without consulting him. (Mich.) 102.

VIII. CRIMINAL LAW AND PRACTICE.

See also *supra*, I., *Jurisdiction.*

The privilege of an accused person against being compelled to testify against himself does not exclude evidence of marks and scars found upon him during forcible examination to ascertain his identity for the purpose of arresting him. (Ind.) 823.

The distinction between matters which must and which need not be negatived in an indictment is shown by a decision that an indictment for selling liquors without a license need not negative an exception in the Statute as to sales in incorporated places. (Or.) 858.

Several counts involving the same transaction, or charging distinct stages in the same

offense, although some charge a felony and others a misdemeanor, may be joined in an indictment, where conviction of a misdemeanor is allowed under an indictment for felony, and no election can be required between such counts. (Ill.) 182.

A steamboat pilot carrying passengers on a pleasure trip is engaged at common labor or in his usual vocation, within the meaning of the Sunday Law. (Ind.) 821.

Opening a letter received through the United States mail is not an offense under N. C. Act 1889, p. 41, § 2, unless it was sealed. (N. C.) 840.

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GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACCORD AND SATISFACTION. See COMPROMISE AND SETTLEMENT.

ACCOUNTING. See CONTRACTS, 81.

ACKNOWLEDGMENT.

A wife who fails to acknowledge a conveyance of the homestead as required by Ala. Code, § 2508, at the time of its execution or subsequently, during the life of her husband, cannot do so efficiently as against the heirs, after the husband's death. *Richardson v. Woodstock Iron Co. (Ala.)* 848

ACTION OR SUIT. See also EXECUTORS AND ADMINISTRATORS, 1; INSANE PERSONS.

1. A passenger who by mistake is given a ticket for the wrong direction, and who on failure to pay his fare is ejected by the conductor without unnecessary force, has no right of action for a tort against the company, but any cause of action he may bring must be based on contract. *MacKay v. Ohio River R. Co. (W. Va.)* 183

2. Bringing suit to redeem from a foreclosure sale will constitute an election on the part of plaintiff to affirm the sale, and will preclude his insisting on its invalidity. *Horn v. Indianapolis Nat. Bank (Ind.)* 676

3. The grantor in a deed given only as security is not a necessary party to a suit by his grantee against a purchaser from the latter without notice of the original grantor's rights, to set aside the deed from the grantees on the ground of fraud in procuring it. *Gruber v. Baker (Nev.)* 802

4. An assignee of the right of action to set aside a deed for fraud, although receiving also a conveyance from the assignor, who is a cotenant, under agreement to maintain the action for their joint benefit, is not, as to the interest assigned, entitled to maintain the action under a statute requiring actions to be prosecuted in the name of the real party in interest. *Gruber v. Baker (Nev.)* 802

5. Where an insurance company issues to each of ten persons as members of a club, for a separate consideration furnished by each, a certificate of insurance which provides that upon the death of either member the company will pay a certain sum to his representatives and to the surviving members of the club, share and share alike, upon the death of a member either of the persons interested in the

sum which thereupon becomes payable may maintain a separate action to recover his share without making the other persons interested parties to the action. *Emmeluth v. Home Ben. Assn. (N. Y.)* 704

6. Suit to recover a legacy must be brought by the personal representative of a deceased legatee,—not by his next of kin. *Gale v. Nickerson (Mass.)* 200

7. Where the persons interested in a will are exceedingly numerous, all need not be made parties to a bill filed for the construction thereof, provided all possible interests are represented. *Hills v. Barnard (Mass.)* 211

8. The attorney-general is the proper party to represent the interests of the public in a suit brought under Mass. Pub. Stat. chap. 142, §§ 14–17, by the heirs and next of kin of a deceased person, to establish and authorize a compromise between themselves and a certain town to which decedent bequeathed property in trust for purposes of a public charity; individual inhabitants of the town have no such interest in the subject matter that they can become parties to the proceeding and appeal from the judgment rendered therein. *Burbank v. Burbank (Mass.)* 748

9. A husband and wife may maintain a joint action for the breach of a contract made with them jointly, by which a third person undertakes to take charge of and safely keep the remains of their deceased child until they are ready to inter the same. *Benihan v. Wright (Ind.)* 514

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ADVERSE POSSESSION.

1. Where a person has been in the open, notorious, exclusive, adverse possession of real estate, as owner, for ten years, he thereby acquires an absolute title to the land, free from the lien created by a tax deed on the property, issued prior to the commencement of such adverse possession. *Alexander v. Wilcox (Neb.)* 785

2. A deed to land may constitute sufficient color of title to found a claim by adverse possession, although it is not properly acknowledged. *Cramer v. Clow* (Iowa) 772

NOTES AND BRIEFS.

Adverse possession; color of title; how far tax title constitutes; requisites of; rule in various States. 772

ALIENS.

1. A "nonresident alien" whose widow, under Iowa Code, § 2442, "shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser," means one who resides outside the State. *Re Gill's Estate* (Iowa) 126

2. Mortgagees are purchasers, within the meaning of Iowa Code, § 2442, protecting purchasers from nonresident aliens against claims for dower. *Re Gill's Estate* (Iowa) 126

3. The wife and children of a Chinese merchant, who is entitled, under the treaty of 1880, art. 2, and Act of Congress 1884, § 6, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate prescribed in said § 6. *Re Chung Toy Ho* (C. C. D. Or.) 204

4. The word "purchase" includes an acquisition by devise, in N. Y. Laws 1875, chap. 88, providing that if a citizen or alien resident who shall purchase and take a conveyance of real estate within the State shall die intestate leaving persons who, according to the Statutes, would answer the description of heirs to him, such persons, although aliens, shall be capable of taking and holding as heirs all the real estate owned by him at the time of his death. *Stamm v. Bostwick* (N. Y.) 597

ANIMALS. See also GAME, NOTES AND BRIEFS.

The imposition of a license tax on dogs, under a city charter empowering the city to tax, regulate, and restrain the running at large of dogs, does not violate Mo. Const. art. 10, § 4, requiring all property to be taxed in proportion to its value. *Carthage v. Rhodes* (Mo.) 852

APPEAL AND ERROR. See also LANDLORD AND TENANT, 1.

1. An appeal may be taken to the General Term of the Supreme Court of New York from a decision of the trial court denying a motion, made upon the judge's minutes, for new trial in an action which has been tried before a jury, notwithstanding judgment has been entered therein from which no appeal has been taken and as to which the time for appealing has expired. *Vosin v. Commercial Mut. Ins. Co.* (N. Y.) 612

2. An affidavit for appeal from the decision of a circuit court commissioner to the circuit court, in a summary proceeding by a landlord to recover possession of the leased premises from his tenant, is sufficient if in the common form of affidavits on appeal from justices' courts, although it does not state the nature of

the action, nor when it arose, nor when it was tried. *Hanaw v. Bailey* (Mich.) 801

3. When a circuit court commissioner takes an appeal bond in proper form containing a certain penalty, in proceedings had before him by a landlord to oust his tenant from the leased property, and grants an appeal by making a return to the circuit court of such proceedings, with the affidavit and bond of appeal, it will be presumed, in favor of the jurisdiction of that court, not only that he approved the bond, but also that he fixed the penalty of the same in accordance with law, although the bond contains no indorsements to that effect. *Hanaw v. Bailey* (Mich.) 801

4. A certificate to a bill of exceptions regularly signed by the judge need not state what it contains, except whether it contains all the evidence. *Muttee v. Tuteur* (Wis.) 86

5. When a case is submitted to the law court on a report of evidence or on an agreed statement of facts, technical questions of pleading will be considered as having been waived, unless the contrary appears. *Pillsbury v. Brown* (Me.) 94

6. Objecting to the admission in evidence of a will for the reason that it is immaterial and incompetent for any purpose is not sufficient to raise the question whether or not it is sufficiently authenticated or proved to be admissible. *Crawford v. Witherbee* (Wis.) 561

7. An inference that a prisoner was not present in court at the time the verdict of a jury against him was received will not be permitted to overcome the legal presumption that everything was rightly done in court. *Welsh v. State* (Ind.) 664

8. The jurisdiction of a trial court which is a court of general jurisdiction will be presumed upon appeal, if the record does not show its absence. *O'Brien v. State* (Ind.) 823

9. The transcript of the record in a case carried for trial to a county different from that in which the indictment was found need not show affirmatively that the grand jury which returned the indictment was duly impaneled, in order to give jurisdiction. That the jury was legally impaneled will be presumed from a statement in the record and a recital in the copy of the indictment contained therein, that the indictment was returned by a grand jury of the county from which the record was transmitted. *O'Brien v. State* (Ind.) 823

10. Where the original indictment is required by statute to be filed with the clerk of the court in which the trial is to be had upon change of venue in a criminal case, if the required transcript is made out and filed it will be presumed on appeal to have been accompanied by the indictment, in the absence of evidence to the contrary; and the fact that the record is silent as to the filing of the indictment is immaterial, if the statute does not require it to make mention of that fact. *O'Brien v. State* (Ind.) 823

11. On appeal from an order granting a new trial because of error of the court in overruling a motion for a nonsuit on the ground that the contract sued on was void, the sufficiency of the complaint, but not the evidence, may be considered. *Alpers v. Hunt* (Cal.) 488

12. A party at the request of whose counsel a question has been prepared and submitted to the jury for a special verdict at the trial of an action, without any suggestion as to its insufficiency, will not be heard to object for the first time on appeal that the question was not broad enough to cover the point in controversy. *Wright v. Muleaney* (Wis.) 507

13. A ruling by a referee that the petition in a case be taken as true because of the defendant's failure to produce books and papers and answer interrogatories is not reversible error, where plaintiff's evidence establishes the facts pleaded without conflict and defendant introduces no evidence whatever. *Cook v. Chicago, R. I. & P. R. Co.* (Iowa) 764

14. Although the motion for the production of books and papers is defective, or the order made upon it too broad, yet if such instruments of evidence are used in the mode required by law on the trial, there is no prejudicial error. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

15. A special finding must be considered as a whole, and cannot be assailed in parts; and if, taken as a whole, the finding legitimately supports the judgment, it will be upheld. A finding containing more facts than necessary is not objectionable, if such facts do not establish another cause of action. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

16. A prisoner who was out on bail at the time of his trial cannot be heard to complain that the verdict of the jury was received in his absence. *Welsh v. State* (Ind.) 664

17. If a proper case for granting a motion for the surgical examination, by experts, of the person of one seeking to recover for personal injuries, is clearly made out, and the motion is refused, the appellate court, having before it all the facts involved in the determination by the lower court, will reverse the judgment. *Alabama G. S. R. Co. v. Hill* (Ala.) 443

18. Where there is error which cannot be said to be without injury, as it cannot be where testimony contributing to the weight of evidence on a point as to which there is conflict of testimony has been erroneously admitted, the judgment must be reversed. *Simmons v. Spratt* (Fla.) 343

19. An error in permitting a question to be asked which calls for the opinion of the witness, involving a mixed question of law and fact as to the depreciation in the market value of property from certain causes, is harmless where the answer of the witness is equivalent to stating the value of the property before and after the alleged causes existed, and that the causes of the decrease are those enumerated. *Gainesville, H. & W. R. Co. v. Hall* (Tex.) 298

20. The suggestion by the trial judge, in his charge to the jury, of a doubt as to the truthfulness of the witnesses of one of the parties, is immaterial if the jury show by their verdict that they believed them. *Wright v. Muleaney* (Wis.) 507

21. In a charge of the court a mistake in stating the number of letters sent from a certain place, made, not positively, but with the qualification "I think," is not ground for reversal when no suggestion of the mistake is

made in the court be (Wis.)

22. A certificate of a lord's decree dissolving a withheld for the purport an opportunity to give it equity under the *Mack v. De Bardeleben*

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ASSIGNMENT. See

1. A vendor's lien upon general, assignable. *Peyton*, 84 Minn. 529.

2. The assignment, in the United States army is against public policy by the courts. *Schwenk*

3. The assignment of bill in equity for a fraud signor will be held void and as savoring of the nance. *Gruber v. Baker*

4. The fact that an assignor in common of the does not change the assignment of a right of a veyance for fraud. *Gr*

5. An assignment by he may become entitled State or county, for put to be rendered, is contra void. *Bowery Nat. Ban*

6. Where a creditor, to be insolvent, attaches him in a foreign State, a livers his claim, with all attachment suit, to a not advantage over other being enjoined from the of the suit, no action can him by the debtor's a either to enjoin the suit name for such purpose, which he has realized for *v. National Bank of t*

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ASSOCIATIONS. See **BENEVOLENT SOCIETIES; CUSTOM; RELIGIOUS SOCIETIES.**

ASSUMPSIT.

1. An assurance to one who is about to make a written protest before the payment of money which is demanded of him, that, if he will not write the protest, he shall receive under his verbal one any benefit which anyone shall receive under a written one in any suit, will have no more effect than to place him in the same position he would have occupied had he completed his written protest. *De La Cuesta v. Ins. Co. of North America* (Pa.) 681

2. Paying money under protest will not entitle a stockholder of a corporation, who is required to make the payment as a bonus for the privilege of subscribing to new stock to be issued by the corporation for the purpose of increasing its capital, to recover back the amount paid, although it is subsequently judicially determined that the bonus was wrongfully exacted and that he was entitled to new stock upon payment of merely its par value. *De La Cuesta v. Ins. Co. of North America* (Pa.) 681

3. The only effect of a protest to the payment of money in a case in which it may be legitimately applied is to show that the payment was not voluntarily made, and that the party protesting intends to claim it back. *De La Cuesta v. Ins. Co. of North America* (Pa.) 681

4. If a demand made upon a person for the payment of money is illegal, and he can save himself and his property in no other way, he may pay under protest and recover back the payment; but if other means are open to him by a day in court or otherwise, he must resort to such means. *De La Cuesta v. Ins. Co. of North America* (Pa.) 681

5. A declared intention not to recognize a right is not duress within the rule that a person acting under duress of person or property, who under protest makes a payment of money unlawfully demanded from him, can recover the same back again. *De La Cuesta v. Ins. Co. of North America* (Pa.) 681

6. Payments of freight charges, made by shippers of goods in ignorance that services similar to those received by them were being secretly rendered by the carrier to other shippers for much less compensation, and after the positive assertion of the carrier that no lower rates were received by it, are not voluntary within the rule that voluntary payments cannot be recovered back. *Cook v. Chicago, R. I. & P. R. Co.* (Iowa) 764

ATTORNEYS. See **CHAMPERTY; CONTRACTS, 16.**

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Unauthorized appearance of attorney; effect of; remedy of client; relief from judgment for. 844

AUCTION.

1. A tender of money in satisfaction of the amount of his bid by one who, acting as clerk at a public sale, bid off property sold thereat, will not vest the title to the property in him so as to enable him to recover it from the possession of the seller, where the terms of sale provided for payment in interest-bearing notes, with surety. *Morgan v. East* (Ind.) 558

2. An agreement between two or more persons that all but one shall refrain from bidding at a judicial sale, and that he shall be permitted to purchase the property, is not necessarily void, but will be upheld if the intention of the parties is fair and honest, and the primary purpose is not to suppress competition but to protect their own rights, and there is no fraudulent purpose to injure or defraud others interested in the sale. *Hopkins v. Ensign* (N. Y.) 731

3. An agreement between a person who thinks of attempting to collect a debt due him from the estate of an insolvent mortgagor, and the mortgagor's devisee, who wishes to bid in the property for the value of the mortgage, by which, in consideration of the creditor's refraining from bidding at the sale, the devisee is to give him a mortgage on the property for the amount of his claim, provided the latter is thereby enabled to secure the property at the desired price, is not illegal in the absence of unlawful intent, although incidentally preventing competition; and in case it is carried out and acquiesced in by the other persons interested in having a large amount realized by the sale, the mortgage cannot be repudiated by the devisee. *Hopkins v. Ensign* (N. Y.) 731

BAGGAGE. See **CARRIERS, 5.**

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Baggage; what constitutes. 431

BAILMENT.

1. When property in the custody of a safe deposit company for safe keeping and storage is demanded by third persons under color of process, it becomes the duty of the company to ascertain whether or not the process requires a surrender of the property; and if it does not, then the company must refuse to surrender it and offer such resistance to the taking, and, if unsuccessful in this, adopt such measures for reclaiming it, as a prudent and intelligent man would offer and adopt if the demand was made and the property taken by a third person under a claim of right without legal process. *Roberts v. Stuyvesant Safe Deposit Co.* (N. Y.) 498

2. It is no defense to an action by the owner of property against a safe deposit company to recover for the loss of the property, which was left with it for safe keeping, and which it negligently permitted to be taken by a third person, that after it went into the possession of such third person it was seized under legal process against the owner; but if it can be shown that the owner had the benefit of it

by application, through regular legal proceedings, upon a judgment against him, such fact will go in mitigation of damages. *Roberts v. Stuyvesant Safe Deposit Co.* (N. Y.) 488

8. Where, in an action by a property-owner against his bailee for negligently permitting the property to be taken by a stranger, the defense is that the property was levied on in the stranger's hands under legal process against the owner, plaintiff has a right to specific findings as to the validity of the levies and as to how far the property was legally applied in satisfaction of valid judgments against him. *Roberts v. Stuyvesant Safe Deposit Co.* (N. Y.) 488

BANKS AND BANKING. See SET-OFF AND COUNTERCLAIM.

1. A bank which in good faith pays a note made by one of its depositors, payable at its place of business, and against which there is no defense, may set off the amount so paid against the balance due on the maker's account, although the payment was made without notice to, or express authority from, him. *Bedford v. Acoam* (Ind.) 560

2. One who sends a draft for collection to a bank which, after being advised by another bank to which it sends the draft for the same purpose, that it has been collected, credits him with the amount, and afterwards becomes insolvent without having received the proceeds, is entitled to such proceeds from the collecting bank, as against the creditors and receiver of the insolvent bank. *Armstrong v. Boyertown Nat. Bank* (Ky.) 558

8. Speculative contracts entered into by a savings bank which is incorporated with the usual powers of receiving on deposit and loaning money and discounting notes, for the sale or purchase of cotton futures, subject to the hazard and contingency of gain or loss, are *ultra vires*. *Jemison v. Citizens Sav. Bank* (N. Y.) 708

4. Speculative dealing in cotton futures is not authorized by a clause in the charter of a savings bank giving it power to buy and sell exchange, bullion, bank notes, government stocks, and other securities. *Jemison v. Citizens Sav. Bank* (N. Y.) 708

5. Where brokers purchase and hold cotton futures in their own names in compliance with the orders of a savings bank, there never being any delivery of cotton or other property, or transfer of any title thereto, to the bank, it is not estopped to set up the defense of *ultra vires* when sued for commissions and the amount expended by the brokers in purchasing the futures. *Jemison v. Citizens Sav. Bank* (N. Y.) 708

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BENEVOLENT SOCIETIES. See also CUSTOM; INSURANCE, 20, 22-24.

Decisions of a voluntary society or association in admitting, displacing, suspending, or expelling members, are of a quasi judicial character, and will not be interfered with by the courts, except to ascertain whether the proceeding was pursuant to the rules and by-laws of the society, or was in good faith, and not in violation of the laws of the land. *Connolly v. Masonic Mut. Ben. Assn.* (Conn.) 428

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Power of member to change his beneficiary; what necessary to effect change. 841

BILLS AND NOTES.

1. A note given in part satisfaction of a "red-line wheat note" which was void for fraud and failure of consideration is, if unsupported by any other consideration, itself void in the hands of the original payee or of an indorsee with notice. *Hunt v. Rumsey* (Mich.) 674

2. To render the indorser liable on a note signed by one who affixes the word "agent" to his name without disclosing his principal, payment must be demanded of, and refused by, the agent; demand on the principal is not sufficient. *Stinson v. Lee* (Miss.) 880

8. The actual and absolute extinguishment of a pre-existing debt in consideration of a transfer to the creditor of negotiable paper will constitute the transferee a holder for value so as to be protected against prior equities therein. *Mayer v. Heidelberg* (N. Y.) 850

4. Where a depositor in a bank having sufficient funds standing to his credit tenders to it his check upon it in payment for negotiable paper which it has for sale, and the bank accepts the check, charges it against the deposit, files it as a voucher, and delivers over the paper purchased, the purchaser is a holder for value, as the antecedent debt is *pro tanto* extinguished. *Mayer v. Heidelberg* (N. Y.) 850

5. A purchase for value and in good faith by a third person of a foreign bill of exchange from the one by whose direction it was drawn, and who promised to pay for it, but who failed to do so, will cut off the drawer's right to stop payment on the draft because of the nonreceipt by him of the purchase price. *Mayer v. Heidelberg* (N. Y.) 850

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BILLS OF LADING.

Minn. Gen. Stat. 1878, chap. 124, § 17, declaring that bills of lading shall be negotiable,

and delivery of these symbols of property while it is in transit be equivalent to an actual transfer and delivery of the property itself. *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 269

BONA FIDE PURCHASER. See **BILLS AND NOTES**, 8, 4; **VENDOR AND PURCHASER**, 1.

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BONDS.

1. Where a bond provides a penalty for failure to perform its covenants, recovery cannot be had upon the covenants and for the penalty also. *Carey v. Mackey* (Me.) 113

2. Where one binds himself under seal to the well and true payment of a certain sum of money monthly during the good behavior of another, under a penalty of \$5,000, the instrument constitutes a good penal bond and the \$5,000 is a penalty, and not liquidated damages. *Carey v. Mackey* (Me.) 113

3. The bonds of a corporation subject to the provisions of the General Manufacturing Act (N. Y. Laws 1848, chap. 40, § 2) may be issued by it at less than par for either money or property required for its use. *Gamble v. Queens County Water Co.* (N. Y.) 527

4. A corporation which purchases property intending to pay therefor by issuing its stock and bonds, the former of which must be issued at par, will not be permitted to issue a much larger quantity of bonds taken at their actual value than is necessary to make up the difference between the par value of the stock offered and the purchase price of the property, the surplus of bonds being rendered necessary by the fact that the actual value of the stock is much less than par. *Gamble v. Queens County Water Co.* (N. Y.) 527

5. A corporation which has power to issue bonds to raise money for the construction of its works may issue them in payment for works already constructed which are suitable for its purposes and can be purchased by it. *Gamble v. Queens County Water Co.* (N. Y.) 527

6. Where municipal officers authorized to purchase certain property for the benefit of the municipality and give warrants therefor, but given no express authority to borrow money, borrow money to purchase the property and give warrants to the lender, instead of paying the vendor with warrants, such warrants are void. *Allen v. La Fayette* (Ala.) 497

BOUNDARIES. See also **FISHERIES**, 1.

1. A conveyance of lots with reference to, or as bounded by, streets and alleys as laid off on a certain plat, passes the title to the centre of the street or alley, even if never brought
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York (Ky.) 551

2. A scow on which intoxicating liquors are sold, anchored in water about 5 feet deep and about $\frac{1}{2}$ mile from shore, is not within any township in Michigan, and no prosecution can be had for such sales under the Michigan statute, which makes the shore the boundary line of a municipal corporation, although rights of landowners for fishing purposes are extended by the statutes over the water a mile from shore. *People v. Bouchard* (Mich.) 106

BRIDGES.

1. All of the towns whose duty it is to keep a bridge in repair are liable as for an insufficiency of the bridge, for an injury occurring at a space between a point designated by the order of the court as the end of the bridge and the end as built, which space was filled in and the filling maintained by one of the towns at its own expense. *Tyler v. Williston* (Vt.) 338

2. Under Vt. Acts 1893, No. 13, § 4, requiring notice to the town or towns in which a bridge is situated, notice of defects to the towns in which the bridge is situated is constructive notice to all of the towns by which it is required to be maintained and kept in repair. *Tyler v. Williston* (Vt.) 338

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Bridges; liability of town for injuries occurring upon. 338

BURIAL. See also **ACTION OR SUIT**, 9.

1. The courts of Indiana possess the power to enforce the right of a father and mother to the body of their deceased child, and to protect them in the exercise of the right of burial; and they also possess power to assess such damages as may accrue to the parents on account of being deprived of such rights. *Benishan v. Wright* (Ind.) 514

2. The right to the custody of a corpse, and the right to superintend its burial, do not belong to the executor or administrator, but to the next of kin. *Benishan v. Wright* (Ind.) 514

3. Procuring at one's own expense the return of a corpse which he had contracted with the next of kin to keep safely until a convenient time for burial, but which he had negligently permitted to go into the possession of a third person, will not prevent a recovery by the next of kin of such damages as they may have suffered by reason of such negligence, unless they expressly agreed that such return would be accepted in full satisfaction of the cause of action arising therefrom. *Benishan v. Wright* (Ind.) 514

CANALS. See **TAXES**, 7.

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CARRIERS. See also ACTION OR SUIT, 1; ASSUMPSIT, 6; DAMAGES, 1; NEGLIGENCE, 8.

1. A railroad conductor may demand a ticket as evidence of a passenger's right of passage, or, on failure to produce it, may demand payment of fare, and, on failure to pay it, may lawfully eject the passenger from the train, using no more force than is necessary. *MacKay v. Ohio River R. Co.* (W. Va.) 183

2. The fact that one who asked a ticket agent for a ticket on a limited or fast train was refused a ticket because the train was not allowed to stop at her destination is sufficient notice to her that any agreement the conductor might afterwards make to put her off at her destination would be a violation of the rules of the company, so as to exempt the company, which provided another train which made stops at all stations, from liability, where she paid fare to the conductor, who agreed to let her off at, but carried her beyond, her destination. *Alabama G. & S. R. Co. v. Carmichael* (Ala.) 388

3. A round-trip excursion ticket used by the purchaser in going to the station named therein, and then sold and transferred, no restrictions appearing, is valid in the hands of the holder, and entitles him to a return passage, subject to the prescribed limitations as to time, etc. *Carsten v. Northern P. R. Co.* (Minn.) 688

4. Where a conductor of a train refuses to recognize an excursion ticket in the hands of the holder, who is thereby entitled to ride thereon, and demands of him the regular fare, and attempts to eject him by force for nonpayment thereof, the railway company is liable in damages for the assault, and the jury in assessing the damages may consider in connection therewith the annoyance, vexation, and indignity suffered by him. *Carsten v. Northern P. R. Co.* (Minn.) 688

5. Ladies' jewelry is not a proper article of baggage to be carried in the trunk of a man traveling alone, so as to render the carrier liable for its value in case of its loss; at least when it is placed in the trunk simply for the purpose of having it transported. *Mets v. California S. R. Co.* (Cal.) 481

6. The fact that goods were taken from the possession of a carrier by one having title paramount to that of the consignor is a good defense to an action by the consignee or the indorsee of the bill of lading for the nondelivery of the property. *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 263

7. A bill of lading issued by a station or shipping agent of a common carrier without receiving goods for transportation imposes no liability upon the carrier, even to an innocent consignee or indorsee for value; and the carrier is not estopped by the bill from showing that no goods were in fact received. *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 263

8. One who ships a horse as an ordinary horse, understanding that the carrier has a regulation limiting its liability in case of injury to a certain sum for an ordinary horse, and if a higher value is given a higher rate will be
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charged, cannot insist upon a higher valuation in case of loss or injury. *Duntley v. Boston & M. R. Co.* (N. H.) 449

9. A regulation of a carrier with respect to the transportation of live animals, fixing the ordinary value of horses at \$200, and requiring an extra charge for transporting animals of a greater value, is reasonable and not in conflict with the general rule that a carrier cannot discharge himself of legal responsibility by general notice. *Duntley v. Boston & M. R. Co.* (N. H.) 449

10. An express company cannot stipulate for exemption from responsibility for the negligence of itself or its servants, even by express contract. *Durgin v. American Exp. Co.* (N. H.) 453

11. A stipulation placing an agreed valuation upon goods delivered to an express company for transportation, which is inserted in the shipping receipt and is designed to fix the extent of the company's liability in case the goods are lost, is binding on the shipper if he understands its purpose and knows that the freight charges are proportioned to the nature and extent of the risk; and the fact that neither the value of the goods nor the rate of charges is asked in a particular case is immaterial. *Durgin v. American Exp. Co.* (N. H.) 453

12. A shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed. *Durgin v. American Exp. Co.* (N. H.) 453

13. S. C. Gen. Stat. § 1513, requiring a railroad company, in order to relieve itself from liability for loss of goods delivered to it for transportation over its own and connecting roads, to produce a receipt therefor from the corporation to whom it was its duty to deliver the goods in the regular course of transportation, includes a steamship company among the corporations from whom receipts must be produced when such company happens to form one of the common carriers in a through line of transportation agreed on by the parties, although the statute does not in terms mention steamship lines. *Miller v. South Carolina R. Co.* (S. C.) 888

14. Delay of a railroad company in producing upon request a receipt for lost goods from a steamship company to which it was the company's duty to deliver them, caused by mistake in producing the receipt of the first railroad company beyond it in the line of transportation, is not such "willful failure and refusal" to deliver the receipt as will deprive the company of the benefit of a statutory provision permitting the initial carrier to relieve itself from liability for loss by the production of such receipt, where from the terms of the Act it was very doubtful whether or not the receipt of the steamship company would suffice and the Act had never been judicially construed. *Miller v. South Carolina R. Co.* (S. C.) 883

liability for goods lost or injured in transit by producing a receipt showing that the goods were delivered to a connecting carrier in due course of transportation, does not require the receipt to be in any particular form; such written evidence of the receipt of the property by the connecting carrier as will shift the liability to account for the property to the latter is sufficient. *Miller v. South Carolina R. Co.* (S. C.) 833

16. Where a carrier agrees that he will carry goods at a certain rate, and that after the shipment he will repay the shipper a rebate of part of such rate, this is only an agreement to carry the goods at a compensation ultimately agreed upon, and is not illegal. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

17. Discrimination in the making of contracts by a carrier for the carriage of goods, without partiality, is inoffensive. Partiality exists only in cases where advantages are equal and one party is unduly favored at the expense of another who stands upon an equal footing. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

18. Common carriers may, within the limits of fairness and impartiality, consult their own interests in making contracts for the carriage of goods. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

19. A contract binding a carrier to transport as many carloads of grain as the shipper may desire transported is valid as to acts done in performance of it, and until revoked. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

20. A common carrier cannot lawfully make unreasonable charges for his services, or unjust discrimination between his customers. *Cook v. Chicago, R. I. & P. R. Co.* (Iowa) 764

21. The allowance of a rebate by a common carrier to certain of his customers from the tariff rates charged other customers for precisely similar services is sufficient of itself to show that the rates charged the latter were unreasonable, and that there was unjust discrimination against them, illegal by the common law, which will give the latter a right to recover the amounts paid by them in excess of the rates charged the former after deducting the rebates. *Cook v. Chicago, R. I. & P. R. Co.* (Iowa) 764

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Carriers cannot contradict bill of lading. 263
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Rates of fare and freights must be uniform; rule in various States; discriminations unlawful as to classes of freight; discrimination between local and through transportation; effect of different delivery stations; agreement for rebates; special rates; reasonableness of; recovery back of excess of freight paid. 734

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Expulsion of passenger. 686

CERTIORARI.

Writs of certiorari to quash proceedings of county commissioners acting as boards of appeal from decisions of tax assessors are not usually issued for mere mistakes in the admission of evidence, when substantial justice appears to have been done. *Lowell v. Middlesex County* (Mass.) 856

CHAMPERTY. See also **ASSIGNMENT**, 3, 4.

The purchase by an attorney from his client of the subject matter of litigation, or any speculative bargain in relation thereto, is presumptively invalid; and to uphold the transaction as against the client the attorney must prove affirmatively by evidence its perfect fairness, adequacy, and equity. No presumption of innocence or improbability of wrong-doing can be considered in his favor. *Burnham v. Heselton* (Ma.) 90

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Check; acceptance of, not *ipso facto* payment. 263

CHINESE. See **ALIENS**, 3.

CITIZENS. See **CONSTITUTIONAL LAW**, 3.

CIVIL DAMAGES. See **INTOXICATING LIQUORS**, 8, **NOTES AND BRIEFS**.

CIVIL RIGHTS.

1. No discrimination between persons can be made by a restaurant keeper in serving customers, on account of color alone, under a statute which declares that all persons shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of restaurants, etc. The terms "full and equal" require identical accommodations for all; offering colored people substantially the same accommodation as that offered white people is not sufficient if the former in fact differs from the latter. *Ferguson v. Gies* (Mich.) 859

2. One who violates the law making it a

misdeemeanor for a restaurant keeper to discriminate against colored persons in serving customers becomes liable to an action for civil damages at the suit of a person injured by the discrimination; and it is not necessary in such action to declare upon or in any way refer to the penal statute. *Ferguson v. Gies* (Mich.) 589

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Civil rights; guarantee without discrimination. 589

CIVIL SERVICE. See also CONSTITUTIONAL LAW, 8, 9; OFFICERS, 1.

A statute which requires the mayor of a city to prepare rules for the selection of the city officers whose appointment has been delegated by the Constitution to the municipal authorities, which must be approved by the state civil service commission before they can go into effect, does not subordinate the power of the local authorities to that of the state authorities in violation of the constitutional provision delegating the appointing power to the municipal authorities. *Rogers v. Buffalo* (N. Y.) 570.

CLOUD ON TITLE.

An action to quiet title may be maintained although founded simply on a title by prescription arising from ten years' adverse possession of the land. *Cramer v. Clow* (Iowa) 772

COMMERCE.

1. Even if a statute imposing a license fee for the privilege of buying certain produce in a particular county to be shipped out of it might be held void as an interference with interstate commerce so far as it applies to produce purchased to be shipped out of the State, it is valid in its application to produce intended for shipment to places within the State. *Rothermel v. Meyerle* (Pa.) 866

2. The exaction of a license fee for the privilege of purchasing goods to be shipped to another State is not unconstitutional as a tax upon interstate commerce, since at most it is simply a tax on the goods at the time of their purchase, at which time they are subject to State taxation, and so remain until the business of transportation has actually commenced. *Rothermel v. Meyerle* (Pa.) 866

COMMERCIAL AGENCY. See LIBEL AND SLANDER, 1-3, 8, 9.

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Commercial agencies; notification sheet not a privileged communication. 108

COMPROMISE AND SETTLEMENT.

The mere fact that there was a settlement between a debtor and creditor which included the amount of a secured claim will not justify a finding that the settlement was in discharge of such claim, where there is nothing to show that the settlement was accepted in satisfaction thereof. *Coleman v. Whitney* (Vt.) 517

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CONDITIONAL SALES. See SALE, 8.

CONFLICT OF LAWS.

1. The date from which a legacy carries interest is to be determined by the law of testator's domicil. *Welch v. Adams* (Mass.) 244

2. An agreement for separation, entered into by a husband and wife in a State where they are temporarily abiding, for causes arising there, and where it is partly performed, will be interpreted by the law of such State when before its courts, and not by that of the State of their domicil, if by the latter it would be invalid; and it may be legally enforced, at least if no attempt was made to evade the laws of the latter State and the contract would not have been criminal there. *Carey v. Mackey* (Me.) 118

CONSOLIDATION. See STREET RAILWAYS, 8.

CONSPIRACY.

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Conspiracy; passive cognizance of fraud not sufficient to show. 802

CONSTITUTIONAL LAW. See also ANIMALS; CIVIL SERVICE; COURTS, 7; HIGHWAYS, 5, 7; MUNICIPAL CORPORATIONS, 4; OFFICERS, 1; VOTERS AND ELECTIONS, 11, 13.

1. A State's denial to persons not citizens of the United States of the right to obtain licenses to sell spirituous liquors within its borders is not a discrimination against them, or an abridgement of their rights within the prohibition of the 14th Amendment of the Constitution of the United States. *Tragesser v. Gray* (Md.) 780

2. The validity of an exercise by a State of its police power in regulating the sale of spirituous liquors does not in the least degree depend on any question as to the presence or absence of discrimination for or against particular persons or classes of persons. The Legislature may lawfully grant the right to sell to a certain class or classes of persons, and withhold it from all others. *Tragesser v. Gray* (Md.) 780

3. No citizen of the United States can complain because a state police regulation denies him the privilege of selling spirituous liquors, even if the privilege is granted to other citizens. *Tragesser v. Gray* (Md.) 780

4. Restricting the right to obtain licenses for the sale of intoxicating liquors to the male inhabitants of the State does not render a law obnoxious to U. S. Const. art. 4, § 2, which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. *Welch v. State* (Ind.) 664

5. The right of liberty and pursuit of happiness, which the Constitution makes one of the inalienable rights of individuals, is not necessarily violated by the prohibition of any act or personal vice or habit which does not involve direct and immediate injury to another. *Territory v. Ah Lim* (Wash.) 895

6. Wash. Sess. Laws 1888, p. 80, amends

inhalant opium shall be deemed guilty of a misdemeanor, is not unconstitutional as being in violation of the inalienable rights to life, liberty, and pursuit of happiness. *Territory v. Ah Lim* (Wash.) 395

7. The question whether a given habit is detrimental to either the moral, mental, or physical well-being of a citizen, or whether the habitual use of a particular drug is deleterious to himself, so as to justify legislative prohibition of its use by individuals, is one of fact which can only be inquired into by the Legislature, and not by the courts in determining the constitutionality of the prohibition. *Territory v. Ah Lim* (Wash.) 395

8. A provision in a statute which establishes an appointive state board of commissioners to consist of three members, that not more than two members shall be adherents of the same political party, is not violative of a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, even when giving the word "liberty" a definition wide enough to include the right to be eligible to hold office, and considering that after two members of the commission have been appointed from one political party all other members of the same party are ineligible to the vacant commissionership. *Rogers v. Buffalo* (N. Y.) 579

9. The fact that a statute authorizing the appointment of a state board of commissioners to consist of three members provides that not more than two of them shall be adherents of the same political party does not render it void under a constitutional provision which declares that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," notwithstanding that after two commissioners have been appointed from one party all other members of that party are ineligible to the vacant commissionership. *Rogers v. Buffalo* (N. Y.) 579

10. Adjudging a person insane without notice to him, under Iowa Code, § 1400, when the commissioners think it would be injurious to him to hold the examination in his presence, does not deprive him of his liberty without due process of law, where a regular practicing physician visits and personally examines him, and any relative, or any citizen of the county, may appear and resist the application, and the parties may appear by counsel if they like. *Chauannes v. Priestly* (Iowa) 193

11. In an action *in personam* of a strictly judicial character, and proceeding according to the course of the common law, service of summons by publication in a newspaper, upon resident defendants who are personally within the State and can be found therein, is not "due process of law." *Bardwell v. Anderson* (Minn.) 152

12. The transportation of game which has been killed within the limits of a State, and which has been sold, or which is intended for sale, within the same State, may lawfully be prohibited by the State Legislature. The killing of game vests no such absolute title to it in
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American Exp. Co. v. People (Ill.) 138
 13. The owner of abutting property assessed for sidewalk improvements is not deprived of his property without due process of law, where the Act authorizing such improvement provides that when execution is issued for the amount of the assessment the owner may file an affidavit denying the whole or any part thereof, returnable to the superior court, the issue upon which is to be tried and determined as in cases of irregularity. *Speer v. Athens* (Ga.) 402

14. A statute requiring the payment of a license fee for the privilege of purchasing certain kinds of produce in a certain county to be shipped out of it, which fee is greater in the case of nonresidents of the county than of residents, is not obnoxious to U. S. Const. art. 4, § 2, entitling citizens of each State to all the privileges and immunities of the citizens of the several States. *Rothermel v. Meyerle* (Pa.) 366

15. If the law-making power goes through the form of enacting a law which it is prohibited by the Constitution from enacting, its action is wholly void and cannot be validated by the subsequent amendment of the Constitution so as to confer authority upon the Legislature to pass such a law. *Seneca Min. Co. v. Secretary of State* (Mich.) 770

16. Under Mich. Const. art. 20, § 1, providing for constitutional amendments, which, after providing for a submission of a proposed amendment to popular vote, concludes by stating that if ratified by the requisite majority "the amendment shall become part of the Constitution," amendments take effect from the time of their ratification, notwithstanding the fact that the next section relating to constitutional revision concludes by stating that all "amendments shall take effect at the commencement of the year after their adoption." *Seneca Min. Co. v. Secretary of State* (Mich.) 770

17. Mich. Pub. Acts 1889, No. 139, authorizing the extension of the corporate existence of a mining corporation which was originally organized for a period of thirty years, having been passed after the ratification of the constitutional amendment authorizing it, is valid, although passed before the beginning of the year after the adoption of such amendment. *Seneca Min. Co. v. Secretary of State* (Mich.) 770

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CONTEMPT. See also REHEARING.

1. In the absence of a statement verified by oath, bringing to the knowledge of the judge

facts alleged to make the insertion of certain allegations in a petition for change of venue a contempt of court, he has no jurisdiction to issue attachments against, and punish as for contempt, the persons responsible for the filing of the petition, under Colo. Code Civ. Proc. chap. 81, if neither the language used nor the filing of the petition is *per se* a contempt. *Thomas v. People* (Colo.) 569

2. It is not contempt of court for a defendant petitioning for a change of venue on account of prejudice on the part of the presiding judge to allege in his petition, which is not read to the court, but is handed to the judge in a respectful manner for his perusal, that when the action was about to be called for trial the judge's wife stated that she must see the judge and arrange with him to have plaintiff win the case; at least not if the allegation is true. *Mullin v. People* (Colo.) 568

3. An allegation of the falsity of a statement inserted by a defendant in his petition for change of venue because of prejudice on the part of the presiding judge, to the effect that at the time the case was about to be called for trial the judge and his wife were, as petitioner was informed, the guests of plaintiff, will not support a judgment against defendant for contempt, where issue upon the statement is taken as to the time only, and the fact that defendant had received information as stated is not denied. *Mullin v. People* (Colo.) 568

4. A statement by a defendant in a petition for change of venue because of prejudice on the part of the presiding judge, that petitioner believes from the rulings and instructions of the judge in a former suit between the same parties that the judge is prejudiced in favor of plaintiff, will not make him guilty of contempt although there is no foundation in fact for such belief, where there is nothing to show that he was guilty of any evil intent. *Mullin v. People* (Colo.) 568

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Contempt; requisites of proceedings to punish for. 569

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CONTRACTS.

I. NATURE AND REQUISITES.

II. CONSTRUCTION; VALIDITY.

III. PERFORMANCE.

IV. CHANGE OR EXTINGUISHMENT.

V. ACTIONS; LIABILITIES.

NOTES AND BRIEFS.

See also AUCTION, 2, 8; BILLS AND NOTES, 1; COURTS, 1.

I. NATURE AND REQUISITES.

1. A contract to pay for the services of a grandson who lived and made his home with his grandfather during minority will not be implied. *Murphy v. Murphy* (S. D.) 820

2. The mere fact that a building remains on the land and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as would imply a promise to pay. *L. R. A.*

for it, where the builder under a special contract has failed to complete it, or completes it in a manner not substantially conforming to his contract. *Elliott v. Caldwell* (Minn.) 59

3. The relinquishment of his right to bid at a judicial sale by a creditor who has no other means of obtaining payment of his debt is a sufficient consideration to support a mortgage for the amount of his claim given him by the one who at the sale secures the legal title to the lands sold. *Hopkins v. Ensign* (N. Y.) 781

4. A promise to provide for the support and education of a minor fourteen or fifteen years old until he becomes twenty-one years of age is not a contract "not to be performed within a year," within the meaning of the Statute of Frauds, requiring such contracts to be in writing, as it may be performed within a year if the child should die within that time. *Woodbridge v. Stern* (C. C. W. D. Mo.) 129

5. A partnership agreement to acquire a leasehold interest in a particular mine, as a necessary incident to the development of the property and the extraction of ores therefrom, is not within the Statute of Frauds, although the interest in the mine was to be acquired by one who was to transfer to the others their respective interests. *Reed v. Meagher* (Colo.) 455

6. A verbal promise by a wife on accepting from her husband, from whom she had separated on account of his intemperate habits, a conveyance of lands at his own suggestion and without her procurement, that on his returning from abroad a sober and temperate man she would return to and live with him, in which event the deed should be void and of no effect,—creates a parol trust within the inhibition of the Statute of Frauds. *Brock v. Brock* (Ala.) 287

7. Where there was no fraud in the execution of a conveyance of land, equity cannot relieve against a breach, by the grantee, of a contemporaneous parol promise to reconvey the lands upon the happening of a certain contingency. *Brock v. Brock* (Ala.) 287

8. An absolute title in fee simple cannot be qualified by oral evidence of an alleged extrinsic agreement by the grantee to reconvey on a condition subsequent not included in the writing. *Brock v. Brock* (Ala.) 287

9. The mere breach of an oral agreement to reconvey lands conveyed is not sufficient, standing alone, to establish that fraud in procuring the title which is required to render the grantee a trustee *ex maleficio*. *Brock v. Brock* (Ala.) 287

10. A verbal agreement is not sufficient to create a lien upon land in favor of a surety upon a note given to raise the money with which to make payment therefor. *Wood v. Wood* (Ind.) 173

11. To make a vote of a corporation a contract which will be binding on it, the obligation which it undertakes to assume must be offered to and accepted by the intended beneficiary. *Sears v. Kings County Elev. R. Co.* (Mass.) 117

12. The description of property in an agreement for its sale, as "one one-and-one-half-story frame dwelling-house, with barn and out-

less," situated on a certain street in a certain town,—is sufficient to warrant a decree for specific performance, where the bill particularly describes the property and alleges that it is the same referred to in the agreement, which is not denied by the answer, and the evidence in regard to the vendee's occupation and tender of purchase money refers to the premises described in the agreement. *Sanders v. Bryer* (Mass.) 255

II. CONSTRUCTION; VALIDITY.

13. In a contract by which one agrees to buy out at a future date a certain business, and to buy all goods that the seller has on hand at that date at their invoice price, provided their entire value is not above a certain amount, the insertion of a clause to the effect that the buyer shall be bound to take only such goods as he himself shall select will not relieve him of the obligation to take goods to the amount agreed upon, but simply gives him the right to choose the goods he will take to make up the quantity which he agreed to buy. *Jacobson v. Sullivan* (Mass.) 508

14. A contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition and providing means to accomplish that object, is illegal and against public policy. *Cleveland, C. O. & I. R. Co. v. Closser* (Ind.) 754

15. Contracts between rival and competing railroad companies, which prevent unhealthy competition, but do not raise rates of transportation above the standard of fair compensation, or violate any duty that is owing to the public from noncompeting roads, are not void as against public policy. *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 689

16. A contract between an attorney and one who is not an attorney, to procure the former employment by a litigant, in consideration of a part of whatever remuneration the attorney receives for his services from the litigant, is contrary to public policy and void. *Alpers v. Hunt* (Cal.) 483

17. A clerk and bartender hired for one entire consideration, by a dealer in groceries and intoxicating liquors, the sale of the latter being illegal, cannot recover anything for his service, even upon *quantum meruit* for services in the grocery part of the store. *Sullivan v. Horgan* (R. I.) 110

18. Plaintiff, a corporation, by its agent, sold and furnished bottled beer to the defendant, the keeper of a house of prostitution, as the agent well knew. While he had no knowledge of just what was to be done with the beer, the agent supposed at the time it was furnished that it was to be used or sold in the brothel. No other facts appearing, it is held that plaintiff can recover a balance claimed to be due from defendant for and on account of said sale. *Anheuser-Busch Brewing Assn. v. Mason* (Minn.) 506

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19. The doctrine of a contract, or for performance in a different way from that contracted for, the circumstances must be such that a new contract may be implied from the conduct of the parties, to pay a compensation for what has been done. The mere fact that partial performance is beneficial to a party is not enough to imply a promise to pay for it. *Elliott v. Caldwell* (Minn.) 52

20. The doctrine of "substantial compliance" with building contracts does not apply when the omissions or departures from the contract are intentional, and so substantial as not to be capable of remedy, and that an allowance out of the contract price would not give the owner substantially what he contracted for. *Elliott v. Caldwell* (Minn.) 52

IV. CHANGE OR EXTINGUISHMENT.

21. The revocation of authority after it has been executed cannot avail to annul a contract made in conformity thereto. *People v. North River Sugar Ref. Co.* (N. Y.) 33

22. A contract for the purchase of a farm "containing about 200 acres" will be rescinded where the farm contains in fact only 135 acres, and there was a mutual mistake in the quantity of land, both parties understanding that there were 200 acres of it, and the vendor informing the purchaser that it did contain that number. *Newton v. Tolles* (N. H.) 50

23. To prevent one from rescinding a contract of purchase by which he has been defrauded, for the reason that he has acquiesced therein, the alleged act of acquiescence must be unequivocal and must show an election to retain the property after discovering the deceit. *Tarkington v. Purvis* (Ind.) 607

24. A sale, by a defrauded vendee, of some of the property received under the fraudulent contract, and a receipt of the money therefor, will not destroy a fully perfected right on his part to rescind the fraudulent contract, if he fully accounts for the proceeds to the fraudulent vendor, unless it appears that such sale was made in the regular course of business, or under such circumstances as show an intent to affirm the fraudulent contract, since he has a right to make sales of the property for certain purposes, such as to preserve it from destruction, etc. *Tarkington v. Purvis* (Ind.) 607

25. Merely signing and acknowledging a deed of assignment of the firm assets for benefit of creditors will not defeat the right of one who has been defrauded in the purchase of an interest in a partnership concern, to rescind the fraudulent contract, if before delivery of the deed he withdraws his consent thereto. *Tarkington v. Purvis* (Ind.) 607

26. No technical tender of property which a vendee was defrauded into buying need be made to the fraudulent vendor before the commencement of an equity suit to compel a rescission on the ground of fraud. It is sufficient if the vendee can show that he has preserved the property substantially in the condition in which he received it, without inten-

tional or unnecessary change. *Turkington v. Purvis* (Ind.) 607

27. A purchaser of the interest of one person in a mine, knowing that a fraud was being perpetrated on the seller by concealing the fact of a rich discovery of ore in the mine, cannot avail himself of the benefits thereof, but the conveyance will be set aside for fraud. *Gruber v. Baker* (Nev.) 303

23. A judgment debtor cannot defeat his own fraudulent conveyance by purchasing through another the property conveyed, under a subsequent judgment against himself. *Eisner v. Heileman* (N. J.) 96

V. ACTIONS; LIABILITIES.

29. No right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy. *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 754

30. Mere knowledge on the part of a person loaning money that the borrower intends to use it by engaging in the purchase of options on grains in the market of another State, or investing it in wagering or gambling contracts, will not defeat an action by the lender to recover back the amount loaned. *Jackson v. City Nat. Bank* (Ind.) 657

31. If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, which does not involve any positive immorality, and there is no other reason of public policy why the courts should refuse to grant relief, a party who has received anything under it from the other party, and has failed to perform on his part, must account to the other for what he has received. *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 689

32. A railroad company which continues to operate a rival and competing line under a prior contract, after the passage of a statute prohibiting such contracts and making the company which operates a rival line subject to penalty, although such continuation was illegal, cannot retain the money acquired by such operation when called upon by the owner of the road for an accounting, but the latter, not being *in pari delicto*, is entitled to an equitable share of the earnings. *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 689

33. A mine-owner who undertakes to deliver a portion of the ore taken from the mine to certain persons in consideration of their constructing a level to drain the mine in such a manner that the ore can be raised without trouble or inconvenience from water is not discharged from his obligation by the fact that the level is permitted to become and remain out of repair, if he is not at all prejudiced thereby, the level remaining sufficient for all practical purposes. *Crawford v. Witherbee* (Wis.) 561

34. An agreement, secured by a mortgage, made by a wife's brother to whom the husband on separation paid a sum of money for her support, to provide for and maintain her during her life without expense to her husband, and to indemnify and save the latter harmless

from any charges on her account, may be enforced by the wife, although she is not a party to the instrument. *Coleman v. Whitney* (Vt.) 517

35. The neglect of one entitled to a life support under a mortgage given therefor, to assert her right until after the sale of the property on the mortgagor's death and after his estate has been substantially settled, will not bar her right to enforce the mortgage, where it does not appear that grantees of the mortgagor have lost their remedy upon his warranty. *Coleman v. Whitney* (Vt.) 517

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Rescission of, for fraud; rights of the party defrauded; election to rescind must be exercised promptly; parties must be put *in statu quo*; action for rescission; ratification defeats right to rescind; effect of lapse of time; estoppel; party cannot rescind while retaining fruits; must return property for breach of warranty. 607

Rescission of; action to recover money paid under; demand. 277

Rescission of; duty to return amount received; must be done within a reasonable time. 50

CONTRIBUTION. See also MARSHALING ASSETS.

A tenant in common purchasing at a tax sale will be entitled to contribution from his cotenants, toward the costs and expense incurred in the purchase of the tax title. *Clark v. Lindsey* (Ohio) 740

NOTES AND BRIEFS.

Contribution; right to, among cotenants. 740

COPYRIGHT. See also PLEADING, 8-10.

1. The owner of a copyright may assign an undivided interest therein, so that the copyright becomes the undivided property of joint owners. He may also assign or transfer, in equity, an exclusive right to use the copyrighted work in a particular manner or for particular purposes, upon such terms and conditions as may be agreed upon. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

2. Permitting the use of a copyrighted article in a foreign encyclopædia, the remainder of which is written by foreigners and *publici juris* in this country, does not warrant its inser-

G. Allen Co. (C. C. S. D. N. Y.) 483
 8. Procuring an article which is to be inserted in a foreign encyclopædia, to be written and copyrighted in this country, for the express purpose of protecting the encyclopædia from being reprinted here in cheap form, which reprint would be of great value to our people and could be made were it not for such article, is not such a fraud on the copyright laws as will prevent a court from entertaining jurisdiction of a bill to restrain an infringement of the copyright. *Black v. Henry G. Allen Co. (C. C. S. D. N. Y.)* 438

4. A statistical atlas is properly copyrighted as a whole; it is not necessary to copyright separately each map in the book. *Black v. Henry G. Allen Co. (C. C. S. D. N. Y.)* 438

5. An inchoate right to a copyright may, prior to the taking of the copyright, be transferred by parol. *Black v. Henry G. Allen Co. (C. C. S. D. N. Y.)* 438

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Copyright; assignment of; transactions for securing under Revised Acts of Congress. 438

CORPORATIONS.

I. POWERS AND LIABILITIES.

II. STOCK AND STOCKHOLDERS.

III. DISSOLUTION.

NOTES AND BRIEFS.

See also ASSUMPSIT, 2; BONDS, 8-5; INJUNCTION, 1; INSURANCE, 4; JUDGMENT, 2; NUISANCES, 9; TRUSTS, 8.

I. POWERS AND LIABILITIES.

1. Persons dealing with the cashier of an incorporated savings bank as such are chargeable with knowledge of the corporate powers of the bank and of the extent to which the cashier can bind it; and it is immaterial that the institution is a foreign one. *Jemison v. Citizens Sav. Bank (N. Y.)* 708

2. The defense of *ultra vires* is as available to a corporation when the attempt is made to hold it liable as principal upon a contract which it entered into as agent, because of its failure to disclose its principal, as when it is sued upon a contract which it made as principal. *Jemison v. Citizens Sav. Bank (N. Y.)* 708

3. In case of a transaction which is simply *ultra vires*, neither party will be heard to allege its invalidity while retaining its fruits. Limitation of the contractual power of a corporation does not prevent it from making restitution of money or property obtained under an unauthorized contract. *Manchester & L. R. Co. v. Concord R. Co. (N. H.)* 689

4. The facts that the capital stock of a corporation had not all been paid in and a certificate of the payments filed as required by Mass. Pub. Stat. chap. 106, § 46, which forbids corporations to commence the transaction of the business for which they are organized until those things are done, at the time it entered into and performed a contract, will

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Boston Truebont Co. (Mass.) 339
 5. An excess of indebtedness for which directors of a corporation can be held liable, under R. I. Pub. Stat. art. 155, § 15, cannot include any claim or debt not existing before the excess, unless contracted or voluntarily incurred, and therefore cannot include a judgment for a tort. *Leighton v. Campbell (R. I.)* 187

6. "Debts contracted" before recording a certificate for the payment of stock, for which directors are liable under a statute, do not include unliquidated claims for damages arising *ex delicto*. *Leighton v. Campbell (R. I.)* 187

7. A judgment in tort is not a "debt contracted" for which directors of a corporation are liable, under R. I. Pub. Stat. §§ 8, 4. *Leighton v. Campbell (R. I.)* 187

II. STOCK AND STOCKHOLDERS.

8. At a meeting of the shareholders of a corporation, each shareholder represents himself and his own interests solely, and in no sense acts as a trustee or representative of others. Hence he has a legal right to vote upon a measure, even though he has a personal interest therein separate from other shareholders. *Gamble v. Queens County Water Co. (N. Y.)* 527

9. If the action of a majority of the stockholders of a corporation resulting from their votes at a stockholders' meeting is so detrimental to the interests of the corporation itself as to lead to the necessary inference that their interests lie wholly outside of and in opposition to those of the corporation and of the minority of the stockholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority, it may be subjected to the scrutiny of a court of equity at the suit of the minority. *Gamble v. Queens County Water Co. (N. Y.)* 527

10. To warrant the interposition of a court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subvert some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interest. *Gamble v. Queens County Water Co. (N. Y.)* 527

11. In determining the question whether or not the price paid by a corporation to one of its directors for property owned by him, by direction of a majority of the shareholders, of which he was one, is so excessive as to constitute a fraud on the rights of the minority, the value of the time and the interest on the money which he has expended thereon may be added to its cost, and he may, in addition, be allowed a fair profit thereon, and whatever advantage he may have gained by a fortunate purchase of materials used. *Gamble v. Queens County Water Co. (N. Y.)* 527

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(N. Y.)

10. **Signature of Officer:**

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Cannot purchase stock of other corporations; equity jurisdiction over; liability of directors of; suits by; when stockholders may sue; corporation a necessary partner. 650

Defense of *ultra vires*, when available; cannot be used to keep property received under contract without making compensation. 708

Foreign; regulation of business of, by State. 601

Officers of, not entitled to compensation for services voluntarily rendered. 117

Sale of property to, by stockholder; price; power to issue bonds for less than par. 527

CORPSE. See BURIAL, 2, 3.

COSTS AND FEES.

1. A defendant should not be relieved from the payment of costs when found guilty of violating a penal statute, without some reason for so doing. *Welsh v. State* (Ind.) 664

2. A rule of court requiring a copy of each pleading to be filed with it, and allowing therefor a fee of 10 cents per hundred words, and directing the same to be taxed with the costs, does not apply to a petition which consists of many counts precisely alike with the exception of dates, etc., as to which a copy of one count with a reference to the others will suffice, so as to allow the taxing of costs for a copy of the whole pleading. *Cook v. Chicago, R. I. & P. R. Co.* (Iowa) 764

COUNTIES.

1. New counties cannot be formed so as to reduce the county from which they are created to a less area than the constitutional limit. *State, Pennell, v. Armstrong* (Neb.) 882

2. When conflicting petitions for the submission of the question of creating new counties are presented, it is the duty of the county board to grant the petition that is first filed, if it meets all the requirements of the law, and to refuse to submit the others. *State, Pennell, v. Armstrong* (Neb.) 882

3. A county board cannot lawfully submit, to be voted upon at the same election, two propositions to organize from a county two new counties, when the territory described in one

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COURTS. See also RECEIVERS, 2.

1. The courts of a State have jurisdiction of an action between nonresidents for the rescission of a sale of lands situated without the State, where the contract was made in the State, and the agent of the vendor, who is a resident thereof, holds the consideration, consisting partly of money and partly of notes of a resident secured by mortgages on lands within the State, and is sought to be restrained in the action from turning over the consideration to the vendor. *Loatza v. San Francisco City & County Super. Ct.* (Cal.) 876

2. An action between nonresidents for the rescission of a sale made within the State, of lands situated in a foreign jurisdiction, the real object of which is not to compel the vendor to accept a reconveyance, but to compel the restoration to the vendees of the moneys paid and a cancellation of the securities given on the contract, all of which are within the court's jurisdiction, the vendees having offered to rescind, — is an action *in rem* and within the jurisdiction of the State courts, although the vendors were not personally served. *Loatza v. San Francisco City & County Super. Ct.* (Cal.) 876

3. The courts of Indiana have jurisdiction to try and punish persons selling intoxicating liquors in violation of its laws upon boats anchored in the Ohio River, where such river constitutes the southern boundary of the State. *Welsh v. State* (Ind.) 664

4. A State has jurisdiction to try and punish offenses against its Sunday laws, committed by persons engaged in carrying passengers over navigable waters of the United States lying along its borders, between different points within its territory. *Dugan v. State* (Ind.) 821

5. An action for injuries to real property is not maintainable in a State in which the lands are not located and of which neither of the parties are residents. *Morris v. Missouri P. R. Co.* (Tex.) 349

6. That the parties are nonresidents and the cause of action originated beyond the limits of the State justifies the court in refusing to entertain jurisdiction, although the action is transitory; and it will be refused where the cause of action arises out of matters connected with Indian lands. *Morris v. Missouri P. R. Co.* (Tex.) 349

7. The power of the Legislature cannot be restrained by the courts upon considerations of policy or supposed natural equity. *Territory v. Ah Lim* (Wash.) 395

8. Equity will not extend its aid for the recovery of a legacy the amount of which is only \$20. *Gale v. Nickerson* (Mass.) 200

9. A judge *de facto* is a judge *de jure* as to all parties except the Commonwealth. *Walcott v. Wells* (Nev.) 59

10. A person appointed judge under a statute increasing the number of judges, even if the Act is unconstitutional, is a *de facto* officer while acting by virtue of his commission in his own right, by consent of the other judges, and

under assignment by the presiding judge to a district in which no other judge is acting. *Walcott v. Wells* (Nev.) 69

COVENANT.

1. Where a person purchases a vacant lot, which supports the half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a previous party-wall agreement entered into by his grantor, obliged to pay a part of the costs of the wall in order to use it, such agreement and wall constitute an incumbrance. *Burr v. Lamaster* (Neb.) 687

2. A covenant against incumbrances covers incumbrances unknown to the purchaser, as well as those known. *Burr v. Lamaster* (Neb.) 687

3. A covenant by and between owners of adjacent lands, as to the use and enjoyment by the respective parties of the waters of a stream to which they are severally entitled, made for the mutual benefit of themselves, their heirs and grantees, runs with the land and binds not only the contracting parties, but also their heirs and grantees, although in subsequent deeds of the respective premises no mention is made of such covenant or of the rights accruing therefrom. *Horn v. Miller* (Pa.) 810

4. Where the right to the use of the waters of a stream is fixed by a covenant between the riparian owners, made for the benefit of their respective heirs or grantees, the fact that a subsequent grantee is the grantee of a part only of the lands of one of the parties to which the covenant is applied does not impair his rights under the covenant as a riparian owner. *Horn v. Miller* (Pa.) 810

5. A covenant by a landowner to render to another one eighth of the mineral raised upon his land, in consideration of the latter's covenant to construct a level for the purpose of draining the land and thus making the ore therein available, which is supplemented by a grant to the latter of such one eighth of the ore, runs with the land. *Crawford v. Witherbee* (Wis.) 361

NOTES AND BRIEFS.

Covenant; against incumbrance; broken by existence of party-wall agreement. 687

With several; when one may sue alone. 704

CRIMINAL LAW.

1. The admission of testimony as to marks and scars found upon the person of a defendant in a criminal prosecution, during a forcible examination of him with a view to ascertaining his identity for the purpose of arresting him, is not prohibited by a constitutional provision that no person in any criminal prosecution shall be compelled to testify against himself. *O'Brien v. State* (Ind.) 323

2. A motion asking the court to direct an acquittal in a criminal case on account of the failure of proof on the part of the State, unless such failure is a total one, must specify wherein it is claimed such proof fails. *State v. Tamm* (Or.) 53

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NOTES AND BRIEFS.

See also **INDICTMENT, ETC.**

Criminal law; definition of crime; power to render opium smoking criminal. 896

Trial; record must show jury legally impaneled and sworn. 838

CROPS. See **EMBLEMENTS; JOINT TENANTS AND TENANTS IN COMMON, 7.**

CUSTOM.

A usage of a mutual benefit association, constituting a part of the contract with each of its members, that masonic questions shall be decided by masonic tribunals, with respect to whether the members are masons or not, as required by the by-laws of the association, is as conclusive on the association as though it provided in terms that the question of being or continuing to be a mason in good standing should be decided by the masonic officers. *Connelly v. Masonic Mut. Ben. Assn.* (Conn.) 428

DAMAGES. See also **BONDS, 2; PLEADING, 2.**

1. That cross-ties under the track at the point where a train was derailed by a broken rail were unsound, decayed, and rotten, and that the rail which broke was old, and the company constantly repaired the old track with old rails,—indicates such gross negligence as authorizes a verdict for exemplary damages. *Alabama G. S. R. Co. v. Hill* (Ala.) 443

2. The measure of damages in assumpsit by the holder of a warehouse receipt for eggs on which he has made advances, against the warehouseman, who has delivered the eggs to the depositor, is the amount of the loan, with interest, if this is less than the value of the eggs. *Fifth Nat. Bank v. Providence Warehouse Co.* (R. I.) 900

3. The plaintiff is entitled, in addition to the nominal damages, to recover compensation for the mental anguish inflicted on him by the negligent delay of a telegraph company in delivering a message telling him that his wife is at the point of death. *Young v. Western U. Teleg. Co.* (N. C.) 669

4. The measure of damages for failure to deliver as written a telegraph message notifying a witness of the day the case is set for trial, and delivering one in place thereof, naming a day so much earlier that, upon arriving at the place of trial, he returns home to await the arrival of the true date, is his expenses in going to and returning from the place of trial and the value of the time lost. Losses resulting from the stoppage of his business, such as salaries of men, cost of keeping teams and the value of their services, and anticipated profits, cannot be recovered unless the company was notified that such losses would follow a failure to correctly deliver the message. *Western U. Teleg. Co. v. Short* (Ark.) 744

5. The breach by a landlord of his covenant to repair a leaky roof will not render him liable in damages for injuries caused by the leak to goods voluntarily left by his tenant beneath the roof after his refusal of the latter's request

6. There can be only one allowance of damages for one wrongful sale of liquor, and only one sale allowed for under any count; and damages can only be allowed for permitting loitering about the premises where liquors are sold, for the particular occasions proved other than those when sales are alleged to have been made. *Sackett v. Ruder* (Mass.) 391

7. The true measure of damages in an action to set aside a conveyance for fraud is the profit derived from the property while in the purchaser's possession. *Gruber v. Baker* (Nev.) 303

8. A verdict for \$571 in an action for libel in publishing plaintiff on a list of delinquent debtors by an agency to collect bad debts is not excessive, where he proves that credit was refused him by one person on account of the publication. *Muetze v. Tuteur* (Wis.) 86

9. A verdict of \$4,000 in favor of one who at midnight was taken from his home to a distant field, stripped naked, tied to a tree, and severely beaten, and then ordered to leave the county, or he would be killed, rendered against the persons who committed the assault, will not be set aside as excessive. *Morgan v. Kendall* (Ind.) 445

10. Plaintiff may recover in an action for damages for an assault and battery such damages as are the natural result of his injury, without specific averment, though such damages accrue after the commencement of the suit. *Morgan v. Kendall* (Ind.) 445

11. Mental anguish suffered by the next of kin by reason of a breach by a third person of his contract with them to safely keep a corpse until they should desire to inter the same may be considered in the assessment of damages for such breach. *Kenihan v. Wright* (Ind.) 514

12. In an action for ejection of a passenger, damages resulting from the loss of a job of work, occasioned by his delay at the station at which he was obliged to leave the train, are too remote to be considered. *Carsten v. Northern P. R. Co* (Minn.) 688

13. The measure of damages in an action against a shipowner to recover damages for his running his vessel upon and partially destroying a fishing net is the cost of repairing the net and the value of the labor required to reset it, together with the value of its use during the time it is necessarily idle; prospective profits which might have been realized from a continued use of the net cannot be allowed as damages. *Wright v. Mulvaney* (Wis.) 807

14. To render a business, the conducting of which pollutes the air with noxious smells and vapors, such a nuisance as will entitle adjoining property-owners to recover damages for the maintenance thereof, it is not necessary that such owners should be driven from their dwellings; it is enough that the enjoyment of life and property is rendered uncomfortable. *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 711

15. The measure of damages recoverable by the owner of the fee when a railroad company permits land condemned for its use to be put to other uses is the rental value of the property

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16. One who acquires an invalid title to the fee of lands which have been condemned for railroad purposes and afterwards applied to other uses, and who subsequently brings suit upon such title and recovers a judgment for the land against the holder of the legal title, can recover rent for such premises only from the time his suit was brought, and not from the time he first claimed title. *Lyon v. McDonald* (Tex.) 295

17. The measure of damages for destruction or injury of buildings, trees, etc., by fire set by locomotives, is the difference in value of such buildings, trees, etc., before and after the injury, and not the difference in value of the land. *White v. Chicago, M. & St. P. R. Co.* (S. D.) 824

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Damages; for negligence of telegraph company. 669
Exemplary or punitive, in case of tort. 445
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DEBTOR AND CREDITOR. See ASSIGNMENT, 6.

DEDICATION.

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Dedication of land to public use; form of; intention; by platting and sale of lots. 551

DEED. See BOUNDARIES, 1; EXPECTANCY; FRAUD AND FRAUDULENT CONVEYANCES, 2-4.

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DE FACTO. See COURTS, 9, 10; OFFICERS, 5.

DEFENSE. See MORTGAGE, 3.

DEFINITIONS. See ALIENS, 4; CORPORATIONS, 5-7; INTOXICATING LIQUORS, 8; LIENS, 1, 2; STREET RAILWAYS, 2; WILLS, 5.

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"Purchase" includes an acquisition by devise. 597
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DEMAND. See TROVER.

DESCRIPTION. See LIENS, 5.

DEVISE AND LEGACY. See WILLS, NOTES AND BRIEFS.

DISCOVERY AND INSPECTION.

A claim of exemption from discovery on the ground that it would fix a penal liability upon the party cannot be sustained where a prosecution for the penalty is already barred by the Statute of Limitations. *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 639

DIVIDENDS. See LIFE TENANTS, 1.

DOGS. See ANIMALS.

NOTES AND BRIEFS.

Dogs; constitutionality of license tax upon. 853

DOWER. See also ALIENS, 2.

The rights of a surety for purchase money of real estate, who is compelled to pay the same, are, in reference to such estate, superior to those of the widow of the purchaser. *Ballew v. Roler* (Ind.) 481

DRAINS AND SEWERS. See also MUNICIPAL CORPORATIONS, 15.

Authority to lay out and construct public drains and sewers cannot properly be claimed by a town as necessarily incident to the exercise of its corporate powers or the performance of its corporate duties, if ample provision for them is made by general statutes. *Bulger v. Eden* (Me.) 205

NOTES AND BRIEFS.

Drains and sewers; statutory regulations; municipal corporations; when not liable for acts or omissions of officers or agents; instances; injuries resulting from accident; municipality liable only for its own negligence. 205

DUE PROCESS. See CONSTITUTIONAL LAW.

DURESS. See ASSUMPSIT, 5.

NOTES AND BRIEFS.

Duress; what constitutes. 633

EASEMENTS. See also PLEADING, 11.

1. Permission by a railroad company to a lumber-dealer to use depot grounds as a lumber-yard in which to store his lumber until sold, and to use the premises as a place of business generally, although the business of the company is facilitated thereby, is inconsistent with the easement vested in the company, and entitles the owner of the fee to recover from such dealer the rental value of the premises. *Lyon v. McDonald* (Tex.) 295

2. An owner of the fee in lands occupied as depot grounds, who occupies an adjoining lot, has no right of passage over the grounds except at the public crossing. *Lyon v. McDonald* (Tex.) 295

3. The mere fact that a view is obstructed from one place to another does not of itself import an injury. *Lyon v. McDonald* (Tex.) 295

4. A conveyance to each other by adjoining lotowners of the open space between the common boundary line and their respective buildings, to be used as a common passway for their mutual benefit, and for no other purpose, divests each owner of the fee, leaving in him only a right of way over such open space; and third persons may also use the space in a reasonable manner, so as not to impede the right

of passage of the grantors. *Low v. Streeter* (N. H.) 271

EIGHT-HOUR LAW. See MUNICIPAL CORPORATIONS, 4.

NOTES AND BRIEFS.

Eight-hour law; validity of. 483

ELEVATORS. See NEGLIGENCE, 3, 5, 7.

NOTES AND BRIEFS.

Elevators; accidents at shafts of. 640

EMBLEMENTS. See also JOINT TENANTS AND TENANTS IN COMMON, 7.

A growing crop, the annual result of agricultural labor, sown by a husband on his land pending a suit for divorce and alimony brought by his wife, passes by a decree which gives the land to the wife as alimony, although such crop is not, in terms, described or referred to in the decree. *Herron v. Herron* (Ohio) 667

NOTES AND BRIEFS.

Emblements; right to; rights of tenant in common to crops. 625

EMINENT DOMAIN.

1. The fact that water from the main of a water supply, by reason of the high pressure in the pipes, would be worth much more for running motors than for supplying power in dams on the stream from which the water supply is taken, gives no right to use it for running such motors for private use without consent of the owners of such dam. *Re Barre Water Co.* (Vt.) 195

2. The use of water for running small motors for light manufacturing is not a public use for which the water can be taken to the detriment of millowners on a stream which is the source of a water supply, even when the main which supplies the water would furnish, when not required for fire purposes, more than was necessary for other public uses. *Re Barre Water Co.* (Vt.) 195

3. A condemnation of lands for depot and station grounds does not pass the fee to the railway company. *Lyon v. McDonald* (Tex.) 295

4. A charter from the State, and a contract with a city and county authorizing the construction and use of a railway in a street, cannot authorize such use without compensation to the owner of the fee. *East End Street R. Co. v. Doyle* (Tenn.) 100

5. A railway whose cars are propelled by a dummy steam-engine and used for passengers only is a burden or servitude on a public street or highway, in addition to that contemplated in the original dedication of the land to public use, for which the owners of the fee are entitled to compensation. *East End Street R. Co. v. Doyle* (Tenn.) 100

6. Damages are recoverable for diminution in the value of property by reason of the vibration, noise, smoke, and noxious vapors and cinders incident to the running of trains near the property, although no part of the property was

for, or applied to, public use, without adequate compensation being made. *Gainseville, H. & W. R. Co. v. Hall* (Tex.) 298

7. A grant of land to a railroad company while a State Constitution is in force which permits compensation in proceedings to condemn land for railroad purposes for the land taken, but not for injuries to adjoining land, the deed not stating the use to which the land is to be applied, does not prevent a subsequent grantee of the grantor's adjoining lands from maintaining an action against the railroad company's lessee to recover damages for injuries resulting to his land in consequence of the use to which the railroad land is put. *Wylie v. Ellwood* (Ill.) 726

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Condemnation of land for railroad purposes; discrimination in value; elements of damage. 298

EQUITY. See also COURTS, 8.

A forged release will not avail to defeat an action at law brought to recover legacies. Hence a suit in equity cannot be maintained for the purpose of canceling such release. *Gale v. Nickerson* (Mass.) 200

NOTES AND BRIEFS.

Equity; instruction of, as to duties of executors and administrators. 244

Jurisdiction over corporations. 650

Jurisdiction over proceedings to forfeit franchises of corporation. 278

Jurisdiction to cancel instruments. 200

ESTOPPEL. See also CONTRACTS, 25; CORPORATIONS, 8; HOMESTEAD, 6; INSURANCE, 12.

1. A party is estopped from asserting title to property when his declarations have induced another who was about to purchase it to believe that it was owned by a third person. *Gruber v. Baker* (Nev.) 802

2. A married woman is estopped to enforce a vendor's lien on land sold and conveyed by joint deed of herself and husband, when they were both active in making the sale, and by their declarations and conduct induced a third person to advance a part of the purchase money to the vendee under an agreement that he should have a first mortgage on the premises as security therefor, and that a second mortgage would be taken for the unpaid installment of the purchase money. *Wilder v. Wilder* (Ala.) 97

3. A woman whose title appears on the records is not estopped from contesting a mechanics' lien on her property by the fact that she knew of the erection of a building thereon without giving notice of her ownership or that she would not pay therefor, where the work was done under a contract with her husband, 9 L. R. A.

the husband was not owned. *Knapp v. Hall* (Conn.) 111

4. The title acquired by one who has conveyed away his property to defraud a creditor, on a compromise of an ejectment suit brought by such creditor to get possession of the property after he has bought it at an execution sale under his judgment, by a reconveyance of the property to himself, will not enure to the benefit of the donee, notwithstanding his deed contained covenants of warranty, as against one who, after the fraudulent conveyance, purchased the property thereby conveyed, from the donor, in good faith and for value, although with notice of such conveyance. *Gililand v. Fenn* (Ala.) 413

5. A mortgagee is not estopped to enforce his mortgage by previously selling the mortgagor's interest in the property on execution sale to satisfy another debt. *Haz v. Seaman* (Colo.) 841

NOTES AND BRIEFS.

Estoppel; by acquiescence or receiving benefits. 609

Of one to repudiate a title which he has sold; knowledge necessary to raise. 341

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EVIDENCE.

I. JUDICIAL NOTICE.

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III. BEST AND SECONDARY; DEMONSTRATIVE; DOCUMENTARY.

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NOTES AND BRIEFS.

See also APPEAL AND ERROR, 17, 19; CRIMINAL LAW, 1; NEW TRIAL, 2, 3.

I. JUDICIAL NOTICE.

1. Judicial notice will be taken of the fact that after a judge was commissioned and sworn into office he was assigned to a certain district by the presiding judge, and commenced to discharge the duties of the office, and has been recognized as judge by the officers and people of the State. *Watcott v. Wells* (Nev.) 59

2. Courts will take judicial knowledge of the fact that primary elections have grown to be an essential part of our political system. *State v. Hirsch* (Ind.) 170

II. PRESUMPTIONS AND BURDEN OF PROOF.

3. Where plaintiff, in a suit to recover the amount of a draft delivered to defendant, testified in his own behalf, when proving his side of the case, that he never received the money for the draft, he took upon himself the burden of proof that he had not been paid for the draft.

and an instruction, requested by plaintiff to the jury, that the burden was upon defendant to prove that it paid for the draft, became unnecessary. *Goff v. Stoughton State Bank* (Wis.) 859

4. There being no witnesses as to how the death of a traveler at a railroad crossing occurred, deceased will be presumed to have been free from contributory negligence, where the circumstances and position in which he was found are as consistent with that presumption as with the presumption of contributory fault. *Phillips v. Milwaukee & N. R. Co.* (Wis.) 521

5. Proof that a fire originated from sparks or cinders from a locomotive throws on the railroad company the burden of establishing the fact that it used the most improved appliances. *White v. Chicago, M. & St. P. R. Co.* (S. D.) 824

6. The fact that the wife had possession of the property, claiming ownership, when it was attached by the creditor of the husband, does not relieve her of the burden of proving that the transfer was not made to her for the purpose of hindering, delaying, and defrauding such creditor. *Stevens v. Carson* (Neb.) 523

7. Although a grant from the State will never be presumed in cases where it could not legally have been made, yet the existence of a statute which simply creates public rights in certain property will not forbid a presumption of a grant of such property to an individual, since it is not inconsistent with the right of the Legislature to make such grant at any time it chooses to do so. *Attorney-General, Mann, v. Revere Copper Co.* (Mass.) 510

8. A plaintiff in an action to recover real property, in whose favor a consent decree was entered, will, although his title does not appear, be presumed to have had a superior title. *Lyon v. McDonald* (Tex.) 295

III. BEST AND SECONDARY; DEMONSTRATIVE; DOCUMENTARY.

9. A partnership to deal in lands may be established by parol evidence. *Reed v. Meagher* (Colo.) 455

10. A partnership agreement to acquire a lease of a particular property for mining purposes, made before the lease has been obtained, can be proved by parol, where the lease was acquired in the name of one of the partners pursuant to, and applied to partnership uses under, the agreement. *Reed v. Meagher* (Colo.) 455

11. Trial courts have power to order the surgical examination, by experts, of the person of a plaintiff seeking to recover for personal injuries. *Alabama G. S. R. Co. v. Hill* (Ala.) 442

12. A motion for the surgical examination, by experts, of plaintiff suing for personal injuries, should not be denied merely because she is a young woman of a nervous temperament and of delicate and refined feelings, where it appears that such examination would not involve any ill consequences to her, and that she has several times submitted to be so examined by her attending physician, without any ill results. *Alabama G. S. R. Co. v. Hill* (Ala.) 442

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13. It is not sufficient ground for denying a motion for a physical examination of plaintiff in an action for personal injuries, that her attending physician had made the examination and had fully deposed to the injuries complained of, where conclusions and opinions as testified to by him do not meet the approval of other reputable physicians examined as to their conclusions from the facts stated by him. *Alabama G. S. R. Co. v. Hill* (Ala.) 442

14. Correspondence between the grantor and grantees of property, though insufficient of itself to establish a trust therein in favor of the grantor, may be considered, together with the oral evidence in the case, for the purpose of determining whether or not there was such fraudulent contrivance on the part of the grantees to secure title to the property as to render him a trustee *ex maleficio*. *Brook v. Brock* (Ala.) 287

15. A bill of exceptions containing evidence of a witness who testified on a former trial of the same cause and has since died is not admissible to prove of itself what his testimony on that trial was. *Simmons v. Spratt* (Fla.) 343

IV. PAROL TO VARY WRITINGS.

16. In an action by an officer of a corporation to recover salary which is alleged to have been fixed by a vote of the board of directors, parol evidence is admissible to show that the vote was never communicated to or accepted by the plaintiff; and for this purpose, proof of the circumstances attending the transaction may be given. *Sears v. Kings County Elec. R. Co.* (Mass.) 117

17. Evidence *dehors* the legislative journals is inadmissible to show that a special or local statute is unconstitutional because proper notice was not given before the introduction of the Act. *Speer v. Athens* (Ga.) 402

18. An action for breach of contract to purchase a certain quantity of quinine, the terms of which are set out in a broker's sale note which contains stipulations covering the quantity sold, the price, the place of delivery, and the time, place, and manner of payment of purchase money, cannot be defeated by showing a breach by the seller of a contemporaneous parol agreement, which is alleged to have been an inducement to the contract, to advance the price of quinine and notify the trade of such advance; especially where it does not appear that the parol agreement was a condition precedent to the validity of the contract. *Ennelhorn v. Beitzinger* (N. Y.) 548

V. OPINIONS.

19. The measure of damages to property arising from the operation of a railroad near it cannot be shown by asking a witness what, in his opinion, is the depreciation in value of the property by reason of the operation of the road, excluding from consideration all damages sustained in common with the community at large; he must be required to state the value of the property before the road was built, and its value afterwards, and the cause of the depreciation, if any. *Gainerville, II. & W. R. Co. v. Hall* (Tex.) 293

20. The giving of notice by mine-owners that a level built by a third person for the purpose of draining the mine must be repaired in compliance with the agreement under which it was constructed, and that the rents payable for its use will be withheld until it is restored to its original usefulness, is an admission that the persons to whom it is given are the successors in title of such third person, which will dispense with proof of such succession. *Crawford v. Witherbee* (Wis.) 561

21. Evidence that the treasurer of a corporation prepared a statement of its liabilities, in which he did not include any claim of his own for salary, and that he afterwards assented to as correct a statement of such liabilities which did not include his claim, is admissible, in an action brought to recover salary alleged to have been due at that time, upon the question of whether or not there was a contract that such salary should be paid him. *Sears v. Kings County Elev. R. Co.* (Mass.) 117

22. An attorney cannot disclose communications made to him by parties who employed him to draw up a deed and mortgage, in a suit between such parties, or either of them and third persons. *Gruber v. Baker* (Nev.) 302

23. One who has taken a policy of life insurance from his debtor as collateral security for his debt cannot, although the absolute owner of the policy, object to the introduction by the company, in an action upon the policy, of evidence as to acts and declarations of the insured before the transfer of the policy, which tend to show a deliberate purpose on the part of the insured to heavily insure his life, and then commit suicide with the intent of defrauding the companies, it being part of the *res gesta*. *Smith v. National Ben. Soc.* (N. Y.) 616

24. No letter written by a grantor of property after he has made an absolute conveyance of it to a third party is admissible in evidence for the purpose of proving the existence of a trust in such property in favor of himself. *Brock v. Brock* (Ala.) 287

25. Declarations of a grantor who has retained possession of the land conveyed after the execution of the conveyance, made during his possession and explanatory thereof, to the effect that he held for another, are admissible on an issue as to whether or not such conveyance was fraudulent. *Mobile Sav. Bank v. McDonnell* (Ala.) 645

26. Where corporate agents are entrusted with the transaction of business requiring continuous negotiations the authority of the agent to bind the principal by his statements does not terminate until the negotiations are at an end. But narrations of an agent of past transactions are not evidence. *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 754

VII. RELEVANCY; MATERIALITY.

27. It is sufficient to entitle testimony to admission that there is some evidence of facts, direct or circumstantial, tending to make it competent. *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 754

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justice of the peace is admissible at the trial of the case upon appeal to the circuit court. *Hunt v. Rumsey* (Mich.) 674

29. The refusal of the defendant in a civil action brought to recover damages for an assault and battery, when called as a witness, to answer questions in relation to the alleged assault and battery, on the ground that his answers might subject him to a criminal prosecution, may be considered by the jury in connection with the other evidence in the case in determining the question of his liability. *Morgan v. Kendall* (Ind.) 445

30. Evidence of applications by a person since deceased to many different insurance companies, by which he secured a large amount of insurance upon his life, and his letters to relatives and friends indicating a deliberate intent on his part to defraud the companies by killing himself, is admissible in an action brought by one of his creditors upon a policy received from the decedent as security for the debt, in support of the defense that the policy was void because obtained with an intent to commit fraud. *Smith v. National Ben. Soc.* (N. Y.) 616

31. Where the defense to an action upon a life insurance policy is placed upon the ground that the policy is void because obtained by the insured in pursuance of a deliberate scheme to heavily insure his life and then commit suicide, and thus defraud the insurance companies, testimony is admissible to show that shortly before deceased began to insure his life witness at his request attempted to raise money for him, and upon informing deceased of his inability to do so, deceased replied that he must have money and would commit suicide if he could not raise it. Evidence is also admissible to show that deceased made inquiries as to the easiest mode of producing death. *Smith v. National Ben. Soc.* (N. Y.) 616

32. Proof of death by suicide, although under the terms of an insurance policy it is no defense to an action thereon, is yet admissible in such action where the defense is fraud, and the suicide is alleged to be the ultimate agency by which the fraud was accomplished. *Smith v. National Ben. Soc.* (N. Y.) 616

33. Evidence as to the capital invested in a business is not admissible in an action brought to recover damages for injuries resulting to plaintiff's property from the conducting of it, since the law in such cases will not undertake to balance conveniences or estimate the difference between the injuries sustained by plaintiff and the loss which may result to defendant from having the business declared a nuisance. *Susquehanna Fertilizer Co. v. Malone* (Md.) 737

34. Proof that a man against whom a newspaper article charges that a breach of promise suit is about to be brought is married, and of the nature of his business, is competent to show the hurtful tendency of the libel and his damages. *Morey v. Morning Journal Asso.* (N. Y.) 621

35. Evidence that a newspaper correspondent had heard the substance of a publication which is libelous *per se*, before sending the item

his paper, is inadmissible, in an action against the publisher, to rebut malice or to mitigate damages, where the libelous article was published without any inquiry or knowledge by defendant on the subject. *Morey v. Morning Journal Assn.* (N. Y.) 621

86. That an action for breach of promise of marriage was begun against a person, not the plaintiff, but of nearly the same name, and that defendant's correspondent had heard of the suit before sending the article for publication, is inadmissible in a libel suit, at least where the defendant had no knowledge of such action before making the publication. *Morey v. Morning Journal Assn.* (N. Y.) 621

87. Evidence that one who refused to give credit to the plaintiff exhibited to him a book in which he is named on the list of delinquent debtors is admissible in an action for libel in publishing such list. *Muetz v. Tuteur* (Wis.) 86

88. An allegation in an action to recover damages for an assault and battery, that by reason of the injuries inflicted plaintiff "was hurt and injured and became and was sick," is sufficient to admit proof of the extent of plaintiff's injuries, as well as of his physical and mental suffering resulting immediately from the assault and battery, as a basis for damages; and such items need not be specifically set out in the complaint. *Morgan v. Kendall* (Ind.) 445

89. In an action to recover damages for furnishing liquor to one who has a habit of drinking to excess, to warrant a recovery under counts covering a period of time plaintiff must show a sale within the period named; but under counts where particular days are set out, a recovery may be had for injuries suffered by reason of a sale on any day not used as a basis for recovery under another count. *Sackett v. Ruder* (Mass.) 891

40. To assist the jury in determining the amount to be assessed as damages for furnishing liquor to one who has a habit of drinking to excess, contrary to the provisions of Mass. Pub. Stat. chap. 100, § 25, evidence may be admitted of the circumstances attending each violation of the statute complained of, and of the consequences which in whole or in part resulted from such violation, so far as they affected the relations between the person complaining and the one receiving the liquor. *Sackett v. Ruder* (Mass.) 891

41. A declaration of a passenger to the conductor, made before the train was derailed, indicating the passenger's opinion that the engineer was going at more than the usual rate of speed, is inadmissible in an action for injury to another passenger. *Alabama G. S. R. Co. v. Hill* (Ala.) 442

42. In a suit against a bank to recover the amount of a check or draft delivered to it, which the bank claims it paid plaintiff for when the draft was delivered, testimony in behalf of the bank that at the close of its business on the day the draft was delivered to it, its cash account and actual cash on hand balanced, and that this could not have occurred unless the amount of the draft had been paid to plaintiff on that day, is inadmissible, numerous transactions between the bank and other parties

having intervened between the delivery of the draft and the making up of its cash account. *Goff v. Stoughton State Bank* (Wis.) 859

43. In an action to rescind a contract for the purchase of real estate on the ground of mistake as to the quantity contained in the tract, evidence is inadmissible to show that the quantity actually there is worth the sum which was to be given for the tract as represented. *Newton v. Tolles* (N. H.) 50

VIII. WEIGHT; SUFFICIENCY.

44. No parol trust will be engrafted on a legal title which the instrument of conveyance makes absolute on its face, unless the fraud necessary to create it is established by clear and convincing proof. *Brock v. Brock* (Ala.) 287

45. Evidence to prove fraud should be so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. *Gruber v. Baker* (Nev.) 802

46. In a contest between a wife and a creditor of her husband over property transferred to her by him after the debt was contracted, she must establish that she is a bona fide purchaser by a preponderance of the evidence. *Stevens v. Carson* (Neb.) 522

47. Evidence that before a train passed there was no fire, but that sparks were flying from the smokestack when it passed, and soon afterwards a fire broke out, and a live piece of coal about one inch long and three quarters of an inch thick was found near by, is sufficient evidence that a fire which broke out about that time was set by the train. *White v. Chicago, M. & St. P. R. Co.* (S. D.) 824

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Evidence; demonstrative. 442

Entries in books of bank as evidence of payment of draft. 859

Prisoner cannot be compelled to furnish evidence against himself. 323

Quantity of, necessary to prove case. 523

EXECUTION. See SALE, 1.

EXECUTORS AND ADMINISTRATORS. See also REPLEVIN, 1.

1. An administrator appointed in one State cannot maintain a suit in a United States circuit court for another State, to restrain an infringement of a copyright which belonged to his intestate, without taking out ancillary letters in such other State; but he may take out such letters after demurrer to his bill, and aver the fact by amendment before answer filed. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

2. Executors and administrators may ask the instruction of a court of equity as to their duties under a will, and as to the effect of acts already done, unless the matter is one which can be more appropriately dealt with in the probate court. Equity may also, in its discretion, give instructions as to future accounts of which the probate court has no jurisdiction.

although the latter court could pass upon them after their rendition and application for a final settlement. *Welch v. Adams* (Mass.) 244

8. That a testator was domiciled in another State, and that his will was originally proved there, is no valid objection to the giving of instructions, by a court which has granted ancillary administration, and which has statutory discretion to distribute funds found within its jurisdiction, as to the payment of certain legacies out of personal property which was within its jurisdiction at the time of testator's death and has since continued to be so, where such property is ample to pay all debts and legacies and all parties interested are before the court. *Welch v. Adams* (Mass.) 244

4. Executors acting under ancillary letters of administration granted by a court in whose jurisdiction personal property of the testator was found are, in dealing with such property, accountable to that court; and without its order a transfer by them of the proceeds thereof for administration to the jurisdiction in which they were originally appointed would be irregular, even if they had paid all debts due where the property was found. *Welch v. Adams* (Mass.) 244

5. An action on an administrator's bond may be maintained against the sureties for wrongful acts of one administrator, although a co-administrator was the only distributee of the estate, by one who has become the owner of the latter's claim. *Nanz v. Oakley* (N. Y.) 228

6. One joint executor or administrator is not liable for the assets which come into the hands of the other, or for the laches, waste, devastation, or mismanagement of the other, unless he consents to, or joins in, an act resulting in loss to the estate. *Nanz v. Oakley* (N. Y.) 228

7. A statute requiring a joint and several bond from executors and administrators does not change the rule which makes them jointly liable for joint acts, and only severally liable for their own acts. *Nanz v. Oakley* (N. Y.) 228

8. The surplus proceeds of a sale of lands made in auxiliary administration after paying the debts in that jurisdiction, instead of being distributed to the heirs and devisees in that jurisdiction, will be transmitted to the principal administrator in another State in which the assets are insufficient to pay debts. *Gara v. Austin* (Iowa) 218

9. A legatee is not bound, in the absence of an order of court, to accept payment of his legacy in installments at the discretion or convenience of the executor. *Welch v. Adams* (Mass.) 244

10. A legatee is not bound to recognize any tender of his legacy made by executors out of funds collected by them from the testator's personal property which was situated in the jurisdiction where the tender was made, if they had there received no letters testamentary, and were simply authorized to take care of and preserve the property, which they had never been directed to transfer to themselves as executors under their foreign letters; and the fact that they subsequently receive letters in the jurisdiction where the property is situated will have no effect upon the rights of the parties as fixed by 9 L. R. A.

the refusal of such tender. *Welch v. Adams* (Mass.) 244

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Executors and administrators; several executors considered as one person; liability on receipt of assets; severally liable for their own tortious acts; liability of sureties on executor's bond; where new bond filed; subrogation of surety on payment of claim. 223

Foreign letters; power and authority of foreign; incapacity of foreign; exceptions to rule; ancillary letters; payment of legacies; interest on legacy; legacies which do not bear interest; legacy in lieu of dower; preference to widow over other legatees; legacy to widow draws interest; instruction of court of equity. 244

Administrators; ancillary administration; power and authority; distribution. 218

EXPECTANCIES.

1. A conveyance of the grantor's expectant interest as heir in his ancestor's real estate, by a deed containing no covenants of warranty, is not binding upon the grantor, even although as heir he subsequently comes into possession of the interest so conveyed. *McClure v. Baber* (Ind.) 477

2. An attempted sale of the interest which the grantor expects to receive as heir in his ancestor's real estate will not be enforced against him in equity, when as heir he comes into possession thereof, although the purchase was made in good faith, unless the price paid was the full and fair market value of the property at the time of the purchase, and the ancestor was made acquainted with all the facts and acquiesced in the sale. *McClure v. Baber* (Ind.) 477

EXPRESS COMPANY. See CARRIERS, 10, 11.

FAMILY. See HOMESTEAD, 3.

FENCE.

Whether or not a person who, in building a division fence between his land and that of his adjoining owner, has placed it by mistake on the latter's land, first caused a survey to be made of the division line by the county surveyor after notice to such owner, is not the sole test of the exercise by him of good faith in the matter which will permit him to recover the materials which he put into the fence. *Hicks v. Clark* (Ark.) 526

FIRE. See also EVIDENCE, 47; MASTER AND SERVANT, 6; RAILROADS, 3.

1. It is a tortious act to start a fire on a bed of turf or peat in a season of great drought when the ground is parched and dry, so that the fire will run through the bed of peat on to another's land upon which the bed extends, and so as to cause serious loss to the latter. *Louisville, N. A. & C. R. Co. v. Nitsche* (Ind.) 750

2. Fire cannot be rightfully used by a railroad company to remove combustible material from its right of way, where the conditions are such as to put in great peril adjacent property. *Louisville, N. A. & C. R. Co. v. Nitsche* (Ind.) 750

ditions negligence or wrong, is not necessarily inferable; but where it is used in an improper manner or under circumstances such as to inexcusably imperil adjacent property, the person so using it is a wrong-doer. *Louisville, N. A. & O. R. Co. v. Nitsche* (Ind.) 750

4. Railroad companies are not liable for setting fire on their own right of way; but are liable for negligently suffering it to escape and injure adjacent property. Where it is reasonably certain that the fire will escape on to lands of others, such companies are responsible for the consequences of its so doing. *Louisville, N. A. & O. R. Co. v. Nitsche* (Ind.) 750

5. Where one was guilty of a positive wrong in setting fire in the edge of a peat bed in a dry time, he cannot escape liability for an injury thereby to another, for the reason that the fire burnt across the premises of third persons before it reached and did the injury to the lands of such other to which the bed extended; an ordinary wind is not an independent intervening agency. *Louisville, N. A. & O. R. Co. v. Nitsche* (Ind.) 750

NOTES AND BRIEFS.

Fire; set out by sparks from locomotive; liability for damages. 750

FISHERIES.

1. For the purpose of regulating fishing therein, a State may claim jurisdiction over a bay within its borders, the headlands at the mouth of which are less than 2 marine leagues apart, although the distance between the opposite shores of the bay within the headlands is more than that; and it may prevent a citizen of another State from taking fish in such bay, although he is using a vessel duly enrolled and licensed under the laws of the United States for carrying on such fishery,—at least in the absence of any law of Congress relating to the subject and of all discrimination against citizens of other States. *Com. v. Manchester* (Mass.) 286

2. Mass. Stat. 1886, chap. 192, regulating the using of nets or seines for taking fish in the waters of Buzzard's Bay, repeals by implication Mass. Stat. 1865, chap. 212, so far as the latter relates to the taking of menhaden by the use of a purse seine in the waters of that bay. *Com. v. Manchester* (Mass.) 286

NOTES AND BRIEFS.

Fishery; right of. 286
Right of, subordinate to that of navigation. 807

Jurisdiction of State superior to that of federal government in the open sea; right to control. 286

FIXTURES.

1. Unless there is a stipulation in the lease to the contrary, a tenant can only remove such improvements erected by him the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession. *Friedlander v. Hewitt* (Neb.) 700
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openly impressed with the character of personalty prior to the giving of a mortgage on the realty on which they are located will retain that character as against the mortgagee, in the absence of other controlling circumstances. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

8. A decree in proceedings to foreclose mortgage liens involving land and buildings thereon, which simply adjudges that the mortgages be foreclosed, the property sold, and the equity of redemption therein barred, will not impress the buildings with the character of realty if they had been previously recognized and treated as personalty. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

NOTES AND BRIEFS.

Fixtures; right of tenant to remove. 700

FORFEITURE. See PUBLIC LANDS, 2.

NOTES AND BRIEFS.

Forfeitures; of insurance policy for nonpayment of premium note. 817
Not favored in the law. 189

FRAUD AND FRAUDULENT CONVEYANCES. See also CONTRACTS, 27, 28; ESTOPPEL, 4; EVIDENCE, 46.

1. An arrangement is not void as a fraud on creditors by which an insolvent debtor, soon after taking out insurance on his own life, payable at his death to his executors, administrators, or assigns, assigns the policy to certain of his creditors to secure payment of their claims, taking from them an agreement to pay the premiums, and, after deducting the amount of such payments and of their claims from the proceeds of the policy, to pay the balance to his heirs or to his order. And if no other disposition is made by him, the heirs are entitled to such balance as against other creditors of the insured, at least where there is no evidence of actual fraud or that such creditors were actually injured by the arrangement. *Johnson v. Alexander* (Ind.) 660

2. When a conveyance of land, made by an insolvent debtor to one of his creditors in satisfaction of an antecedent debt, is attacked by other creditors of the grantor, the grantee must show that the consideration for it was both valuable and adequate. *Mobile Sav. Bank v. McDonnell* (Ala.) 645

3. The assumption by a grantee of a debt due to a third person from his grantor, who is in failing circumstances, is a valuable consideration for a conveyance of real estate by the grantor to the grantee, within the rule that such consideration must exist to uphold the conveyance against the attacks of other creditors of the grantor; and it is immaterial whether such third person accepts the grantee as his debtor in place of the grantor or not. *Mobile Sav. Bank v. McDonnell* (Ala.) 645

4. The assumption by a grantee of a debt due from his grantor to a third person may be relied on as a consideration to support a deed, although the consideration recited therein is the payment of cash, and such recital is subsequently qualified by a statement that the true

5. A conveyance infected with actual fraud may, under Ala. Code, § 1735, be avoided by a subsequent bona fide purchaser from the grantor, although he had notice of the previous fraudulent conveyance. *Gilliland v. Fenn* (Ala.) 413

6. Payment by a debtor who has fraudulently conveyed away his property for the purpose of hindering his creditor, of such creditor's claim, will not purge the conveyance of fraud so as to render it impregnable against the attack of one who subsequently purchases the property so conveyed, bona fide and for value, from the fraudulent grantor. *Gilliland v. Fenn* (Ala.) 413

NOTES AND BRIEFS.

Fraudulent conveyances; voluntary conveyance; validity of; consideration; inadequacy of consideration; grantee for valuable consideration gets good title; voluntary conveyance good as to subsequent creditors; where vendor had sufficient property remaining; transactions, when fraudulent; fraudulent conveyance, who protected from; conveyance to defraud may be avoided; intent to hinder, delay, or defraud; fraudulent intent a question of fact; failure to file deed for record; notice of fraudulent intent inferred from circumstances; conveyance, when voidable; knowledge on part of purchaser; actual notice to purchaser not necessary; voluntary conveyance, when void as to subsequent purchasers. 413

Conveyance to delay creditors. 86

Badges of fraud; retention of possession by a vendor; purchase from debtor by creditor; sufficiency of consideration; agreement to pay debts of vendor; mortgage by debtor to secure creditor. 645

GAME. See CONSTITUTIONAL LAW, 12.

NOTES AND BRIEFS.

Game; individual property in; liability for unlawful transportation of. 188

GAMING. See CONTRACTS, 30.

NOTES AND BRIEFS.

Gaming; money loaned for gaming purposes, right to recover back. 657

GIFT.

A gift by a man to a woman in expectation of marriage, of money to enable her to purchase her marriage wardrobe and to defray her expenses in going to his home to be married, is conditional, so as to entitle him to recover the money back in case of her failure to fulfill the engagement, although he attached no conditions to the gift, and had no expectation that the money, part of which was spent by her in purchasing clothes, would ever be refunded. *Williamson v. Johnson* (Vt.) 277

NOTES AND BRIEFS.

Gift in prospect of marriage; how far revo-

3 *Idle.*
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NOTES AND BRIEFS.

Great ponds; individual rights in. 510

GUARANTY.

The liability of one who guarantees the payment by lessees of rent for whatever time they may hold the premises after the expiration of the lease, at the same rate reserved therein, will be discharged if the lessees and the landlord enter into a new arrangement by which the lessees retain possession of the premises after the lease expires, as tenants at will, at a monthly rent different from that mentioned in the lease. *Warren v. Lyons* (Mass.) 353

HEIRS. See WILLS, 5.

HIGHWAYS. See also CONSTITUTIONAL LAW, 13.

1. Where a way was originally laid out 3 rods wide, the public is entitled to a way of that width, notwithstanding the wrought part and the part actually used by travelers may have been less than that. The traveled path may also from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out. *Pillsbury v. Brown* (Me.) 94

2. The use of ways, commenced under an actual and recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law, is presumed to be coextensive with the location. *Pillsbury v. Brown* (Me.) 94

3. After the lapse of twenty years, accompanied by an adverse use, a location of a way *de facto* becomes a location *de jure*. *Pillsbury v. Brown* (Me.) 94

4. Benefit to the owner of lands assessed for sidewalk improvements, as well as the necessity or reasonableness of the improvement, is conclusively determined by the Act authorizing the assessment, and will not be inquired into by the courts unless in extraordinary cases presenting a manifest abuse of legislative authority. *Speer v. Athens* (Ga.) 402

5. Assessments of abutting property for sidewalk improvements, not being an exercise of the right of eminent domain, do not fall within the constitutional provision that private property shall not be taken or damaged for public purposes without the previous payment of just and adequate compensation. *Speer v. Athens* (Ga.) 402

6. An abutting property-owner assessed for a sidewalk improvement, who files an affidavit denying the assessment, pursuant to statute making such affidavit returnable to the superior court where the issues are to be tried and determined, as in cases of irregularity, may show fraud or mistake, error or excess, in the amount of the execution, want of statutory authority to support the assessment, or failure to

7. An Act conferring upon city authorities power to construct and improve sidewalks, and to collect the cost out of abutting lands, does not violate the constitutional requirement providing that taxation shall be *ad valorem* and uniform, as such assessments are not taxation within that provision. *Speer v. Athens* (Ga.) 402

8. No action can be maintained against a municipality to recover damages sustained by individuals on account of defects in its streets, in the absence of express statutory provisions imposing liability on it for such defects. *Bates v. Rutland* (Vt.) 863

9. The trustees and street commissioner of a village are public officers, and not agents of the village so as to render it liable for their acts of negligence while engaged in preparing material for the repair of streets, where the village charter constitutes it a highway district of the town in which it is located, and provides that highway taxes shall be paid to the treasurer, to be expended by the village trustees in maintaining the streets, which shall be under the superintendence of a commissioner to be appointed and controlled by the trustees. *Bates v. Rutland* (Vt.) 863

NOTES AND BRIEFS.

Highways; right of public to use of its entire width; right to use not lost by nonuser; widening same; action for trespass on land. 94

Use of streets in municipalities. 100

Who liable for defect; negligence of surveyor. 863

HOMESTEAD. See also ACKNOWLEDGMENT.

1. Under How. (Mich.) Stat. § 7721, a lot and the house thereon may be claimed by a person as a homestead if he resides therein and owns no other property, in compliance with the requirements of the statute, although he uses the property in the business of conducting a hotel. *King v. Welborn* (Mich.) 803

2. A homestead may be claimed in a house and the village lot on which it is situated, although the lot is in extent equal to two lots as the same are platted on the village map, under a statute permitting a homestead exemption to be claimed in a quantity of land not exceeding in amount one lot if situated in a village; and the whole amount may be reserved from sale provided it does not exceed the value permitted by the statute. *King v. Welborn* (Mich.) 803

3. Children who are strangers to him in blood, and who have no natural or legal obligation for support on a debtor with whom they reside, are not members of his family so as to make him a bona fide housekeeper with a family, entitled to a homestead exemption. *Bosquett v. Hall* (Ky.) 851

4. A verbal promise to give security cannot create a mortgage lien upon a homestead. *King v. Welborn* (Mich.) 803

5. No act of a wife, unless amounting to an estoppel or to affixing her signature, can make

6. To make the assignment of a homestead effectual by estoppel, the rate as to both the husband and wife. *Butler* (Minn.)

NOTES AND

Homestead in public land; discharge of lien of law; discharged as to lien of right; power to release rights of claimant and release of; exemption from force of law from trespassers.

Requisites for conveyance of homestead. Meaning of the word "homestead."

Recent decisions under homestead law; separate lots; exemption from lien of insolvent debtor; right of husband to contract by husband alone; lien law; mortgage of; force of law from trespassers.

HUSBAND AND WIFE. See also ACTION OR SUIT, 9; EVIDENCE, 2; OF LAWS, 2; EVIDENCE, 2.

1. The courts are not to set aside a marriage contract void on account of insanity of one of the parties for want of understanding in entering into it, under him or her incapable of understanding. And though such person is some vice or uncontrollable propensity, yet if otherwise sane, and understand the nature and consequences of the marriage contract, a decree of divorce cannot be granted. *Lewis v. Lewis* (Minn.)

2. A contract of marriage is void when brought about by fraud, or by practices, but, as a general rule, by one of the parties of peculiar character, or habits, or health, or other peculiar circumstances, sufficient ground for avoiding the contract. *Lewis v. Lewis* (Minn.)

3. When a husband and wife are partners in business as partners and the wife cannot the ground of coverture. *Y.*

4. Under Ga. Code, § 2611, all property acquired by a husband and wife in and to the wife and married woman may make a contract for the purchase or acquisition of whether she has a separate estate. *Hays v. Jordan* (Ga.)

5. A married woman is not liable for the negligence of a servant hired by her while she is living apart from her husband and is a resident of another State. *(R. I.)*

6. When a husband and wife are partners in business as partners and the wife cannot the ground of coverture. *Y.*

7. A wife claiming that her home was caused by

seeks a divorce on the ground of desertion, sustain her claim by the corroborative evidence of circumstances or of other witnesses. *Herold v. Herold* (N. J.) 696

8. The final test of the sufficiency of ill treatment or extreme cruelty as a cause of divorce is its actual or reasonably apprehended injurious effect upon the body or health of the complaining party. *Waldron v. Waldron* (Cal.) 487

9. Cal. Civ. Code, § 94, defining extreme cruelty as the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage, is not to be accepted as a complete definition of the words "extreme cruelty" as used in § 92, so as to render the mere infliction of grievous mental suffering a cause of divorce. *Waldron v. Waldron* (Cal.) 487

10. That a husband on several occasions, when intoxicated, called his wife vile names in the presence of others, is not sufficient ground for granting a divorce on the ground of extreme cruelty, where the wife was not uniformly kind to the husband and her health was not injured thereby. *Waldron v. Waldron* (Cal.) 487

11. An agreement between a husband and wife who have separated, or who are in contemplation of an immediate separation, for a separate support for the wife, is valid, at least where there is good cause for the separation and the contract therefor does not offend public policy. *Carey v. Mackey* (Me.) 118

12. A decree of divorce which is silent upon the subject does not, of its own force, terminate a prior agreement between the parties for a separate support. *Carey v. Mackey* (Me.) 118

13. Contracts between husband and wife for separate support, which are formal enough to be enforced in equity before divorce, may be enforced at law after divorce. *Carey v. Mackey* (Me.) 118

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Marriage; incapacity to contract; what marriages are void *ab initio*; decree annulling. 505

Husband and wife; cannot bear relation as partners to each other. 593

Agreement of separation; how far a bar to proceedings for divorce. 517

Articles of separation; penal bond; recovery in action on. 118

Divorce for desertion; desertion must be for the statutory period; action on ground of desertion and failure to support; plea of justification of desertion; condonation; consent or acquiescence defeats action. 696

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Married woman, how far bound by estoppel. 97

IMMIGRATION. See ALIENS, 3.

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INCUMBRANCE. See COVENANT, 1, 2

INDICTMENT, INFORMATION, AND COMPLAINT.

1. Several counts stating the same offense in different ways may be joined in an indictment, although some of them charge a felony and others a misdemeanor, where the practice of the State permits conviction of misdemeanor under an indictment for felony. *Horman v. People* (Ill.) 152

2. In an indictment for selling spirituous liquor without a license, under Or. Act 1889, it is not necessary to allege in the indictment that such sale did not take place within an incorporated town or city. *State v. Tamler* (Or.) 853

3. An indictment for reading and publishing the contents of a letter without authority, to be sufficient under N.C. Acts 1889, chap. 41, § 2, must charge that the letter opened and read was sealed, or that its contents were published knowing it to have been opened and read without authority. *State v. Bagwell* (N. C.) 840

NOTES AND BRIEFS.

Indictment; offenses of the same general character may be joined; felonies and misdemeanors may be joined; separate offenses of same class; separate misdemeanors; several counts; counts at common law and under statute; charging acts in single count. 163

Exception in statutory definition of crime to be negated; examples; when indictment need not negative exception; need not negative matters of defense; exceptions in distinct statutes. 853

INFANTS.

NOTES AND BRIEFS.

Infant; care required of. 313

INJUNCTION.

1. Where the action of the majority of the shareholders of a corporation is plainly a fraud upon, or is really oppressive to, the minority shareholders, and the directors and trustees have acted with and formed part of the majority, a suit to enjoin such action may be maintained by one of the minority shareholders suing in his own behalf and in that of all others coming in, to which suit the corporation must be made a party defendant. *Gamble v. Queens County Water Co.* (N. Y.) 527

2. A bill to enjoin a creditor from proving his claim in insolvency proceedings cannot be maintained unless brought under Mass. Pub. Stat. chap. 157, § 15, which does not permit the supervisory jurisdiction of the Supreme Judicial Court of Massachusetts to be invoked in such proceedings until after the question of allowance of the claim has been passed upon by the insolvency court. *Proctor v. National Bank of the Republic* (Mass.) 123

INSANE PERSONS.

A person judicially found to be of unsound mind cannot bring an action for slander in his

wn name, but it must be brought by his guar-
ian, under Iowa Code, § 2569. *Chavannes v.*
Tristly (Iowa) 198

NOTES AND BRIEFS.

Insane persons; examination and confine-
ment. 198

INSOLVENCY AND ASSIGNMENT FOR CREDITORS. See INJUNCTION, 2; INSURANCE, 4.

INSURANCE. See also ACTION OR SUIT, 5;
CORPORATIONS, 25; FRAUD AND FRAUD-
ULENT CONVEYANCES, 1; FLEADING, 7.

1. Ala. Rev. Code, § 1180, prohibiting the
gent of any foreign insurance company from
ransacting any insurance business without first
rocuring a certificate of authority from the
uditor, does not prohibit the transaction with-
n the State by a foreign insurance company of
usiness generally, not in the line of insurance
usiness. *Boulware v. Davis* (Ala.) 601

2. A constructive total loss and abandon-
ment of a ship's cargo will render the insurer
liable on a policy insuring the same, although
t provides that the insurance shall be "free
rom partial loss," at least if the cargo does not
onsist of articles of a perishable nature which
re included, in the common memorandum
ause of the policy. *Mayo v. India Mut.*
ns. Co. (Mass.) 881

3. Fertilizer when constituting a ship's cargo
will not be treated as if included in the common
emorandum clause of a policy insuring it,
hich exempts the insurer from liability for
artial loss in certain enumerated articles of a
erishable nature, among which fertilizers are
ot included, so as to defeat a claim for con-
structive total loss and abandonment. *Mayo v.*
ndia Mut. Ins. Co. (Mass.) 881

4. Jurisdiction of an action by a creditor
r stockholder to wind up the business of an
nsolvent mutual insurance company, and, as
cidental thereto, to grant an injunction re-
taining the continuance of the business and
e disposing of its property, and to appoint a
ceiver, is conferred by Wis. Rev. Stat.
§ 8218, 8219, which apply to mutual as well
s to other incorporated insurance companies.
Oshkosh Mut. F. Ins. Co. (Wis.) 278

5. Statements in an application for insurance,
ncerning the condition or value of the prop-
erty, are immaterial and cannot be fraudulent
here the policy is subject to the statute re-
quiring the insurer to cause a personal exami-
nation to be made, and a full description of the
roperty given, and its insurable value fixed in
e policy. *Queen Ins. Co. v. Leslie* (Ohio) 45

6. A person insured cannot waive the benefit
Ohio Rev. Stat. §§ 8643, 8644, requiring an
nsurance company to have a personal exami-
nation made and full description given of prop-
erty insured, and its insurable value con-
sistently fixed in the policy, as the measure of
covery in case of a total loss. *Queen Ins. Co.*
Leslie (Ohio) 45

7. The neglect or omission of an insurance
ent to make an examination of property in-
red and fix its insurable value, as required by
io Rev. Stat. §§ 8643, 8644, cannot defeat or
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affect the operation of the statute or prevent its
application to the policy. *Queen Ins. Co. v.*
Leslie (Ohio) 45

8. Conditions of a policy in conflict with a
statute making the insurer liable for the amount
fixed in the policy upon which to receive a
premium, as the insurable value of the prop-
erty,—such as stipulations that the amount of
the damage shall be estimated according to the
actual value of the property at the time of the
loss, and that an award of arbitrators shall be
obtained before action can be brought,—are
without binding force. *Queen Ins. Co. v.*
Leslie (Ohio) 45

9. A carriage-house and stable are covered by
insurance on "one two-story frame dwelling
and additions thereto, with shingle roof . . .
used as a dwelling . . . Including the founda-
tion, gas, and water pipes," etc.,—where they
are under the same shingle roof that covers the
dwelling, and are partitioned off only by a
single row of studding, while the second story
is divided by a different arrangement of parti-
tions, and over the carriage-house is a bedroom
occupied by a hired man, which is supplied
with gas and other conveniences, and furnished
like other parts of the house. *Hannan v.*
Williamsburgh City F. Ins. Co. (Mich.) 127

10. A transfer of the equitable title to prop-
erty will avoid a policy of insurance thereon
which provides that it shall become void if any
change takes place in the title or possession of
the property, in a State where the beneficial
interest passes with the equitable title. *Cottin-*
ham v. Firemans Fund Ins. Co. (Ky.) 627

11. A building is vacant or unoccupied,
within the meaning of an insurance policy
which declares that the insurance shall be void
in case it becomes vacant or unoccupied, where
a tenant has moved out, although for the pur-
pose of letting in new tenants who intend to
move in the next day after a fire occurs, and who
have already made some repairs on the house,
but have left nothing in it except two or three
planes. *Continental Ins. Co. v. Kyle* (Ind.) 81

12. Acceptance by the insurer, with full
knowledge of the facts, of the amount due on
a premium note which was overdue and unpaid
at the time of the destruction of a part of the
insured property, will render him liable, under
a policy providing for a suspension of liability
during default in payment of premium notes,
for the amount of the loss already accrued, and
will estop him from claiming either a for-
feiture or that his liability revived from time
of payment and attached only to property not
then destroyed; at least where the entire
premium was thereby paid, and there was no
provision that default in payment should
entitle the insurer to treat the premium as
earned. *Phenix Ins. Co. v. Tomlinson* (Ind.)
817

13. Death produced by accidentally drinking
poison is within the terms of a policy against
death occasioned by violent and accidental
means. *Healey v. Mutual Acc. Assn.* (Ill.) 371

14. Entire destruction of the use of both of
a person's feet by paralysis, caused by an ac-
cidental pistol wound in the back, is within the
provisions of an accident insurance policy pro-
viding indemnity for the loss of "two entire

685
Mut. L. Ins. Co. (Wis.)
15. Death resulting from malignant pustule caused by contact with putrid animal matter containing bacteria of the kind known as "bacilli anthrax" is death from disease, and not from accidental means, within the meaning of a policy insuring against death from external, violent, and accidental means, and which is not to cover death caused by disease. *Stedman v. United States Mut. Acci. Asso.* (N. Y.) 617

16. The fact that the disposition of the balance of the proceeds of a life insurance policy which has been assigned to secure a debt was not absolute, but that payment thereof was directed to be made to the debtor's heirs or to such other person as he should direct, is not alone sufficient to deprive the heirs of such balance, and if the disposition is otherwise sufficient they will take the same in case no other person is designated. *Johnson v. Alexander* (Ind.) 660

17. Failure to pay an assessment by reason of a stroke of apoplexy causing unconsciousness which continues until death will not forfeit a benefit certificate which declares that it shall be void for failure to pay assessments, where it also provides that a member may be reinstated by paying assessment arrearages, "for valid reasons to the officers of the association,"—such as a failure to receive notice of the assessment. *Dennis v. Massachusetts Ben. Asso.* (N. Y.) 189

18. "Valid reasons" for which, under his contract, a person may be reinstated in a benefit association after failure to pay an assessment, are not to be arbitrarily determined by its officers, but their determination is subject to review in the courts. *Dennis v. Massachusetts Ben. Asso.* (N. Y.) 189

19. A by-law of a mutual benefit insurance society requiring the presentation of claims to subordinate officers, and, in case of a decision adverse to the claimant, that an appeal be taken to the governing body of the society, is reasonable and valid, and is not invalidated by a further distinct invalid provision assuming to make the decision on such appeal final and conclusive. *Supreme Council Order of Chosen Friends v. Forsinger* (Ind.) 501

20. A reversal by the proper officers of a masonic lodge as illegal, although after the death of the member, of a vote by which such member was suspended, and his restoration to the rolls as of the date of his apparent suspension, render him a member as though no such vote had ever been passed, so as to create a liability on a certificate of membership in a mutual benefit society providing that membership shall be forfeited by suspension or nonmembership in any masonic lodge. *Connelly v. Masonic Mut. Ben. Asso.* (Conn.) 428

21. A clause in the charter of a benefit insurance society, which attaches the beneficial interest in the insurance to membership in the society, and permits the member to change the beneficiary or payee of the insurance at any time without the latter's consent, does not prevent the making of a contract between the parties by which a vested interest will pass to the designated payee, which will compel the society to recognize him as the one entitled to the

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22. The acceptance, by a member of a mutual benefit association, of a certificate issued for him and in accordance with his directions, will be presumed, although he never signed the blank form of acceptance printed upon its face, where it does not appear that such signature was made in the slightest degree a requisite for showing acceptance. *Luhrs v. Luhrs* (N. Y.) 544

23. The designation of the member's wife as beneficiary in a mutual benefit certificate will give her no absolute right to the money due thereon, of which she cannot be deprived by the substitution in her place of a new beneficiary in accordance with the rules of the association, where such change was provided for by the constitution and by-laws of the society at the time she was originally designated. *Luhrs v. Luhrs* (N. Y.) 534

24. Where a member of a benefit society has complied with all the requirements necessary to effect a substitution of a proper person as beneficiary in place of the one originally designated by him, and has surrendered his certificate to the proper officer of the local lodge for the purpose of having the change made, and all that remains to be done is the purely formal matter of making the change, without a particle of discretion remaining in anyone, the right of the substituted beneficiary attaches, and the new certificate, when issued, will relate back to the time of such surrender, so that his claim will not be defeated by the death of the member before the change is actually made. *Luhrs v. Luhrs* (N. Y.) 534

25. A member of a mutual benefit association may by writing signed by him surrender his benefit certificate, and direct the payment of the benefit to new beneficiaries, and direct a new certificate payable to them, although the writing, mailed to the association just before his death, did not reach it until after that event, and though the original certificate remains with his wife, to whom it is payable and who refuses to surrender it, the application having directed payment to her subject to such future disposal as he might thereafter direct. *Clark v. Hirschl* (Iowa) 841

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Forfeiture of policy for nonpayment of premium. 189

Accident; "accidental" defined; conditions in policy; restrictions as to occupation and employment; death while traveling; while committing public offense; violation of rules of company; death from injuries intentionally inflicted; suicide; voluntary exposure to danger; contact with poisonous substances; external visible sign of injury not essential to recovery. 685

Accident; death from malignant pustule. 617

Accident; death by external, violent, and accidental means; unintended act not within exceptions in policy. 371

Life; policy assignable; assignment by delivery; endowment policy; assignee must have interest in life of insured; assignment as security for debt; policy payable to wife. 660

Fire; effect of transfer of equitable title on policy. 627

Fire; title or interest of insured; forfeiture for sale of insured property; what not a transfer of property. 627

Fire; insurance; forfeiture for nonpayment of premium note; waiver of. 817

Fire; condition against vacancy and nonoccupancy. 81

Marine; right to abandon; time for abandonment; notice of; revocation of; acceptance and effect of; technical total loss. 881

INTEREST. See also CONFLICT OF LAWS, 1; TENDER AND PAYMENT INTO COURT, 1.

1. A legatee's claim to interest is not defeated by the fact that he has caused delay by unjustifiable legal proceedings, embarrassing the executors in the settlement of the estate. *Welch v. Adams* (Mass.) 244

2. Interest on a legacy should be computed at the legal rate, notwithstanding the fact that the funds could not be safely invested by the executors so as to earn that amount. *Welch v. Adams* (Mass.) 244

3. Where a pecuniary legacy is given to a widow in lieu of dower, together with certain productive real estate, to the considerable income of which she is at once entitled, the legacy will not draw interest until after the expiration of the time usually allowed after the death of the testator for the collection of assets; especially where no time for its payment is specified further than that it is to be paid "as soon as convenient" after testator's decease. *Welch v. Adams* (Mass.) 244

4. A partner is entitled to interest on advances made by him to the firm, and on unwithdrawn profits, where for years prior to the time when his right thereto is disputed the custom has been to credit each partner with such interest on the books of the concern, with the knowledge and approval of both, notwithstanding the partnership articles provide that the capital of neither shall be taken to pay interest to the other, and make no provision whatever as to advances and unwithdrawn profits. *Winchester v. Glasier* (Mass.) 424

5. The right of a partner to interest on advances, arising from a long-continued custom of the partnership to allow such interest, cannot be affected by the fact that, without his knowledge, the bookkeeper, in accordance with his interpretation of the partnership articles and with the assent of the other partner, charged back to the respective partners the amount of such interest standing to their credit. *Winchester v. Glasier* (Mass.) 424

6. Interest will not be allowed to a member of a partnership on advances and unwithdrawn profits left with the firm, unless it is provided for in the partnership articles, or is in accordance with the understanding of the parties. *Winchester v. Glasier* (Mass.) 424

7. Advances made by a partner to the concern,

with the understanding that he shall receive interest thereon, will be treated as a loan, and will draw interest until repaid, notwithstanding the prior dissolution of the partnership. *Winchester v. Glasier* (Mass.) 424

8. Where interest at 7 per cent has been credited by partners at their accountings upon advances made by the respective members to the concern, each partner is entitled to receive the amount so found due him; but if the agreement between the partners for interest is not in writing, and remains executory, only 6 per cent can be allowed. *Winchester v. Glasier* (Mass.) 424

9. A surety who has paid more than his share of the debt is entitled, in an action for contribution against his cosurety, to interest on the amount recovered, from the time of its payment, at the legal rate only, although the debt secured bore a higher rate. *Bushnell v. Bushnell* (Wis.) 411

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Interest; allowance of, on accounting between partners. 424

INTERSTATE COMMERCE.

NOTES AND BRIEFS.

Interstate commerce; state power to regulate freights and fares. 754

INTOXICATING LIQUORS. See also BOUNDARIES, 2; CONSTITUTIONAL LAW, 1-4; COURTS, 8; EVIDENCE, 39.

1. In considering Ind. Rev. Stat. 1881, § 2098, prohibiting the sale of intoxicating liquors in quantities less than a quart on the day of any election, the next section, prohibiting sales by druggists upon the day of any state, county, township, primary, or municipal election, is to be taken as showing the meaning of the words "any election." *State v. Hirsch* (Ind.) 170

2. A primary election is within the spirit and letter of Ind. Rev. Stat. 1881, § 2098, prohibiting the sale of intoxicating liquors in quantities less than a quart on "the day of any election." *State v. Hirsch* (Ind.) 170

3. The Legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors; if he sells at all it must be on such terms as the Legislature sees fit to impose. *Tragesser v. Gray* (Md.) 780

4. When a statute makes the granting of a license to sell liquors dependent upon the approval of the applicant by a board of commissioners, no one can demand such license without first obtaining the required approval from the commissioners. *Tragesser v. Gray* (Md.) 780

5. The fact that no provision is made by law for the granting of licenses for the sale of intoxicating liquors upon rivers which form part of the boundaries of a State, and which are within its jurisdiction, does not authorize sales thereon without a license, where it is made unlawful to sell such liquors within the jurisdiction of the State without a license so to do. *Welch v. State* (Ind.) 664

chap. 100, § 25, does not expressly state that the person signing it holds such relationship to the one referred to therein as is required by the statute to render a liquor-seller who, after having received the notice, furnished liquor to such person, liable for the prescribed penalties, it must be shown that he understood—that is, knew or believed—that such relationship existed. *Sackett v. Ruder* (Mass.) 391

7. An affidavit charging a person with the unlawful sale of "beer" contrary to the form of the statute in such cases made and provided is not subject to the objection that it does not charge the sale of malt or intoxicating liquor. *Welch v. State* (Ind.) 664

8. Under Pa. Act May 8, 1854, which authorizes anyone aggrieved to recover damages, against a person furnishing intoxicating drinks to another when intoxicated, for injury to person or property, the father of a son twenty-five years of age, between whom and the son no family relation exists, is not a person aggrieved within the meaning of that Act, so as to be entitled to recover for moneys voluntarily expended by him for medical attendance, nursing, etc., of his son during the illness of the son from injuries sustained by him from a sale of liquor to him when intoxicated. *Veon v. Creaton* (Pa.) 814

9. A father cannot recover for unlawful sale of liquor to his son by reason of his contingent liability for his son's support under the poor-laws on a count of injuries thereby caused, there being no certainty that such liability will ever attach. The contingency is therefore too remote. *Veon v. Creaton* (Pa.) 814

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Intoxicating liquors; sale to inebriate, liability for. 391

Police power of State; state power to regulate; power to restrict sale; constitutionality of license laws; local legislation not unconstitutional; local-option laws; discrimination as to locality, as to persons; State may make traffic in, a criminal offense; prohibitory laws constitutional; special taxation of traffic. 780

Liquor laws of Pennsylvania construed; licensing sale of; license bond required; cancellation of license; effect of city ordinance; Civil Damage Act. 814

JOINT TENANTS AND TENANTS IN COMMON. See also CONTRIBUTION; PARTNERSHIP, 7.

1. Where a devisee who is a tenant in common with other devisees dies leaving a will by which he devises his estate to his niece, the legal title to his undivided interest in the land devised to him passes under his will to the niece. *Simmons v. Spratt* (Fla.) 343

2. A stranger to the common title cannot question the rightfulness of the exclusive possession of one tenant in common as against his cotenants; and where there has been an actual partition, such stranger cannot make the irregularity or invalidity of the partition pro-

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pass, his title, to the extent of his undivided interest, is sufficient to maintain or assert his exclusive possession to the whole land assigned him, or any part thereof. *Simmons v. Spratt* (Fla.) 343

3. Where there has been an actual partition of land among tenants in common, and one of them conveys by metes and bounds a part of that assigned to him in severalty, the grantee has, as to the part so conveyed, the same rights against a stranger to the common title as his grantor had. Though the deed should prove void as to other cotenants, it is good as against the grantor and a stranger to the common title. *Simmons v. Spratt* (Fla.) 343

4. Title cannot be acquired against a cotenant in common at a sale under an incumbrance which was created by the former owner, through whom both parties claim title. *McPheders v. Wright* (Ind.) 176

5. Where one of several reversioners of the equity of redemption of real estate in possession of the life tenant, which is worth considerable more than the amount of the mortgage, purchases the interest of the mortgagee, together with all rights which he has acquired under foreclosure proceedings, and, before the foreclosure is complete, acquires the life interest in the property, he is bound, before he can complete the foreclosure as against his co-reversioners, to notify them of the peril to their interests and give them an opportunity to come in and contribute with him towards a redemption from the mortgage; and in case he fails to do so, and gets title to the property under his foreclosure proceedings, they will be entitled to their proportions thereof upon payment of their shares of the mortgage debt. *Barnes v. Boardman* (Mass.) 571

6. Where a reversioner acquires the life interest in the equity of redemption of real estate after having purchased the interest of the mortgagee in the property, and then forecloses and takes title to the property without notifying his co-reversioners, after which he sells the property to a bona fide purchaser for value, the co-reversioners, upon coming in to redeem, may, if they consent thereto, be given an interest in the fund realized from the sale, instead of in the property. *Barnes v. Boardman* (Mass.) 571

7. Crops grown upon land while it is in the peaceable possession of one of several tenants in common become his individual property when they are, in the due course of husbandry, peaceably and in good faith severed by him from the common estate; and if his cotenants afterwards enter and take away such crops they will be liable in trover for the value thereof. *Le Barron v. Babcock* (N. Y.) 625

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Tenant in common; cotenant cannot purchase outstanding title or incumbrance for his own exclusive benefit. 571

One joint tenant cannot acquire adverse claim by payment of taxes; contribution among cotenants. 740

Right of, to crops; liability to account for
se and occupation. 625

JUDGMENT. See also **COURTS**, 9, 10;
NAME.

1. Reversioners have a right to rely on the proposition that, since the life tenant is entitled to possession of the property, they will be notified if any attempt is made to oust him by which their rights will be affected; and hence records of proceedings against the life tenant alone will not affect them with notice of the acts thereby disclosed. *Barnes v. Boardman* (Mass.) 571

2. A protest made by a stockholder of a corporation at the time of payment by him of the onus required for the privilege of subscribing to new stock issued by it for the purpose of increasing its capital will entitle him to no advantage from a decree in a suit to which he was not a party, brought by other stockholders to restrain the increase of the capital or to compel the issuance of stock to them upon payment of its par value only, although such decree requires the stock to be issued to complainants at par, and provides for a refunding of whatever bonus payments may have been made by them under protest. *De La Ouesta v. Ins. Co. of North America* (Pa.) 681

3. A widow who is made a party to a suit in which a mortgage upon her deceased husband's lands is foreclosed cannot, in a subsequent suit, set up any title to the land which she acquired before the foreclosure decree was rendered, although she did not appear or answer in the foreclosure suit. *Bailow v. Boler* (Ind.) 481

4. A landlord will not be bound by the result of a suit to which he was not a party on the record, instituted by his tenant, unless it very clearly appears that the action was instituted by him and that he conducted and controlled the litigation after it was begun. *Wilson v. Brookshire* (Ind.) 792

5. Relief from a judgment rendered against a person upon the unauthorized appearance of an attorney in his name is to be sought through direct application to the court by motion in the action in which such appearance was entered, in the absence of special circumstances which may render such remedy inadequate or incomplete. *Vilas v. Butler* (N. Y.) 844

6. An unauthorized appearance by an attorney on behalf of a nonresident of a State, in a suit against the latter in a court of such State, is not binding upon the defendant, and if the suit is brought and carried to judgment without either personal service of process upon the nonresident or his having been within the jurisdiction of the court during the pendency of the proceedings, he may attack the judgment or want of jurisdiction. *Vilas v. Butler* (N. Y.) 844

7. Delay of about seven years on the part of nonresident defendant against whom a judgment has been rendered upon the unauthorized appearance of an attorney in his name, after receiving notice of the judgment, before applying to have it set aside, is not such laches as will preclude his obtaining relief, where the parties opposing it acquired their rights with full knowledge of the facts and have made no pre-

judicial change in their situation because of such laches, while the judgment has been reversed as to defendants in the action situated similarly to the nonresident defendant who is applying for the relief. *Vilas v. Butler* (N. Y.) 844

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JURY. See **TRIAL**, 1.

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Juror; right of peremptory challenge. 891

Juror cannot impeach his own verdict. 820

LACHES. See **CONTRACTS**, 85.

LANDLORD AND TENANT. See also **APPEAL AND ERROR**, 2; **DAMAGES**, 5; **FIXTURES**, 1; **GUARANTY**.

1. The surrender of the leased premises by a tenant to his landlord after taking an appeal from the decision of a circuit court commissioner adjudging restitution of the property to the landlord because of the forfeiture of the tenant's contract will have no effect upon the appeal; such surrender does not amount to a satisfaction of the judgment of restitution so as to leave nothing to appeal from. Nor is it an admission that the tenant was wrongfully in possession when the suit was brought. *Hanaw v. Bailey* (Mich.) 801

2. Where one person leases to another for a fixed term a farm upon the agreement that it shall be worked in a good and workmanlike manner, and inserts in the lease a provision that in case the lessee does not do the work properly the lessor may have it done at the cost of the lessee, and strikes out from the blank upon which the lease is written a clause permitting a re-entry for breach of covenants, the lessee cannot be turned out of possession before the expiration of his term because of failure to properly work the farm. *Hanaw v. Bailey* (Mich.) 801

3. A tenant in possession, under a lease which does not provide that he may remove his fixtures and improvements, cannot, after he has surrendered possession to his landlord, re-enter and remove his fixtures. *Friedlander v. Hewitt* (Neb.) 700

4. A creditor, by the levy of an execution upon a tenant's fixtures, acquires no greater rights therein, or to remove the same, than the tenant had. *Friedlander v. Hewitt* (Neb.) 700

5. That a lessee has cut down two or three scrub trees which shaded the garden, and permitted a family with which he boarded to occupy the house on the leased premises for the purpose of caring for them, is not a breach of covenants in the lease against committing waste

and subletting, of which the lessor can avail himself after the lessee has tendered the purchase price for the premises in accordance with an agreement in the lease giving him an option to purchase them. *Sanders v. Bryer* (Mass.) 265

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Landlord and tenant; right of tenant to remove fixtures; cannot remove after the expiration of the term; effect of acceptance of new lease. 700

Tenancy with rent payable in produce, duty of tenant; proceedings to eject tenant. 801

Summary proceedings to oust tenant, notice in; agreement by landlord to keep premises in repair. 798

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Contract of lease as conditional sale. 878

LIBEL AND SLANDER.

1. A red envelope sent through the mails indorsed for return to an organization "for collecting bad debts," these words being in very large type so as to attract special attention, constitutes a libel. *Muetz v. Tuteur* (Wis.) 86

2. Communications sent to the members of an organization to compel delinquent debtors to pay up, showing the name of a debtor on the delinquent list, are libelous and not privileged, where the object is not to protect members from trusting such debtors, but merely to aid them in coercing payment, and the members of the association are not interested in the communications in any other way than to make their own debtors pay up. *Muetz v. Tuteur* (Wis.) 86

3. A member of an organization for the collection of bad debts is liable for libelous communications by the association which are sent for him and in his behalf, where he sets the proceedings in operation. *Muetz v. Tuteur* (Wis.) 86

4. The following words: "'Tis now almost forgotten that Governor Harvey pardoned his own brother out of the penitentiary. The convict Harvey had been sent to Lansing from Salina,"—published in a newspaper, if false, are, under the facts and circumstances surrounding this case, libelous. *State v. Brady* (Kan.) 606

5. To constitute criminal libel, it is not necessary that the alleged libelous article reflect upon the conduct of any particular person, but if directed against a family, it is libelous. *State v. Brady* (Kan.) 606

6. In prosecutions for libel, it is not necessary to prove express malice, where the alleged libelous article is libelous *per se*. *State v. Brady* (Kan.) 606

7. A newspaper publication charging that a breach of promise suit is threatened to be brought against a married man is libelous *per se*, its tendency being to disgrace him and to bring him into ridicule and contempt. *Morey v. Morning Journal Assn.* (N. Y.) 621

8. A privilege as to a communication by a commercial agency to those persons who are interested in obtaining the particular information and to whom it is furnished upon special

request does not extend to false communications made to patrons who have no such interest in the subject matter. *Pollasky v. Minchener* (Mich.) 102

9. Express malice may be inferred by a jury where a notification sheet containing false statements as to a chattel mortgage is sent out to the patrons of a commercial agency, advising caution in dealing with a party and prompt action on the part of creditors, although the correspondent who sent the information merely advised caution in dealing, and the agent who made the report to be sent out knew that the information was incorrect in one particular at least, because there was no such bank as that to which it was said that the mortgage was given, and, notwithstanding a request to the correspondent to investigate the matter and report further, the publication was made without waiting for the result thereof, and when it would seem that plenty of time had elapsed to ascertain the truth. *Pollasky v. Minchener* (Mich.) 102

10. The liability of the general manager of a commercial agency in a certain district for a false publication in respect to a chattel mortgage alleged to have been given by a certain party should be submitted to the jury where the publication was made by a notification sheet sent to the patrons of the agency by the chief clerk of such manager, on information sent to the manager addressed to him in his name, without anything to indicate that it was intended for the commercial agency, and the clerk, who was authorized to open his letters and prepare such notification sheets without consulting the manager unless there was something exceptional in connection with the matter, sent out the report without consulting him. *Pollasky v. Minchener* (Mich.) 102

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Libel and slander; libel defined; license of the press, restriction; false and malicious publication; reputation of tradesmen and business men; words tending to bring one into disgrace, ridicule or contempt; imputing criminal act, corruption and dishonor, or want of chastity. 621

By mercantile agencies; what constitutes; presumption of malice; by newspaper; who liable for. 103

Statements of mercantile agencies; how far privileged. 86

LICENSE. See also **COMMERCE**; **CONSTITUTIONAL LAW**, 14; **TAXES**, 1.

1. A city ordinance empowering the city council "to license and tax all exchange, loan, and brokers' offices, agencies of insurance offices . . . within the city," gives the power to compel each agent to pay the tax for each company represented by him. *Simrall v. Covington* (Ky.) 556

2. The imposition of a license tax upon insurance agents and solicitors representing any insurance company not located within the city is invalid because unequal, unjust and partial. *Simrall v. Covington* (Ky.) 556

3. The grant to a city of authority to regulate the vending of meats, etc., justifies the

imposition of such fees and charges as will cover the expense of inspecting the articles offered for sale and of police supervision of the business. *Jacksonville v. Ledwith* (Fla.) 69

4. The municipality of Jacksonville, Florida, has no power to select the subjects of occupational taxes for raising revenue, but is limited to the occupations named in its charter or the revenue laws of the State. *Jacksonville v. Ledwith* (Fla.) 69

5. Upon licensing a market in a municipal corporation a sufficient fee may be charged to cover, not only the necessary expense of issuing the license, but also that of the additional labor of officers and other expenses imposed upon the public by the business. *Jacksonville v. Ledwith* (Fla.) 69

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License; as a tax; validity of; municipal licenses. 786

LIENS. See also **PRINCIPAL AND SURETY**, 3; **SALE**, 4.

1. A coal mine is an "improvement," within the meaning of Ala. Code 1886, § 8018, giving a lien on buildings or improvements for materials, fixtures, or machinery. *Central Trust Co. v. Sheffield & B. C. I. & R. Co.* (C. C. N. D. Ala.) 67

2. Coal cars, which are a necessary part of a coal mine, are "materials," if not "fixtures" or "machinery," within the meaning of Ala. Code 1886, § 8018, giving a lien for materials, etc., upon a building or improvements. *Central Trust Co. v. Sheffield & B. C. I. & R. Co.* (C. C. N. D. Ala.) 67

3. A mechanics' lien is not enforceable against a house and lot held by a town for the use of a public school, unless the statute expressly allows it. *Hovey v. East Providence* (R. I.) 156

4. A mechanics' lien on premises of a married woman for the erection of a building under a personal contract with her husband, whom the contractor supposed to be the owner, cannot be claimed under Conn. Gen. Stat. § 8018, on the ground that the building was erected with her "consent," where she has consented to the erection of the building on the husband's express agreement to pay the expense thereof. *Huntley v. Holt* (Conn.) 111

5. Under Pa. Act June 16, 1886, a claim for a mechanics' lien on an oil refinery sufficiently describes the property, which states the name of the refinery, and describes the lot on which it is situated by metes and bounds, with the number of acres, and refers to a map attached which shows the exact location of the refinery, its tanks, buildings, stills, etc., with the various pipe connections as used in the refinery. *Linden Steel Co. v. Imperial Ref. Co.* (Pa.) 863

6. To support a mechanics' lien under Pa. Act June 16, 1886, against an oil refinery, it is not necessary that every part and appliance of the refinery should appear in the claim, but there should be such reasonable certainty of the description as will clearly identify the subject of the lien. *Linden Steel Co. v. Imperial Ref. Co.* (Pa.) 863

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7. An amendment of a claim for a mechanics' lien, allowing leave to file an index explanatory of the map attached to the statement of the claim, is properly allowed. *Linden Steel Co. v. Imperial Ref. Co.* (Pa.) 863

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Liens; priority of. 481

Liens; payment of another's debt creates no equitable lien. 178

LIFE TENANTS.

1. Where a member of a joint-stock association organized for dealing in land, whose interest therein is purely personal estate consisting of a right to share in the profits and to an account of assets, devises his estate to trustees, with directions to pay the income to one for life, and after his death to pay the principal to another, dividends received by the trustees out of profits made by the association after testator's death are income and go to the life tenant, and not to the remainderman. *Re Oliver's Estate* (Pa.) 421

2. Profits made by a joint-stock association formed for the purpose of dealing in land, by a sale of land at a greatly increased price because of the discovery therein of mineral ore after the death of one of its members, whose interest consisted simply of a right to share in profits and to an account of assets, will be held to have accrued after such member's death, and will belong to the income, and not to the principal, of his estate, notwithstanding the land was bought during his lifetime. *Re Oliver's Estate* (Pa.) 421

LIMITATION OF ACTIONS. See also **CONTRACTS**, 85.

1. The right to enforce an obligation for a life support is not barred by the mere neglect, for any length of time, to take the benefit of the provision. *Coleman v. Whitney* (Vt.) 517

2. A law taking a certain class of cases out of the operation of the Statute of Limitations, which had previously been within its provisions, can have no effect on rights acquired under the statute previously to the passage of such law. *Attorney-General, Mann, v. Revere Copper Co.* (Mass.) 510

3. The statute which provides that action for relief against frauds shall be brought within six years does not apply to an action brought to procure the cancellation of a sheriff's deed of land sold under a judgment which had been purchased and held by one who, acting under a trust, had collected funds for its satisfaction, to such purchaser, and to remove the incumbency of the judgment from the property. *Wilson v. Brookshire* (Ind.) 793

4. The six years' Statute of Limitations is not available on behalf of a trustee who, with funds in his hands for the payment of a judgment against real estate of the beneficiary, purchases such judgment and has it assigned to himself, to defeat a suit by the beneficiary for its cancellation. *Wilson v. Brookshire* (Ind.) 793

5. An action by a surety who has paid more than his proportion of the debt, against his

applicable to such actions, and is not brought within the statute applicable to equitable actions by the fact that an equitable action may be maintained for contribution in a proper case. *Bushnell v. Bushnell* (Wis.) 411

6. The right of action of a surety who makes partial payments on the debt secured, upon the liability against his cosurety for contribution, commences to run as to each payment from the time he pays the creditor more than his proportion of the debt. *Bushnell v. Bushnell* (Wis.) 411

7. The Statute of Limitations does not begin to run against the claim of a shipper to recover back excessive payments of freight charges so long as he has no knowledge of his rights, owing to the fraudulent concealment of the cause of action by the carrier. *Cook v. Chicago, R. I. & P. R. Co.* (Iowa) 764

8. The commencement of an action by a substituted service, in accordance with the requirements of N. Y. Code Civ. Proc. §§ 485-487, of the summons which has been delivered to the sheriff for service before the cause of action has become barred by the Statute of Limitations, will prevent a plea of the statute from defeating the action, if such service is made within the time prescribed by N. Y. Code Civ. Proc. § 899, providing that the attempt to commence an action by delivering the summons to a sheriff for service shall be equivalent to its commencement so far as the Statute of Limitations is concerned, provided the action is actually commenced within a certain time thereafter, although that section mentions as a means of commencing the action only personal service and service by publication. *Clare v. Lockard* (N. Y.) 547

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Limitation of actions; parol trust; when barred; effect of fraud. 287

LOCAL GOVERNMENT. See; CIVIL SERVICE.

LOGS AND LOGGING. See EVIDENCE, 4.

MAIL. See INDICTMENT, ETC., 3.

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Mail carrier; right to recover damages for injuries received by reason of defects in property where he goes to deliver mail. 640

MAINTENANCE. See ASSIGNMENT, 3.

MARKETS. See also MUNICIPAL CORPORATIONS, 5, 7-9.

1. A market authorized to be established and regulated by the Jacksonville Municipality Act (Fla. Stat. 1887, chap. 8775) is a place to which the public may resort for selling and buying certain articles exposed for sale in stalls, for the use of which toll may be charged, and for whose government reasonable regulations may be prescribed. *Jacksonville v. Ledwith* (Fla.) 69

2. Regulations restricting to public markets the sale of articles falling within the police

Jacksonville v. Ledwith (Fla.) 69
3. A license to a person to sell meats or other thing named in a city is not the grant of a right to maintain a market, within the meaning of a statute authorizing the establishment and regulation of markets. *Jacksonville v. Ledwith* (Fla.) 69

4. A market is not a "privilege," within the meaning of the Act establishing the municipality of Jacksonville, Florida, and giving the city power to levy and collect taxes for revenue purposes upon all property or privileges taxable for state purposes, but is a franchise or technical privilege which is not taxable by the city for revenue purposes. *Jacksonville v. Ledwith* (Fla.) 69

5. Authority given to a municipal corporation to establish and regulate markets implies power to purchase or provide a site, erect necessary buildings and stalls, and to adopt reasonable regulations for the government of the market and business transacted thereat. *Jacksonville v. Ledwith* (Fla.) 69

6. Under the grant to a city of authority to regulate the sale of meats, etc., by ordinance, sales may be confined to particular places, providing this is done by impartial and general regulation affording the same rights to all alike upon the same conditions. *Jacksonville v. Ledwith* (Fla.) 69

7. The power of a municipality to establish markets implies authority to change their location when essential to the convenience of the community. *Jacksonville v. Ledwith* (Fla.) 69

8. An appropriation for another purpose, by a municipal corporation, of a building constructed or rented principally to provide a market-house, does not render the erection or renting of the building illegal. *Jacksonville v. Ledwith* (Fla.) 69

NOTES AND BRIEFS.

Markets; regulation of, and market-houses. 69

MARRIAGE. See HUSBAND AND WIFE, BRIEFS AND NOTES.

MARSHALING ASSETS.

1. On foreclosure of a vendor's lien covering an entire tract of land, one having a subsequent lien on a portion of the tract to indemnify him against liability as a surety, whose lien has not become liquidated and absolute by default of his principal, is not entitled to have the value of such portion ascertained by the decree, to the end that it be decreed to pay only its proportion of the lien as between him and other sublienors. *Gridley v. Brookwaterfield Co.* (Ky.) 555

2. A sublienor of a portion of an entire tract of land foreclosed under a prior lien covering the entire tract, whose lien, which is to secure a contingent liability, becomes liquidated and absolute subsequent to the decree and pending the question of contribution among sublienors, may plead that fact and have the value of the portion covered by his lien determined by a further decree, to the end that it shall be de-

creed to pay only its proportion of the lien foreclosed. *Gridley v. Brooks-Waterfield Co.* (Ky.) 555

MASTER AND SERVANT.

1. It is the duty of the employer to furnish his employé a reasonably safe place in which to work, and with reasonably safe appliances and apparatus; but the employé takes the risk of a more hazardous method, if he knows the danger and enters on the employment. *Sweet v. Ohio Coal Co.* (Wis.) 861

2. Where an employé knows that machinery or appliances are defective or dangerous, and continues his employment without objection or complaint, he assumes the risk of the danger, and waives any claim for damage against his employer in case it shall result in injury to him. *Sweet v. Ohio Coal Co.* (Wis.) 861

3. An employé, who works near a long, steep, and irregular stairway, without railing, which he is called upon to go up and down, and which was intended for employées, is chargeable with knowledge of the obvious defects in the stairway, and cannot recover of his employer for damage to himself by reason of such defects. *Sweet v. Ohio Coal Co.* (Wis.) 861

4. A railroad company is liable for injuries received by one of its brakemen in consequence of the negligence of its car inspector in permitting a foreign car to come upon its road in a defective and unsafe condition. *International & G. N. R. Co. v. Keenan* (Tex.) 703

5. A railroad company is not liable for injuries resulting to one of its locomotive firemen by reason of the negligence of the engineer upon the same engine, unless the company exposed the fireman to unusual and unnecessary risks, or retained the engineer in its service knowing that he was unfit or incapable, since the engineer and fireman are fellow servants within the rule exempting the employer from liability for injuries resulting from the negligence of fellow servants. *Hobbs v. Atlantic & N. O. R. Co.* (N. C.) 838

6. A railroad company cannot be held liable for injuries to adjoining property-owners from negligent performance by a third person of his contract to burn the brush growing upon its right of way, when such burning, if carefully done, would have caused no injury. *St. Louis, I. M. & S. R. Co. v. Yonky* (Ark.) 604

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Master and servant; degree of care required of master in furnishing tools to servant. 861

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Liability for negligence of independent contractor. 604

MAXIMS.

1. Causa proxima, non remota, spectatur. *Louisville, N. A. & O. R. Co. v. Nitsche* (Ind.) 750

2. Ex dolo malo non oritur actio. *Sullivan v. Hergan* (R. I.) 110

3. Legal maxims are not to be followed with rigid strictness, but it is the duty of the court to 9 L. R. A.

ascertain and give effect to the spirit of the principle which they dimly indicate but do not fully express. *Louisville, N. A. & O. R. Co. v. Nitsche* (Ind.) 750

4. Potior est conditio defendentis. *Sullivan v. Hergan* (R. I.) 110

MECHANICS' LIEN. See LIEN.

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Mechanics' lien; public buildings not subject to lien law. 156

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MERCANTILE AGENCIES.

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MONOPOLY.

NOTES AND BRIEFS.

Monopoly; validity of. 83

MORTGAGE. See also FIXTURES, 2, 3; JUDGMENT, 3; TENDER AND PAYMENT INTO COURT, 3-5.

1. A paper made for a deed of trust conveying land to secure a debt, signed by the grantor, but without a seal, though not effectual as a deed of trust at law, is an equitable mortgage enforceable in equity, and may be recorded under W. Va. Code, chap. 74, § 4, and when recorded is a valid lien against subsequent purchasers and creditors. *Atkinson v. Miller* (W. Va.) 544

2. There is no breach of a mortgage given for a life support, until an application for such support and a failure to furnish it. *Coleman v. Whitney* (Vt.) 517

3. While the remainderman of mortgaged land acquiesces in a sale thereof under the mortgage, at which the title was acquired by the life tenant for much less than the real value of the property, a contract between the life tenant and a third person, by which the former was enabled to secure the property so cheaply because of the latter's agreement not to bid at the sale, in consideration of the execution to him of a mortgage on the property after it should be secured, cannot be assailed by the remainderman in a suit to foreclose the latter mortgage; the remedy is by application to set aside the first foreclosure sale. *Hopkins v. Ensign* (N. Y.) 731

4. No relief can be had against the officer who made a foreclosure sale, upon the ground of his neglect of duty in reference thereto, in a suit brought to redeem the property therefrom. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

5. Improvements cannot be made by a mortgagee in possession at the expense of redemptioners. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

6. Tender of the amount due a senior lienholder in possession of his debtor's property

under a judicial sale is excused in favor of a junior lienholder seeking to redeem the property, where the former has money in his hands exceeding the amount of his claim, which he is equitably bound to apply in discharge thereof. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

7. A junior mortgagee, who is made defendant to a suit to foreclose the senior mortgage, and whose lien is provided for in the decree, which directs a sale of the property and a distribution of the proceeds among all the lienholders in the order of priority, cannot redeem from the sale under statutes which do not permit a judgment creditor to redeem from his own sale. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

8. Where a firm consisting of two partners, being the owners of horses, executed a chattel mortgage on them to plaintiff, which was duly filed, and afterwards one of the partners sold his interest in the horses to the other, and received from him a chattel mortgage on them to secure the purchase money, and died before the time for renewing the first mortgage, and, after the time for renewing it, his administrator took the horses under the latter mortgage, the plaintiff, although he neglected to renew his mortgage by filing the affidavit to renew the same, required by Wis. Rev. Stat. § 2315, may recover the horses of defendant after a demand and refusal, although creditors had filed claims with him against the estate of his intestate; such recovery being subject to the right of the surviving partner, or of the defendant, as administrator, to redeem them from plaintiff's mortgage, by paying the debt it was given to secure. *Ullman v. Duncan* (Wis.) 688

9. Under Wis. Rev. Stat. § 2815, which provides for renewing chattel mortgages, the only effect, as to creditors, of a failure to renew a chattel mortgage, is to render it invalid as against such creditors of the mortgagor as obtain liens upon the property after the time expires to renew the mortgage. *Ullman v. Duncan* (Wis.) 688

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Redemption after foreclosure; allowance for improvements; tender essential to redeem; time allowed for; by junior incumbrancer; notice; effect of want of; right of senior mortgagee to disbursements; accounting. 676

Setting aside sale. 731.

MOTION.

An order for publication of notice to a non-resident may be entered *nunc pro tunc* if no final judgment has been entered in the cause and such entry is necessary to conform the record to the fact. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

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MUNICIPAL CORPORATIONS. See also BONDS, 6; BRIDGES, 1; LICENSE; MARKETS, 1, 3, 5-8; PARLIAMENTARY LAW.

1. Where a city charter prescribes the manner of passing, and the number of city council necessary to pass, ordinances, an ordinance passed under the charter authority in any other manner is void. *Jacksonville v. Ledwith* (Fla.) 69

2. That the penal provision for the enforcement of an ordinance imposing an occupation tax is void does not invalidate the remainder of the ordinance. *Magenau v. Fremont* (Neb.) 786

3. A city ordinance providing punishment for the maintenance of a nuisance is not invalid or unconstitutional because the general statutes of the State provide for the punishment of like offenses. *People v. Detroit White Lead Works* (Mich.) 722

4. A city ordinance providing that eight hours' labor constitutes a legal day's work, where performed under a contract of the city, and that anyone who under such contract demands, receives, or contracts for more than eight hours' labor in one day from any person, or who employs Chinese labor, shall be guilty of misdemeanor and punished by fine,—is an attempt to prevent certain parties from employing others in a lawful business, and is therefore unconstitutional and void. *Re Kuback* (Cal.) 483

5. A grant to a municipal corporation of power to regulate by ordinance the vending of certain articles of diet gives authority to prescribe by ordinance reasonable times and places of their sale, and to prohibit their sale elsewhere. *Jacksonville v. Ledwith* (Fla.) 69

6. An ordinance amending a section of a former ordinance, providing that such section "shall read as follows," stating the provisions, becomes the entire section; and anything omitted therefrom which was in the original section is repealed. *Jacksonville v. Ledwith* (Fla.) 69

7. Where the language of a statute authorizing an exercise of the police power is so broad as to include things which are not, as well as those which are, subjects of the power, the exercise of such power will be confined to things which are legally the subjects of the power. *Jacksonville v. Ledwith* (Fla.) 69

8. The police power of States to establish and regulate markets, conferred by a State upon municipal corporations, renders it competent for such corporations, if the authority delegated is sufficient, to prohibit the sale of such articles as are within the exercise of the police power and usually sold at markets, elsewhere than at a duly established market. *Jacksonville v. Ledwith* (Fla.) 69

9. Under a grant to a municipal corporation of power to regulate by ordinance the vending of certain articles of food, sales may be restricted to markets duly established by ordinance. *Jacksonville v. Ledwith* (Fla.) 69

10. The grant to a city of authority to regulate the vending of meats, etc., does not give power to tax, for purposes of revenue, the oc-

supation of vending any of the named articles. *Jacksonville v. Ledwith* (Fla.) 69

11. The power to borrow money is not incident to municipal corporations, and to exist it must be granted by express legislation, or it must be supported by a legislative investment of power, coupled with the imposition of duties which are incapable of exercise and performance without the borrowing of money. *Allen v. La Fayette* (Ala.) 497

12. Municipal corporations may create debts in the accomplishment of any object clearly within their power and reasonably essential to the attainment of their charter purposes, and such debts may be evidenced by the drawing of warrants therefore upon disbursing officers in favor of the creditors. *Allen v. La Fayette* (Ala.) 497

13. A municipality which has received the benefit of money borrowed by municipal officers and applied to an authorized purpose is liable to the lender on an implied contract to repay the money. *Allen v. La Fayette* (Ala.) 497

14. Municipal authorities empowered by charter to purchase and hold, for the benefit of the town, property to a certain value, and to maintain public schools, and to this end, as well as to defray ordinary expenses of municipal government, to levy an annual tax, are authorized to purchase a schoolhouse on credit and to give warrants therefor. *Allen v. La Fayette* (Ala.) 497

15. Where general laws place the duty of constructing drains and sewers on municipal officers, such officers in the performance of such duty act as public officers, and not as agents of the municipality; and the municipality cannot be held liable for injuries resulting from their negligence. *Bulger v. Eden* (Me.) 205

NOTES AND BRIEFS.

Municipal corporations; power to borrow money. 497

When not liable for acts or omissions of officers or agents; instances; injuries resulting from accident; municipality liable only for its own negligence. 205

Construction of ordinances imposing license tax. 786

NAME.

The record of a general judgment against William M. is not constructive notice of one against H. W. M., so as to render it a lien upon his real estate after it has come into the possession of a remote grantee, who purchased bona fide, for value, and without notice, further than that furnished by the record, that H. W. M. and William M. were one and the same person. *Johnson v. Hess* (Ind.) 471

NEGLIGENCE. See also RAILROADS, 1, 2; TELEGRAPH COMPANIES, 2.

1. Negligent failure on the part of one navigating public navigable water to see and avoid a fishing net set therein, when he could have done so without detriment to the prosecution of his voyage, will render him liable for the in-

juries he occasions to the net. Maliciousness or wantonness in running upon the net is not necessary to a right of recovery. *Wright v. Mulvaney* (Wis.) 805

2. It is not negligence as matter of law for the owner of a fishing net set in a public navigable water, from which he is engaged in taking fish, to fail to warn an approaching vessel of the existence and situation of the net, so as to prevent a recovery from the owner of the vessel for injuries done by its running through the net. Whether or not such failure is negligence is a question for the jury. *Wright v. Mulvaney* (Wis.) 807

3. To entitle one to recover damages for injuries received in falling into an elevator well on another's premises, in an action in which he relies solely on the common-law counts, he must offer evidence which will justify the jury in finding that he entered such premises by some invitation or authority from the latter, that he was injured in so doing by some want of due care, for which the latter is responsible, in the construction or management of the portion of the premises which he was authorized to use, and that he himself was in the exercise of due care. *Gordon v. Cummings* (Mass.) 640

4. The maintenance, by tenants of the upper stories of a building, of boxes for the reception of their mail in a lower hallway thereof, which is entirely under the control of the owners of the building, will authorize the jury to find that a letter carrier who enters the hallway for the purpose of placing mail in the boxes does so by the implied invitation of such owners; and it is immaterial that the building is used for workshops and that there are no offices in it. *Gordon v. Cummings* (Mass.) 640

5. Leaving open, unguarded, and unlighted after dark the entrance from a street to an elevator well, which is of the same general appearance as the entrance to a hallway leading into the building, from which it is separated by a post only a foot wide, will justify a jury in finding the owners of the building, who have control of the elevator, guilty of negligence, in an action against them for damages by one who falls into the well while rightfully seeking to enter the building, although his business is with a tenant occupying another part of the building. *Gordon v. Cummings* (Mass.) 640

6. Millowners who have permitted their unenclosed and publicly situated millyard to be used for a playground by children, who have been accustomed to play upon the pile of furnace ashes which have for months been cold and devoid of danger, cannot make an excavation therein and fill it with hot ashes, leaving no traces of the change, without either giving proper notice thereof, or answering in damages if children of tender years, in attempting to go upon the ash-pile as usual, get into the hot ashes and are injured. *Penso v. McCormick* (Ind.) 813

7. A person familiar with the premises is not guilty of negligence as matter of law in falling into an elevator well by the side of the entrance to a building, into which he was attempting to go, if the place was dark and the entrance to the elevator well, which was usually guarded by a gate or chain, was at the time unprotected,

and he, after stepping upon the sill, felt for obstructions, and, finding none, concluded he was in the right place and took the next step, which precipitated him to the bottom of the well. *Gordon v. Cummings* (Mass.) 640

8. The negligence of the driver of a stage coach will not be imputed to his passenger, who has no control over him or the management of the coach, so as to defeat an action on behalf of the passenger against a third person to recover damages for an injury resulting from the joint negligence of the driver and the third person. *Becke v. Missouri P. R. Co.* (Mo.) 157

9. The negligence of the custodian of a child too young to be capable of caring for itself, in permitting it to go improperly attended upon a public street, will be imputed to the child in a suit by it to recover damages for injuries inflicted upon it while there, through the negligence of a third person. *Casey v. Smith* (Mass.) 259

10. Permitting a child three years old to go upon a public street crowded with vehicles to await the coming home of its father, which is not expected for at least fifty minutes, accompanied only by its brother between seven and eight years old and its sister about five years old, is such negligence as will preclude a recovery of damages by the child in case it is run over and injured by a third person, the circumstances being such that an adult in its place would have escaped unhurt. *Casey v. Smith* (Mass.) 259

NOTES AND BRIEFS.

Negligence; basis of liability for; property-owner owes no duty to trespasser or to licensee; effect of contributory negligence; accidents at elevator shafts. 640

Liability for placing danger in the way of a child. 818

Liability of property-owner to mail carrier injured by defect in property. 640

Person approaching railroad track; failure to look and listen. 521

Negligence of driver not imputed to passenger; duty of railroad company as to travelers on highway; warning on approach to crossing; statutes of various States construed; high rate of speed; degree of care required of traveler; reckless assumption of risk; contributory fault defeats recovery; rule in Missouri. 157

Imputed to child. 259

NEGROES. See CIVIL RIGHTS

NEWSPAPERS.

NOTES AND BRIEFS.

Newspapers; who liable for publication of libel by. 108

Sunday editions; validity of. 821

NEW TRIAL.

1. Where an action embracing a substantive cause in which a new trial as matter of right is not allowable, as well as other causes in which such new trial is allowable, proceeds to 9 L. R. A.

judgment, the former cause will control and warrant the refusal of a second trial. *Wilson v. Brookshire* (Ind.) 792

2. Testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity, or misconduct of the jury, or of some one or more of the panel. *Murphy v. Murphy* (S. D.) 820

3. Even a mistake in the nature of a clerical error in the verdict of the jury cannot be proved by testimony of the jurors. *Murphy v. Murphy* (S. D.) 820

4. An objection that the verdict did not contain a separate valuation of the articles taken cannot be raised for the first time on a motion for new trial by the defendant in an action of replevin, against whom a verdict has been returned which is sufficient to support the judgment rendered. *Hobbs v. Clark* (Ark.) 526

5. When facts found are not sustained by the evidence, the question is properly brought before the court for review by a motion for new trial, and not by a motion to strike out portions of the finding. *Tarkington v. Purvis* (Ind.) 607

NOTICE. See also BRIDGES, 2; TAXES, 24-26; WRIT AND PROCESS.

When a tenant is in the actual possession of real estate, at the time it is sold by the landlord, the purchaser is chargeable with notice of the rights of the tenant. *Friedlander v. Hewitt* (Neb.) 700

NOTES AND BRIEFS.

Notice; publication of; entry *nunc pro tunc*. 676

NUISANCES.

1. The rule that no length of time will legalize a nuisance is not applicable to a case where the nuisance is a public one consisting simply of an invasion, by adverse use, of the rights of the public in regard to the enjoyment of property in the way in which a private owner would ordinarily enjoy it, there being a statute which permits the acquisition by disseisin of a complete title against the State. *Attorney-General, Mann, v. Revere Copper Co.* (Mass.) 510

2. If one carries on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages therefor. *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 711

3. Devoting real estate to uses which produce destructive vapors and noxious smells, and which result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood, is not reasonable under the maxim, *Sic utere tuo ut alienum non laedas*. *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 711

4. The existence of negligence is not essential to the maintenance of an action against the proprietor of a business which is in and of itself a nuisance, to recover for injuries resulting to third persons from the conducting of it. *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 711

5. A statute authorizing in general terms the creation of corporations for manufacturing and supplying illuminating gas will not exempt a corporation organized under its provisions from liability for consequential injuries to adjoining property-holders, flowing from the careful prosecution of the business for which it was created. To have such a result the statutory exemption must be expressed or must be a clear and unquestionable implication from powers expressly conferred; and it must appear that the Legislature contemplated the doing of the very act which caused the injuries. *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 711

6. A business will be abated as a public nuisance which, located in the midst of a populous community, constantly produces odors, smoke, and soot of such a noxious character and to such extent that they produce headache, nausea, and other pains and aches injurious to health among, and taint the food of, the surrounding inhabitants. *People v. Detroit White Lead Works* (Mich.) 722

7. If smoke, soot, and the emission of noxious odors and gases are so inseparably connected with a business that the conducting of it constitutes a nuisance, the facts that it is carried on in a careful and prudent manner, and that nothing is done by those managing it that is not a reasonable and necessary incident of it, cannot be relied on by its owners to defeat a prosecution for the maintenance of a nuisance. *People v. Detroit White Lead Works* (Mich.) 722

8. The fact that a business, the conducting of which constitutes a nuisance, was established upon an open common remote from habitations will not defeat a prosecution of the proprietors for the maintenance of a nuisance after the land in its vicinity has been built up and occupied; such business must give way to the rights of the public, and when buildings and habitations approach the place of its location, means must be devised to avoid the nuisance, or it must be removed or stopped. *People v. Detroit White Lead Works* (Mich.) 722

9. The officers of a corporation, as well as the corporation itself, may be convicted and fined for the maintenance of a nuisance if the business of the corporation is permitted to become such. *People v. Detroit White Lead Works* (Mich.) 722

10. The fact that coal sheds, as maintained and used, constitute a public nuisance, does not prevent a person living near them from maintaining a private action against their owners to recover damages for injuries inflicted upon him by the coal dust falling upon the furniture, food, and clothing in his house, and the disturbance of his rest and quiet by the noise of the grinding machinery, which deafens him in his own dwelling. *Wylie v. Edwood* (Ill.) 726

11. The erection of coal sheds upon lands of a railroad company many years after it acquired them, and after the real estate in the vicinity has been built up and surrounded by residences and stores, and their use in such manner as to create grinding and grating noises and scatter dust and dirt, so as to destroy the comfort and injure the health of those living upon the adjoining property, will constitute a nuisance which will give the adjoining owners

a right of action for the injuries specially suffered by them. *Wylie v. Edwood* (Ill.) 726

12. That the unloading of coal into a particular shed situated upon a railroad company's right of way by means of particular machinery is a part of the necessary operation of the road will not preclude a recovery of damages from the company for injuries thereby inflicted upon adjoining property-owners, unless the process of unloading was prudent, careful, and proper. *Wylie v. Edwood* (Ill.) 726

13. Where, in carrying on the business of manufacturing sulphuric acid and commercial fertilizer, gases are generated and escape into the surrounding atmosphere, which are so offensive and noxious as to affect the health of the family of an adjoining resident and land-owner, and to compel them at times to abandon the table and even the house, and to materially injure his property, such owner sustains an actionable injury for which he may recover damages. *Susquehanna Fertilizer Co. v. Malone* (Md.) 787

14. When expensive works have been erected and are used in carrying on a business which is useful and needful to the public, adjoining property-owners cannot maintain actions for every trifling annoyance which such business causes them. In determining the question of nuisance in such cases the locality and all the surrounding circumstances must be taken into consideration. *Susquehanna Fertilizer Co. v. Malone* (Md.) 787

15. The fact that a business was established before plaintiff acquired his property and came into the neighborhood is no defense to an action to recover damages for injuries resulting to plaintiff's property from the conducting of the business, in the absence of a prescriptive right to conduct the business. *Susquehanna Fertilizer Co. v. Malone* (Md.) 787

NOTES AND BRIEFS.

Nuisance; what is; limitation over of right to use one's own property; conduct of business, when; emission of smoke, soot, cinders, and coal dust; justification under legislative authority; under municipal authority; municipal authority to abate; abatement of action; remedy by injunction; by action for damages by indictment; liability for nuisance. 711

Liability for conducting business so as to constitute. 787

Maintaining a public nuisance an indictable offense; effect of municipal ordinance; conduct of business as. 722

Right to maintain private action for; damages. 726

Unlawful use of streets; laying of drains and sewers in. 205

NUNC PRO TUNC. See **MOTION.**

OFFICERS. See also **ASSIGNMENT**, 5; **CONSTITUTIONAL LAW**, 8, 9.

1. The imposing of a test by means of which to secure qualifications in a candidate for an appointive office of a nature to enable him to properly and intelligently perform the duties of such office is not prohibited by a constitu-

office of public trust." *Rogers v. Buffalo* (N. Y.) 579

2. The title to an office cannot be tried in an action of replevin for property belonging to the office. *Hallgren v. Campbell* (Mich.) 408

8. A city officer appointed for a fixed term, the power of removal not being expressly declared by law to be discretionary, is not removable except for cause, upon notice and opportunity to defend. *Hallgren v. Campbell* (Mich.) 408

4. The fact that a city charter provides expressly that elective officers shall not be removed except for cause does not raise the presumption that the Legislature intends that appointed officers may be removed without cause. *Hallgren v. Campbell* (Mich.) 408

5. A statute, though unconstitutional, may give such color to the appointment of an officer as to constitute him an officer *de facto*. *Walcott v. Wells* (Nev.) 59

6. So long as a municipal officer attempted to be removed by the council in a manner or at a time not authorized by the city charter claims to hold the office, one appointed by the council to succeed him does not become an officer *de facto* by the fact that he claims to have accepted the office. *Hallgren v. Campbell* (Mich.) 408

7. The acts of a *de facto* officer are valid and binding, so far as the interests of the public or third persons are involved. *Magenau v. Fremont* (Neb.) 786

NOTES AND BRIEFS.

See also ASSIGNMENT.

Office; title to, cannot be tried in replevin. 408

OPIUM. See CONSTITUTIONAL LAW, 6.

NOTES AND BRIEFS.

Opium; smoking of, how far criminal. 395

ORDER. See MOTION.

ORDINANCES. See MUNICIPAL CORPORATIONS, 2, 3.

PARENT AND CHILD. See ACTION OR SUIT, 9.

NOTES AND BRIEFS.

Parent and child; liability of parent to pay child for services. 820

PARLIAMENTARY LAW.

1. A meeting of a city council held at a time other than that fixed by ordinance for a regular meeting is valid, if the mayor and all the councilmen are present and act as a body, notwithstanding the meeting was not called by the mayor or two councilmen. *Magenau v. Fremont* (Neb.) 786

2. Where a meeting of a city council is adjourned to a specified date, and at such date a quorum of the council meet, they may transact any business within the powers conferred by statute. *Magenau v. Fremont* (Neb.) 786

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lawful session, may pass any ordinance by the concurring vote of a majority of all the members elected to the council, or by the affirmative vote of one half of the whole number of councilmen, with the concurrence of the mayor. *Magenau v. Fremont* (Neb.) 786

PARTITION. See also JOINT TENANTS AND TENANTS IN COMMON, 2.

1. Where a deed ineffectual to convey a legal title has been executed by executors with intent to partition lands of the testator, and to set apart the share which the person entitled to the interest of testator's deceased son (being his niece and devisee) should take in severalty, and after about eleven years she gives a mortgage on part of the land, which is subsequently foreclosed and the land sold, the mortgage shows an acceptance and ratification by her of the partition; and in the absence of any showing to the contrary, it is to be assumed that she relied on the partition for her right to mortgage the land in severalty. *Simmons v. Spratt* (Fla.) 343

2. Although a voluntary partition of lands made by tenants in common and evidenced by quitclaim deeds does not imply a warranty, yet if a legatee whose legacy is made a charge upon lands, of which he is also one of the residuary devisees, unites in a partition, accepts grants, executes conveyances, receives all the benefits of a cotenant and acquiesces in the partition for almost twenty years, he will not be permitted to charge his legacy on the land in the hands of third persons. *Davidson v. Coon* (Ind.) 584

PARTNERSHIP. See also CONTRACTS, 5; EVIDENCE, 9, 10; INTEREST, 4-8.

1. A partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day, unless the agreement has been actually consummated or executed. *Reed v. Meagher* (Colo.) 455

2. Before an executory agreement to form a partnership in future is actually executed, one party may withdraw with the consent of the others, and another be substituted in his place. *Reed v. Meagher* (Colo.) 455

3. Where parties agree to obtain a lease of mining property for the sole or principal object of extracting ores, and, after obtaining the lease, to work the mine as a partnership, the relation existing between them after the lease has been obtained and the work begun is that of a mining partnership, and not that of a general or commercial partnership. *Reed v. Meagher* (Colo.) 455

4. An agreement between several persons to operate together in obtaining a lease of mining property, and thereafter to work the mine as a copartnership, and share expenses and profits in proportion to the respective interests of the partners, does not of itself constitute a partnership, but may create that relation after the agreement is carried out. *Reed v. Meagher* (Colo.) 455

5. One member of a mining partnership formed pursuant to an agreement between sev-

eral persons to act together in obtaining a lease of mining property to be worked after the acquisition of the lease as a partnership, in whose name the lease is taken, after which the property is devoted to partnership use for the extraction of ores, can convey no other interest than his own in the leasehold estate, unless with the consent of his copartners. *Reed v. Meagher* (Colo.) 455

6. One member of a mining partnership in whose name the lease of the property is held is not justified in transferring the interest of another member, on the assumption that he has abandoned such interest, by the mere fact that he had received no answer to a letter written several weeks before, but which is shown not to have been received until after the transfer, in regard to a contribution to the purchase of certain machinery. *Reed v. Meagher* (Colo.) 455

7. The interest of a member of a partnership organized on the joint-stock plan for the purpose of dealing in land, the articles of which provide that the affairs of the company are to be managed by trustees, and the interest of each member in the joint fund is to be measured by his shares of stock, is simply an interest in the profits made and a resulting interest in the business and assets of the company, and is personal estate; and he has no title to the land purchased by the company, as tenant in common or otherwise. *Re Oliver's Estate* (Pa.) 421

8. Where a member of a partnership becomes a member of another firm, from which he receives a salary, which is never entered on the books of the first concern, but which he retains for his own use, with the knowledge of his copartner in such concern, who makes no claim to share in it until after their partnership is dissolved, such claim will be disallowed. *Winchester v. Glazier* (Mass.) 424

9. Where the question as to whether or not a partner is entitled to a salary when no profits are made is left open to doubt by the partnership articles, if he is credited with salary at such times for a series of years on the books of the concern, with the knowledge of the other partner, who makes no objection thereto, such interpretation by the parties themselves of the partnership agreement will be conclusive, and the claim for salary at such times must be allowed upon a winding up of the concern. In like manner, failure by one partner to object to an increase in the salary paid the other will make such increase binding on him. *Winchester v. Glazier* (Mass.) 424

10. Accounts between partners, which are not partnership matters, may be adjusted by being charged in the partnership account, if the partners agree thereto. *Winchester v. Glazier* (Mass.) 424

NOTES AND BRIEFS.

Partnership; right of husband and wife to form. 593

Compensation for services of partners; allowance of interest in partnership accounting. 424

PARTY-WALL.

1. Describing the boundary line between two lots, in a mortgage by a purchaser of both 9 L. R. A.

given upon one of them to secure payment of purchase money, as running through the center of a party-wall between the buildings upon them, will not amount to an implied grant of a perpetual easement for the maintenance of the party-wall as such, in favor of one claiming title through a foreclosure sale under such mortgage. *Heartt v. Kruger* (N. Y.) 185

2. The accidental destruction by fire of a party-wall, as to the maintenance of which there has been no grant of a perpetual right, will destroy all right in either party to claim an easement in the property of the other for the further support of a party-wall, notwithstanding some portion of the foundation of the wall remains standing. *Heartt v. Kruger* (N. Y.) 185

NOTES AND BRIEFS.

Party-wall; how far agreement to build constitutes an incumbrance. 637

Duration of rights in; right to use; destruction of; right to rebuild. 185

PAYMENT. See also ASSUMPSIT, 3, 4.

1. A check on a bank is payment only when the money is received on it; and no presumption that a creditor takes a check in absolute payment arises from the mere fact that he accepts it from his debtor. *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 263

2. Payment by check by a purchaser of goods sold for cash on delivery is only conditional, and if the check is dishonored the vendor may retake the goods, even from an innocent subpurchaser for value, unless he is estopped by negligence or laches. *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 263

NOTES AND BRIEFS.

Payment; acceptance of check not *ipso facto* payment. 263

When voluntary; protest. 631

How far a judgment and attachment constitutes. 282

PERPETUITIES.

NOTES AND BRIEFS.

Perpetuities; suspending time of vesting of estate. 211

PERSONAL RIGHTS. See CONSTITUTIONAL LAW, 5-7.

PHOTOGRAPHS.

There is an implied contract between a photographer and his customer that the negative for which the customer sits shall only be used for the printing of such photographic portraits as the customer may order or authorize. *Moore v. Rugg* (Minn.) 59

PHYSICIAN AND SURGEON. See PRINCIPAL AND AGENT.

1. Where a complaint which seeks to hold certain persons individually liable for the debts of a voluntary unincorporated association alleges that at the time of the incurring of such debt and for many years before defendants constituted such association, an admission in the answer that defendants were previous to that time members of, and met at, a certain church and conducted religious exercises according to the rites and doctrines of said church, is equivalent to an admission that defendants were members of the association as charged, and will render proof of such fact unnecessary. *Sheehy v. Blake* (Wis.) 564

2. Damages cannot be assessed in an action for injuries not set out in the complaint. *Lyon v. McDonald* (Tex.) 295

3. The fact that the court cannot grant all the relief asked in a petition does not deprive it of jurisdiction to grant any relief. *Rs Oshkosh Mut. F. Ins. Co.* (Wis.) 273

4. To a bill to restrain the infringement of copyrights of maps, it is proper to attach copies of the infringed and infringing maps as parts thereof. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

5. A bill for an injunction need not be verified at the time it is signed. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

6. A complaint which states facts constituting a prima facie case is good as against a demurrer, although it lacks symmetry and precision and states the facts somewhat vaguely and obscurely. *Davidson v. Coon* (Ind.) 584

7. A complaint upon a certificate of membership in a mutual benefit society, averring the contract with the corporation, performance of the conditions thereof on the part of plaintiff, that he was totally disabled, and that he made proper proof of his disability, — is sufficient without alleging that his proofs were such as satisfied the corporate officers. *Supreme Council Order of Chosen Friends v. Forstner* (Ind.) 501

8. A bill to restrain infringement of a copyright, filed by the author and his publishers, which sets out the terms of an agreement between the parties, and states that if the agreement did not transfer an interest in the copyright to the publishers it was an exclusive license to them, sufficiently states the publishers' title. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

9. In a bill by the legal and equitable owners of a copyright to enjoin its infringement, it is unnecessary to state the manner in which the equitable interest became vested. If the owner of the entire legal title is a complainant, it is immaterial whether the equitable titles became vested by an instrument in writing or by parol. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

10. Positively averring the infringement of a copyright, in a bill to restrain such infringement, is sufficient, although the infringement is not stated to be within the knowledge of the affiant. *Black v. Henry G. Allen Co.* (C. C. S. D. N. Y.) 433

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tain buildings erected by defendant, without showing what advantage or benefit there was in such a view, or what damage could result by obstructing it, does not state a cause of action. *Lyon v. McDonald* (Tex.) 295

12. A bill to foreclose a mortgage given to a corporation to secure the payment of a bond is not subject to demurrer for simply failing to show affirmatively the capacity of the corporation to make the contract, since the contracts of corporations are prima facie valid. *Boutware v. Davis* (Ala.) 601

13. An answer in an action to recover rent, which attempts to plead a termination of the tenancy by written notice in accordance with the terms of the lease, is demurrable if it fails to show a sufficient notice, although it states facts sufficient to show a surrender and acceptance of the premises. *Hendry v. Squier* (Ind.) 796

POLICE POWER.

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Police power; rights of corporations subject to. 33

POND. See WATERS AND WATERCOURSES, 1.

PRESCRIPTION. See WATERS AND WATERCOURSES, 2.

PRIMARY ELECTION. See INTOXICATING LIQUORS, 2.

PRINCIPAL AND AGENT. See also CARRIERS, 7; CONTRACTS, 21.

A physician and surgeon who, at the request of the general superintendent of a railroad, renders professional services to persons injured by the company's trains, in ignorance of the fact that the superintendent has no authority to contract for such services, may recover therefor from the company; and the facts that the right to employ physicians and surgeons in such cases is vested in another officer, and that the company is not liable for the injuries which he was summoned to attend, are immaterial, since no inquiry was necessary in regard to such matters. *Cincinnati, I. St. L. & O. R. Co. v. Davis* (Ind.) 503

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Principal and agent; principal not bound by acts of agent in excess of authority. 97

Rule that trustee cannot profit by trust, applicable to agents; agent cannot assume incompatible relations; character of agent inconsistent with that of purchaser; will hold purchased property in trust for principal; application to set aside sale. 793

PRINCIPAL AND SURETY. See also GUARANTY; INTEREST, 9; LIMITATION OF ACTIONS, 5, 6.

1. A creditor, in order to preserve his rights against a surety, is under no obligation

to pursue any of the remedies given him by law against the principal, though the surety requests him to do so; and the latter is not discharged by a failure of the creditor to levy an execution obtained by him against the principal. *Morrison v. Citizens Nat. Bank* (N. H.) 282

2. A surety is not discharged because a creditor who attached the property of the debtor in an action on the debt secured, and afterwards attached the same property in other actions on an unsecured demand subject to the former attachment, and recovered judgment in all of such suits, applied the avails of the attached property on the unsecured demand, leaving the secured claim, as well as part of those not secured, unsatisfied. *Morrison v. Citizens Nat. Bank* (N. H.) 282

3. A surety on a note for money borrowed to pay for land, although he has paid the note, has no equitable lien upon the land for his claim against the principal. *Wood v. Wood* (Ind.) 178

4. A paying surety who, after deducting all payments made and property turned over to him by the principal debtor, has still paid more than his share of the debt, will not be required to account to his cosurety for such payments and property. *Bushnell v. Bushnell* (Wis.) 411

5. A surety who has made partial payments aggregating more than his share of the debt, his right to contribution as to all of which is barred by limitation except the last, is entitled to judgment against his cosurety for the amount of such last payment. *Bushnell v. Bushnell* (Wis.) 411

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Principal and surety; liability of surety on executor's bond; subrogation of surety on payment of claim. 228

Liability of surety or guarantor; guarantor of lessee. 858

Contribution between cosureties. 411

PRIVILEGED COMMUNICATIONS.

See LIBEL AND SLANDER, NOTES AND BRIEFS.

PROCEEDINGS IN REM. See COURTS, 2.

PROHIBITION.

1. A writ of prohibition will not be granted where there is a complete and effective remedy by appeal or writ of error. *Walcott v. Wells* (Nev.) 59

2. A judge *de facto* cannot be prevented from acting by a writ of prohibition on the ground that he is acting as judge without any authority of law. *Walcott v. Wells* (Nev.) 59

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Writ of prohibition; defined; cannot be made to serve purpose of a writ of error or of review; when will not lie. 59

PROTEST. See ASSUMPSIT, 1, 3; JUDGMENT, 2.

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PUBLICATION. See WRIT AND PROCESS.

PUBLIC LANDS.

1. Where before a government survey of public lands two persons made homestead entries on different portions of what afterwards proved to be one homestead claim, designating their respective claims as between themselves by claim lines, and each recognizing the other's rights, an agreement made by them, upon attempting to enter their claims and finding that the land must all be entered by one person, that one of them should enter the land, and upon obtaining title convey to the other his share thereof, is enforceable against the one who obtains the title. *Sweeney v. Sparling* (Iowa) 777

2. A forfeiture, under Ind. Rev. Stat. 1841, § 4347, for default in an installment of interest on a certificate of purchase of school lands, does not divest the title of the purchaser to the real estate, but simply authorizes the State to sell the real estate for its own reimbursement. *McPheeters v. Wright* (Ind.) 176

PUBLIC POLICY. See ASSIGNMENT, 2.

PURCHASER. See ALIENS, 2.

QUO WARRANTO.

NOTES AND BRIEFS.

Quo warranto; to dissolve corporation; grounds of forfeiture. 83

RAILROADS. See also EASEMENTS, 1, 2; PRINCIPAL AND AGENT.

1. Running a passenger train without a head-light, at the rate of 25 miles an hour, through a populous country and over a highway crossing near the suburbs of a city, after dark on a dark night, is negligence as matter of law. *Becke v. Missouri P. R. Co.* (Mo.) 157

2. Failure to give statutory signals or to have the head-light burning when a passenger train approaches a highway crossing after dark is negligence of the employés of the railway company "whilst running, conducting, or managing any locomotive, car, or train of cars," within the meaning of Mo. Rev. Stat. 1879, § 2121, fixing the damages at \$5,000 in case of death resulting from such negligence. *Becke v. Missouri P. R. Co.* (Mo.) 157

3. A railroad company is not liable for loss by fire set by a locomotive, if it has used upon its engines the best and most approved appliances, and is not chargeable with negligence. *White v. Chicago, M. & St. P. R. Co.* (S. D.) 824

4. Neglect on the part of a traveler upon a highway to observe the rule that when nearing a railroad crossing he must look and listen for approaching cars, by which he is killed on a side track, will not necessarily defeat a recovery for his death, where he had just before seen a train containing the car pass along the main track beyond the switch leading to the side track, and there was nothing to lead him to suspect that cars were to be sent back from the train along the side track, and the day was so cold that he had a shawl over his head, which might have interfered with his sight and hear-

sons of their movements, left them to go wild, and remained on the engine to protect themselves from the weather. *Phillips v. Milwaukee & N. R. Co. (Wis.)* 521

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- Railroad companies; charter rights of, subject to legislative control. 754
- Liability for setting out fire. 824
- Duty to guard against setting out fires; fires communicated by sparks from locomotive; liability for damage; action. 750
- Liability for act of independent contractor. 604
- Duty as to travelers on highway; warning on approach to crossing; construction of statutes of various States; rate of speed. 157
- Liability on round-trip tickets. 688
- Pooling-contracts, validity of; how far parties *in pari delicto*; completion of contract; ratification of contract. 689
- Ejectment of passenger from car. 132
- Duty to furnish cars for transportation, and safe mode of delivery; duty to feed and water stock; responsibility of; forwarding by connecting line; damages for failure to transport; liability for delay in shipment and delivery; liability for miscarriage and wrongful delivery; damages for negligent loss or injuries; notice of claim for damages; not liable for accidents; contracts limiting liability. 449

RATIFICATION. See PARTITION, 1.

REAL PROPERTY. See also NAME.

1. A condition may be attached to the right to enjoy a devised estate, the nonperformance of which will give the property to another if there is vested in him a valid remainder or reversion, of which the taking effect in possession is contingent upon the event which defeats the precedent estate; and he is entitled to take advantage of the prohibited act. *Conger v. Lowe (Ind.)* 165
2. When an estate is given to one for life, with the remainder to his heirs, the law, by an arbitrary rule, vests the whole estate in the ancestor. *Conger v. Lowe (Ind.)* 165
3. The word "heirs," when found in a will, will be construed as a word of limitation, even although the testator's intention may be thereby frustrated, unless it clearly appears from the context that the word was not used as a word of limitation, but of purchase. *Conger v. Lowe (Ind.)* 165
4. Where an estate is devised to one for life upon a condition, with remainder, in case of his death or refusal to comply therewith, to his "lawful heirs," the words "lawful heirs" will be construed as synonymous with "children" and as being words of purchase; and the entire estate will not unite in the ancestor, but in case he fails to comply with the condition his children will be entitled to the estate. *Conger v. Lowe (Ind.)* 165
5. There may be interests in a contingent remainder, which are vested subject to the happening of an event. *9 L. R. A.*

6. No interest in a contingent remainder will be held to vest before the contingency has terminated, if there is a contingency affecting the estate, as well as one affecting the persons who are to take it, unless testator plainly intended it should. *Hills v. Barnard (Mass.)* 211
7. The registration of a mere voluntary deed which is unaffected by actual fraud operates as notice so as to bind a subsequent purchaser from the grantor; but the registration of a deed affected by actual fraud does not, at least not to the extent of barring the assertion of his rights based on the fraud of the transaction. *Gilliland v. Fenn (Ala.)* 413

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- Real estate; conveyance of property in expectancy, valid. 477
- Dedication of land to public use; form of; a matter of intention; dedication by platting and sale of lots. 551

RECEIVERS.

1. The superior court, having general jurisdiction of an action to rescind a sale of lands on the ground of fraud on the part of the vendors, has, under Cal. Code Civ. Proc. § 561, jurisdiction to appoint a receiver to preserve the moneys and securities paid and delivered on the contract, and to keep them within the jurisdiction until the rights of the parties can be determined. *Loaiza v. San Francisco City & County Super. Ct. (Cal.)* 376
2. Although a receiver has no legal right to sue in the courts of a State other than that of his appointment, yet courts may, in the absence of statutory regulations, recognize the appointment and title of a foreign receiver and take jurisdiction of his suits, unless such suits work injustice to the citizens of their State or contravene the policy of its laws. *Boulware v. Davis (Ala.)* 601
3. A court will take jurisdiction of a suit brought by a foreign receiver of an insolvent corporation for the purpose of gathering its assets for equal distribution among creditors, where only the parties litigant are interested, no domestic creditor appearing to assert rights adverse to those of the receiver, although it is eight years since the receiver was appointed. *Boulware v. Davis (Ala.)* 601
4. The balance due on a locomotive sold to a railroad company more than six months before the road went into the hands of a receiver cannot be allowed, on a claim made nearly a year after his appointment, to be paid out of the earnings of the receivership in preference to the claims of bondholders under a prior mortgage, but is to be classed with general debts of the corporation. *Manchester Locomotive Works v. Truesdale (Minn.)* 140

NOTES AND BRIEFS.

- Receiver; foreign; authority of. 601
- Receivers' certificates; priority of, over existing mortgages. 140

RECORD. See APPEAL AND ERROR, 9, 10; REHEARING.

REHEARING.

On the denial of a rehearing on a review of the evidence, the petition for which is discourteous and disrespectful in some of its language, the objectionable language will not be perpetuated as a part of the record, but the petition will be stricken from the files. *Waldron v. Waldron* (Cal.) 492

RELIGIOUS SOCIETIES.

Where the trustees of an unincorporated religious society, regularly elected for the purpose of managing its financial affairs, use money advanced by the pastor, who is also a member of the board of finance, in the erection of a church edifice, and also allow his salary to remain in arrears, which transactions are shown on books of the society regularly kept by its proper officer, and the total amount of indebtedness to the pastor is publicly stated from time to time before the assembled congregation, and finally a committee is appointed to settle the account, which is done and the amount found due stated to the congregation and credited to the pastor on the society's books, with no objection on the part of the members, who acquiesce therein for several years, they will be held, in a suit to recover the amount from them individually, to have authorized the settlement and to have afterwards ratified it, so as to be bound thereby. *Sheehy v. Blaks* (Wis.) 564

REMAINDER. See LIFE TENANTS, 1, 2.

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Remainders; vested and contingent, distinguished and defined. 211

REMOVAL OF CAUSES.

The right of a nonresident defendant to remove a suit from any state court to the circuit court of the United States upon the ground of prejudice or local influence is confined to cases in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. *Bierbauer v. Miller* (Neb.) 228

NOTES AND BRIEFS.

Removal of causes; local prejudice; right dependent on amount in dispute; plaintiff has no right to remove; citizenship of plaintiff; time within which application must be made; must be made to circuit court; affidavit in support of application. 228

REPLEVIN. See also NEW TRIAL, 4; OFFICERS, 2.

1. An administrator may maintain replevin in his own name to recover possession of chattels belonging to his intestate's estate. *Kent v. Bothwell* (Mass.) 258

2. Where the complaint in an action of replevin describes the articles sought to be recovered, and there is no denial of the taking and withholding of any part of the property described, a verdict simply finding for plaintiff and the value of the "property taken," without describing it, is sufficient to support a

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judgment in the alternative for a return of the property or its value. *Hobbs v. Clark* (Ark.) 526

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RESTITUTION. See LANDLORD AND TENANT, 1.

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SAFE DEPOSIT COMPANY. See BAILMENT, 1.

Safe deposit companies; liability of, for loss of property. 488

SALE. See also AUCTION, 1; PAYMENT, 2.

1. A sale of goods, the right, title, and interest therein to remain in the seller until sold by the purchaser, does not pass the absolute title at once to the purchaser, so as to render the property subject to levy and sale upon an execution in favor of the latter's creditors, at least where the credit was not given because of the goods being in the purchaser's possession. *Dewes Brewing Co. v. Merritt* (Mich.) 270

2. A sale of goods, the right, title and interest therein to remain in the seller until sold by the purchaser, is not void as against public policy. *Dewes Brewing Co. v. Merritt* (Mich.) 270

3. The delivery of a piano, taking therefor the notes of the lessee so-called, "for value received, for the rent," the lessors to retain title until payment of all notes, on payment of which notes "given for the use of this piano" title to pass to the lessee, but in default of payment the piano to be returned,—is not a lease, but a conditional sale; and upon a recovery of the property the vendors should return the money paid them, after deducting a proper amount for the use of the piano. *Hays v. Jordan* (Ga.) 378

4. No lien can be enforced on a locomotive for the balance of the purchase price on a sale which was made upon the condition that it should be paid for on delivery, where after failure to pay upon delivery the vendor, without asserting the right to retake the property, sued for the price and obtained a part of it by judgment and garnishment. *Manchester Locomotive Works v. Truesdale* (Minn.) 140

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SAVINGS BANK. See BANKS AND BANKING, 8-5.

SCHOOLS. See MUNICIPAL CORPORATIONS, 14; PUBLIC LANDS, 2.

SEAL. See MORTGAGE, 1.**SET-OFF AND COUNTERCLAIM.** See also BANKS AND BANKING, 1.

A bank can set off deposits made by one who subsequently makes an assignment for creditors, against a debt owing to it by the insolvent, but which had not matured at the time of the assignment. *Fidelity Trust & S. V. Co. v. Merchants Nat. Bank* (Ky.) 108

NOTES AND BRIEFS.

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Verbal contract to support a person for a number of years not within. 129

Payment of another's debt creates no equitable lien. 178

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1. Whether proper notice has been given before the introduction of a local or special bill is for the decision of the Legislature. *Speer v. Athens* (Ga.) 402

2. The words "other purposes," in a charter giving a company the right to furnish water "for the extinguishment of fires and for domestic, sanitary, and other purposes," must be considered, in determining the right of eminent domain, to mean "other like purposes," or "other like public purposes," as the statute would be unconstitutional if it attempted to authorize the taking of private property for private use without consent. *Re Barrs Water Co.* (Vt.) 195

NOTES AND BRIEFS.

Statutes; take effect when. 402

STREET RAILWAYS.

1. A statute conferring on a street-railway company the right to adopt a new motive power in place of animal power does not violate a constitutional provision that no law shall authorize "the construction or operation of a street railroad" without the consent of the owners of one half in value of the adjacent property. *Re Third Ave. R. Co.'s Petition* (N. Y.) 124

2. Although the word "railroads," when used in a statute, will generally be construed to embrace street passenger-railways, yet Pa. Const. art. 17, § 4, which prohibits the consolidation of competing railroad and canal companies, when construed in the light of the remaining sections of that article, as well as that of its manifest purpose, does not include such railways. *Montgomery v. Philadelphia City Passenger R. Co.* (Pa.) 369

3. The fact that two street passenger-railways run through parallel streets in the same city does not bring them within the provisions of Pa. Const. art. 17, § 4, which prohibits the consolidation of parallel or competing railroad or canal companies, since such railways are not competing in the sense in which that word is used in the article. *Montgomery v. Philadelphia City Passenger R. Co.* (Pa.) 369

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Street railways; motive power of. 124

SUBROGATION.

A surety has no right to insist that the proceeds of attached property shall be first applied in satisfaction of the debt on which he is liable, although the property was first attached in the suit on that debt; and if he pays that claim he is not entitled to be subrogated to the creditor's rights under the first attachment, as against his rights under a subsequent one. *Morrison v. Citizens Nat. Bank* (N. H.) 262

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Subrogation; of surety on executor's bond after paying claim. 223

Payment by one of another's debt; right to. 173

Right of paying surety against cosurety. 411

SUNDAY. See also COURTS, 4.

A steamboat pilot who is employed upon a boat engaged in carrying passengers to and from pleasure parties on Sunday is within the provisions of a statute providing for the punishment of persons who are found on that day at common labor or engaged in their usual vocations, works of necessity and charity alone excepted. *Dugan v. State* (Ind.) 821

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Sunday laws; traveling on Sunday; Sunday newspapers; works of necessity. 891

SUPPORT. See LIMITATION OF ACTIONS, 1; MORTGAGE, 2; WILL, 10.

TAXES.**I. UNIFORMITY; WHO AND WHAT TAXABLE.****II. ASSESSMENT; COLLECTION.****NOTES AND BRIEFS.**

See also ADVERSE POSSESSION, 1; ANIMALS; CERTIORARI; CONTRIBUTION; HIGHWAYS, 6, 7; LICENSE, 8, 5; MARKETS, 4; MUNICIPAL CORPORATIONS, 10.

I. UNIFORMITY; WHO AND WHAT TAXABLE.

1. A city ordinance which imposes a fixed sum upon each of the various Avocations therein named, and makes no exceptions in favor of or against any person who may desire to pursue the business taxed, does not violate the rule respecting uniformity prescribed by the Constitution and statute. *Magenau v. Fremont* (Neb.) 786

2. A corporation owning real estate the products of which are exclusively expended in the training and furnishing of persons for charitable purposes, such as the visitation of the sick, the care of hospitals, orphanages, and poor schools, is exempt from taxation by § 5 of the New Jersey Act concerning taxes. *State, Sisters of Charity, v. Chatham* (N. J.) 198

3. The mere fact that one person has a right to have certain canals through land of which another owns the fee kept open for the passage of water will not entitle the latter to exemption from taxation upon the land covered by the water which flows in them, at least where he has the right to use water from them to any extent short of interference with the rights of the former. *Lowell v. Middlesex County* (Mass.) 856

4. An exemption from taxation of the real estate of a corporation so long as it is occupied by the corporation for the purposes contemplated in its organization will not prevent taxation of such portions of the property as have been rented out to tenants, although the rents are applied to uses contemplated in the organization of the corporation. *Louisville v. Louisville Board of Trade* (Ky.) 629

5. When one seeking to enjoin the taxation of certain property upon the ground that it is exempt shows by his petition that at least a portion of the property is taxable, the burden is upon him to definitely point out the extent to which he is entitled to the relief for which he asks. *Louisville v. Louisville Board of Trade* (Ky.) 629

6. To authorize an assessment of taxes against a nonresident doing business in New York, as provided for by N. Y. Laws 1855, chap. 87, § 1, it is indispensable that the person assessed shall in fact have money invested in a business carried on by him in the State, either as a principal or partner. *McLean v. Jephson* (N. Y.) 498

7. A landowner is not subject to taxation upon land covered by a canal running through his property, the fee of which is in a third person, although he has acquired the right to maintain buildings over such canal, above high-water mark, for a term of ninety-nine years. *Lowell v. Middlesex County* (Mass.) 856

8. The taxes upon real estate occupied as a family residence are properly assessed to the husband, and not to the wife, under a statute permitting it to be assessed to the owner or to the person in possession of it, although she holds an unrecorded deed to it, the record title being in a third person, in the absence of anything to overthrow the presumption that he, as head of the family, is in possession, for which purpose the undisclosed title of the wife is insufficient. *Southworth v. Edmands* (Mass.) 118

II. ASSESSMENT; COLLECTION.

9. The question whether or not persons or property are assessable under the statutes of a State is jurisdictional, and is always open to investigation when the authority to make an assessment is assailed. *McLean v. Jephson* (N. Y.) 493

10. Assessors cannot acquire jurisdiction to make assessments by determining that they have it; their authority to act must always depend upon the existence of the jurisdictional facts described in the statute by which their authority is conferred; and if they act without jurisdiction, their assessment is void and open to attack in any proceeding taken to enforce payment of it. *McLean v. Jephson* (N. Y.) 493

11. A nonresident coming into a State for business purposes, and having no property in the locality where he stops, and no just reason to suppose that he will be taxed there, is under no obligation to examine the assessment lists of that locality, and cannot be held liable for an erroneous assessment if he neglects to examine the roll and obtain a correction of the error therein. *McLean v. Jephson* (N. Y.) 493

12. The question of disproportionate taxation is open upon appeal from assessors to county commissioners for an abatement of taxes on the ground of overvaluation of property, but it is limited to whether or not more than a fair cash value has been put upon the property, and the inquiry cannot be extended to whether or not the property has been valued relatively more or less than similar property of other persons, since the statute requires a fair cash valuation of all property for taxation. *Lowell v. Middlesex County* (Mass.) 856

13. Evidence as to the valuation by assessors of other similar property cannot be considered by the county commissioners, upon an appeal to obtain an abatement for overvaluation of certain property, for the purpose of determining the proportionate, as distinguished from the actual, cash value of the property, where the statute requires a fair cash valuation of all property for taxation; but the admission of such evidence for the purpose of determining actual cash value will not cause a quashing of the proceedings. *Lowell v. Middlesex County* (Mass.) 856

14. The admission in evidence by the county commissioners sitting as a board of appeal to review a decision of assessors valuing property for taxation, of their own valuation of the same property upon a similar appeal in the preceding year, will not cause a quashing of the proceeding, unless it appears that injustice has

clusive of the present value, and therefore did not constitute such evidence as they were compelled to receive. *Lowell v. Middlesex County* (Mass.) 356

15. The fact that water-power is expressly excluded from consideration in the determination of the value of buildings for purposes of taxation, by the clause relating to them in a statute which contains directions to assessors as to the method of arriving at the taxable value of real estate, and is not elsewhere referred to, will not prevent its being valued and taxed with the land to which it is appurtenant and in connection with which it is used. *Lowell v. Middlesex County* (Mass.) 356

16. A return of an assessment as being "on land and water-power" does not show that the water-power was assessed independently of the land. *Lowell v. Middlesex County* (Mass.) 356

17. County commissioners have no power upon appeal to them from a decision of assessors placing a valuation on property for the purpose of taxation, to interfere with the assessment on the ground that the assessors neglected to comply with the statutory provisions as to separate description and valuation of certain kinds of property. *Lowell v. Middlesex County* (Mass.) 356

18. The insufficiency of an affidavit of the giving of notice of a tax sale is immaterial if it is satisfactorily shown that the notice was in fact given. *Southworth v. Edmonds* (Mass.) 118

19. The collector may sell the whole of a tract of land for delinquent taxes, under Mass. Gen. Stat. chap. 12, although a part only would be sufficient to satisfy the demand and could conveniently be sold separately. *Southworth v. Edmonds* (Mass.) 118

20. A sale for taxes is not rendered void by the fact that a portion of the assessment was for the payment of interest on a debt contracted for the purchase of a park, for which purpose the municipality could not lawfully raise money. *Southworth v. Edmonds* (Mass.) 118

21. The announcement by the collector at a tax sale that he hopes no person will bid more than the amount of taxes, interest, and charges on a piece of property, will not avoid the sale, where there is no reason to suppose that the remark was intended to, or does in fact, influence the bidding. *Southworth v. Edmonds* (Mass.) 118

22. Where a person seised of lands as tenant in dower neglects to pay the taxes thereon so long that they are sold for the payment of taxes, if one of several tenants in common of the remainder in fee of such lands purchase the lands at the tax sale, the purchase will be held to enure to the benefit of all the cotenants in remainder. *Clark v. Lindsey* (Ohio) 740

23. A tax deed issued more than five years after the expiration of the time to redeem from the tax sale is invalid, and creates no lien upon the real estate therein described. *Alexander v. Wilcox* (Neb.) 735

24. No notice of the expiration of the time for redemption of land from a tax sale need be given where there is no person in possession of

to be served on the person in possession and also on the person in whose name the land is taxed, if a resident of the county where the land is situated. *Brown v. Pool* (Iowa) 767

25. One who, without asserting any claim of right to do so, herds cattle over a range of uninclosed land extending from 1 to 2 miles in area, including a particular quarter-section, is not in possession of such quarter-section within the meaning of a statute requiring service of notice of the expiration of the time of redemption of land from a tax sale upon the person in possession thereof. *Brown v. Pool* (Iowa) 767

26. A statute requiring service of notice of the expiration of the time for redemption from a tax sale upon the person in whose name the land is assessed does not require the purchaser to serve such notice on himself where the land, after the sale, has been assessed in his name. *Brown v. Pool* (Iowa) 767

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Sale for; redemption from; statute to be strictly complied with; notice, rights of owner to rely on receipt of; to whom given; what it contained; service of; copy of, to be sent by mail; constructive; service by publication. 767

Exemption; restricted use of property. 629

TELEGRAPH COMPANIES. See also DAMAGES, 4.

1. Eight days' delay in delivering a message saying, "Come in haste; your wife is at the point of death,"—though the receiver's place of business was well known and within a short distance of the office of the company, whereby he was prevented from being present at his wife's death or attending her funeral,—entitles him to maintain an action for the tort. *Young v. Western U. Teleg. Co.* (N. C.) 669

2. A stipulation in a printed form upon which telegraph messages are required to be written before being accepted by the company for transmission, that the company shall not be liable for mistakes or delays in the transmission or delivery, or for the nondelivery of unrepeatable messages, beyond the amount received for sending them, is contrary to public policy and void so far as it seeks to relieve the company from liability for the negligence of itself or its servants. *Western U. Teleg. Co. v. Short* (Ark.) 744

3. Failure by a telegraph company to transmit and deliver a message in the form or language in which it was received is prima facie

evidence of negligence, for which the company is liable. *Western U. Teleg. Co. v. Short* (Ark.) 744

NOTES AND BRIEFS.

Telegraph companies; diligence required in delivery of message; injury to feelings as element of damage; who may recover damages for delay in delivery of message. 689

Liability for failure to deliver, or incorrect delivery of messages; limitation of liability; measure of damages. 744

TENDER AND PAYMENT INTO COURT. See also AUCTION, 1; EXECUTORS AND ADMINISTRATORS, 10; MORTGAGE, 6.

1. Depositing the purchase price of real estate in a bank after demanding a conveyance and making tender of the amount due will not relieve the purchaser from paying interest thereon until it is accepted by the vendor under a decree of specific performance, if he does not inform the vendor of such deposit or place it at his disposal, and subsequently draws it out and uses it in his business, at the same time being in possession of the premises, receiving the rents and profits, without paying rent, although he is at all times prepared to pay the amount on demand. *Sanders v. Bryer* (Mass.) 255

2. A deposit by executors for a legatee of a sum which does not equal the amount of the legacy and interest then due, and which the legatee refuses to accept as a partial payment, will not stop interest on the legacy or any part thereof. *Welch v. Adams* (Mass.) 244

3. Tender of the amount due upon a promissory note secured by a chattel mortgage, though made after the note has matured, extinguishes and discharges the lien of the mortgage. *Moore v. Norman* (Minn.) 55

4. It is not necessary to keep a tender good by bringing the money into court, where an action is brought by a mortgagee to obtain possession of chattels after a tender of the debt has been made. *Moore v. Norman* (Minn.) 55

5. To extinguish the lien of a chattel mortgage by a tender, the proof should be clear that the tender was fairly made and deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded for the latter to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered. *Moore v. Norman* (Minn.) 55

NOTES AND BRIEFS.

Tender; to divest lien of chattel mortgage; sufficiency of. 55

TOWN. See ACTION OR SUIT, 8; BOUNDARIES, 2; BRIDGES, 2; DRAINS AND SEWERS.

TRADE-MARK.

1. A white label with a red border, containing the words "microbe killer" and the picture of a man striking a human skeleton with a bludgeon, is not fraudulently imitated by a yellow label with a black border, containing 9 L. R. A.

merely the words "microbe destroyer." *Alff v. Radam* (Tex.) 145

2. The words "microbe killer," being English words in common use, cannot be appropriated in their original meaning as a trademark. *Alff v. Radam* (Tex.) 145

3. The word "international" cannot be exclusively appropriated by anyone as part of a trade-name, if used in its ordinary sense, for the purpose of characterizing the business to which it is applied as pertaining to matters or people of different nations. *Koehler v. Sanders* (N. Y.) 576

4. The name "International Banking Company" cannot be deemed arbitrary or fanciful, although applied to a business entirely distinct from that of banking, in connection with which it has never before been used, so as to entitle its originator to its exclusive use as against other persons engaged in the same business. *Koehler v. Sanders* (N. Y.) 576

5. Equity will not aid in the protection of a trade-name which, although descriptive of a business, does not describe the one in which its owner is engaged, but another requiring greater financial strength, thus tending to mislead and defraud the public in its dealings with the owner, and to give the latter an advantage which he would not otherwise possess. *Koehler v. Sanders* (N. Y.) 576

NOTES AND BRIEFS.

Trade-mark; defined; object of; of what may consist; what cannot be appropriated; geographical names; use of in business; name of place in trade-mark; property right in, when attaches; property in words; words and names in common use; assignment of trade-name and trade-mark; right to exclusive use of; protection of right to sole use of; imitation of, an infringement; when court will not interfere. 145

In words "microbe killer." 145
"International Banking Company" cannot be appropriated as. 576

TRESPASS.

Trespass is the proper remedy for diversion by defendant of the water of a stream to the prejudice of the plaintiff's right as a riparian owner, as fixed and determined by the agreement of the predecessors in title of the respective parties. *Horn v. Miller* (Pa.) 810

NOTES AND BRIEFS.

Trespass; upon land covered by public street; right of action for. 94

TRIAL. See also LIBEL AND SLANDER, 10; REPLEVIN, 2.

1. A statutory right to challenge peremptorily in a civil case two of the jurors from the panel called to try the cause extends to bystanders put upon the panel, as well as to jurors regularly summoned; and such jurors may be challenged after they have been sworn, but before anything else is done, where such practice prevails in the cases of regularly summoned jurors. *Sackett v. Rider* (Mass.) 891

2. The question whether a cause is a cause

sine qua non, without the existence of which the injury would not have taken place, is a question of fact. *Louisville, N. A. & O. R. Co. v. Nitsche* (Ind.) 750

8. A question of special damages in an action for libel in publishing a person as a delinquent debtor is for the jury, where he proves that one person has refused him credit on account of the publication. *Muelze v. Tuteur* (Wis.) 86

4. Where a transfer of real estate by a failing debtor in satisfaction of an existing debt is attacked by creditors, the question of the sufficiency of the consideration for the transfer should be submitted to the jury. *Mobile Sav. Bank v. McDonnell* (Ala.) 645

5. In an action to recover damages for injuries resulting from the conducting of a business which is a nuisance, the questions whether or not the business is carried on in a convenient and proper place, and whether or not the use made by its owner of his land is under the circumstances reasonable, should not be submitted to the jury, since no place can be convenient for the carrying on of a business which is a nuisance and which causes substantial injury to the property of another, and no use of one's own land can be reasonable which deprives an adjoining owner of the lawful use and enjoyment of his property. *Susquehanna Fertilizer Co. v. Malone* (Md.) 787

6. Requested charges having no testimony to support the hypothesis on which they are based are properly refused. *Alabama G. S. R. Co. v. Carmichael* (Ala.) 888

7. It is not error to refuse a request to give a special instruction to the jury, where the court has already embodied the proposition contained therein, in its general charge. *International & G. N. R. Co. v. Keenan* (Tex.) 708

8. Requested charges which undertake to call the attention and invite the consideration of the jury to facts and circumstances developed in evidence, tending to cast suspicion on certain transactions, and which are supposed to be persuasive of fraud, are properly refused as being mere arguments. *Mobile Sav. Bank v. McDonnell* (Ala.) 645

9. Instructions assuming that both parties agreed to a rule of damages in respect to which a statute gives election are not thereby erroneous, where evidence has been offered by plaintiff and admitted without objection to prove the damages according to such rule. *Rosum v. Hodges* (S. D.) 817

10. Instructions that a grandson can recover the value of his services for his grandfather on an implied contract are erroneous, where they also charge that the relation of parent and child exists between them. *Murphy v. Murphy* (S. D.) 820

11. An instruction the wording of which would lead the jury to believe that they had the discretion to fine defendant or not to fine him, if they found him guilty of violating the statute, is properly refused where the statute prescribes a fine in all cases of guilt. *Welsh v. State* (Ind.) 664

12. An instruction is properly refused in a criminal case which requires the jury to acquit 9 L. R. A.

if they find that a former jury has been impaneled and sworn to try defendant on the same charge, without regard to the facts which may have led to the discharge of such jury. *Welsh v. State* (Ind.) 664

18. Where a special verdict sufficiently covers all material and controverted questions of fact in the case, it is not error to refuse to submit other questions to the jury as the basis of a special verdict. *Wright v. Mulvaney* (Wis.) 807

14. A general verdict of guilty is sufficient, under an indictment charging the same offense in several counts, although some of them charge a felony and others a misdemeanor. *Herman v. People* (Ill.) 182

NOTES AND BRIEFS.

Trial; when instructions may be refused. 708

Right of peremptory challenges to jurors. 891

Petition to change venue, as contempt. 566

Of criminal action, change of venue. 823

TROVER.

No demand is necessary before bringing an action against an innocent purchaser for the conversion of plaintiff's property, which has been tortiously obtained from him and sold to such purchaser. *Rosum v. Hodges* (S. D.) 817

NOTES AND BRIEFS.

Trover and conversion; the necessity of demand before suit; wrongful attachment and levy of property; sale of converted property. 817

TRUSTS. See also CORPORATIONS, 21, 26.

1. A declaration in a will establishing a trust fund the income of which is to be paid annually to a certain person for life, that such income shall not be subject to the debts of the beneficiary, and that if any attempt is made to subject it to such debts it shall be added to the principal and the beneficiary shall receive no part of it, will not take it out of the operation of a statute making trust estates subject to the debts of those to whose use they are held, where the beneficiary is given power to dispose of the principal by will. *Haycraft v. Bland* (Ky.) 599

2. Where a will which devises manufacturing property to trustees, with directions to permit testator's three sons to occupy and improve it for their joint benefit so long as they can agree and make the business profitable, and when they fail to do so to sell the same, invest the proceeds, and pay over to each son one third of the accumulated fund upon his arriving at the age of fifty years, contains a clause which requires the property to be appraised and sold, if one of the sons so desires, to either two if they will buy it at the appraised value, otherwise to strangers,—a sale to two of the sons under the latter clause will not terminate the trust, but it will continue, as to the proceeds, the same as if the sale had been made under the other provision of the will. *Kendall v. Gleason* (Mass.) 509

the subscriptions and apply the money to the cancellation of corporate debts, cannot acquire an interest in a judgment against the corporation, for the payment of which he has sufficient money in his hands, realized from stock subscriptions, which shall be hostile to those on whose behalf he is acting, without their consent. *Wilson v. Brookshire* (Ind.) 792

4. A will giving to testator's nephew and two nieces the residue of his property in equal shares, to be held in trust by executors or trustees, consisting of the nephew and one of the nieces, in case the other niece marries the property to be held and owned by the trustees, transfers the property to the trustees in trust for themselves and the other niece; and no interest passes to the testator's heirs at law which will entitle them to maintain a bill for the division of the property according to the Statute of Distributions. *Gale v. Nickerson* (Mass.) 200

5. While trust funds may sometimes be properly invested in railroad stock, yet a trustee under a deed of trust containing no specific directions concerning investments will be compelled to make good the losses sustained by investing in such stock after he has already invested between one fifth and one fourth of the entire trust fund in stock of the same road, where the road runs through a new and comparatively unsettled country, has required a great outlay of money, is heavily indebted, and its continued prosperity cannot be predicted, although he acted in good faith and upon the advice of persons whom he considered qualified to give advice upon the subject. *Dickinson's Appeal* (Mass.) 279

6. To avoid a purchase by a trustee of property involved in the trust, it is sufficient for the beneficiaries to show his relation to the property and to them. *Wilson v. Brookshire* (Ind.) 792

NOTES AND BRIEFS.

Trust; devise of property in; distinction between principal and income. 421

Parol, how far within Statute of Frauds. 287

Party claiming property discharged of, must show such discharge. 517

Trust; investment by trustees; rules in the several States. 279

Trustee cannot purchase trust property, nor at his own sale; sale will be set aside; purchase enures to benefit of *cestui que trust*, when; indemnification of trustee; trustee cannot profit by trust. 792

USE AND OCCUPATION. See EASEMENTS, 1.

USURY.

Interest voluntarily paid in excess of the highest legal rate can be recovered back after the contract has been executed, although there is no statute authorizing such recovery, the lender being entitled to credit for the amount of the loan, with interest at the highest lawful rate. 9 L. R. A.

NOTES

Usury; what is not paid as interest; equi

VARIANCE. See

VENDOR AND also LANDLORD

1. Taking a conveyance of an antequity to a person who in no way character purchaser as agent and undoubted prior land. *Tarkington v.*

2. A fraudulent rescission of the sale of the defrauded vendee of the property paid demand is to have the amount of purchase price to pay back to *v. Purvis* (Ind.)

3. A deed intended as regards recorded without an purchaser will take the equity of redemption

NOTES

See also BONA FIDE

Vendor and purchaser "more or less," in a contract of land by metes and contract.

Lien of vendor; waiver of; right of a tract.

VENDOR'S LIEN PURCHASER, N

VERDICT. See

VILLAGE. See

NOTES

Voluntary association of members for debt

Suspension of meeting not reviewable by court

VOTE. See CORP

VOTERS AND COUNTIES, 2, 3; 2.

1. A person cannot be permitted to vote, because of qualifications which he does not have to (Ind.)

2. A law which registered in order to it permits another person

registered, is void under a Constitution which prescribes registration according to law as one of the qualifications of voters. *Morris v. Powell* (Ind.) 826

8. Where a State Constitution has fixed and defined the qualifications necessary to constitute one a voter, the Legislature has no power to require additional qualifications. Hence, where a property qualification is not among those fixed by the Constitution, a statute requiring a certain class of persons, in order to entitle themselves to vote, to produce certificates which can only be obtained in case they own property, is void. *Morris v. Powell* (Ind.) 826

4. Where the Constitution requires residence in a voting precinct for only thirty days before an election to entitle a person to vote, the Legislature cannot require him to register ninety days before an election, if the act of registering includes the fixing and designation of the precinct in which he shall be entitled to vote. *Morris v. Powell* (Ind.) 826

5. A requirement that an intending voter shall, at the time of registering, sign a statement as to his lodging place, and that he is a bona fide resident of the precinct in which he lodges, the production of a certificate of which at election time is necessary to show his right to vote,—is an attempt to compel him to designate, at the time of registration, the precinct in which he shall be entitled to vote. *Morris v. Powell* (Ind.) 826

6. Where the Constitution requires the Legislature to provide for the registration of all persons entitled to vote, a law providing for the registration of a class or part only of the voters is void. *Morris v. Powell* (Ind.) 826

7. A law imposing extra burdens and hardship in the matter of registration, upon persons entitled to vote under the Constitution, but who are absent from the State for a period of six months or more, or who are compelled to change their places of residence from one county to another within six months next preceding an election, in order to be permitted to cast their votes, is invalid. Hence a law which requires such persons to register ninety days before an election, while other persons are not required to register at all, is void. *Morris v. Powell* (Ind.) 826

8. Provisions of a state law as to the conditions for the nominations of candidates for office before the day of election are mandatory and must be strictly complied with; and the name of one who was not nominated in the manner fixed by the statute should not be published or printed on the official ballot. *Price v. Lush* (Mont.) 467

9. The fact that the name of one who was elected to an office was published and printed on the ballots, although he was not nominated in any legal manner, and the notification of his nomination was not filed within the period named in the statute, avoids his election under the Australian ballot system, notwithstanding a statutory provision allowing voters to write or paste on ballots the name of any person for whom they desire to vote. *Price v. Lush* (Mont.) 467

10. Where registration is not made by the 9 L. R. A.

Constitution an electoral qualification, a registry law can be sustained only as providing a reasonable mode or method by which the qualifications of an elector may be ascertained, or as regulating reasonably the exercise of the right to vote. *State, Boyle, v. Board of Examiners* (Nev.) 835

11. Nev. Const. art. 16, § 1, providing that proposed constitutional amendments, upon being approved or ratified "by a majority of the electors qualified to vote for members of the Legislature voting thereon," shall become a part of the Constitution, does not restrict the right to vote at a special election for the adoption of an amendment to those only who were qualified to vote for the members of the Legislature who voted upon the proposed amendment, but all the electors of the State are entitled to vote upon the submission thereof. *State, Boyle, v. Board of Examiners* (Nev.) 835

12. The adoption of the registry lists of a general election held the preceding year is a reasonable regulation which will not invalidate a special election for the approval of proposed constitutional amendments, held three months after the general election. *State, Boyle, v. Board of Examiners* (Nev.) 835

13. Since registration is not an electoral qualification, a statute providing for the submission of proposed constitutional amendments to a vote of the people at a special election does not violate Nev. Const. art. 16, § 1, on the ground that the voters registered under the Act are not qualified to vote upon the proposed amendments because of not being, at the date of the special election, registered so as to have entitled them to vote for a member of the Legislature which voted to submit the amendments to the electors. *State, Boyle, v. Board of Examiners* (Nev.) 835

NOTES AND BRIEFS.

Voters and elections; power of Legislature to fix qualifications of voters. 826

Statutory requirements must be complied with. 467

WAIVER. See ASSUMPTION, 1; WILLS, 16.

WAREHOUSEMEN.

A warehouseman who has given a receipt for eggs in cases without any distinguishing marks, but which he can identify, to be delivered only on surrender and cancellation of the receipt, is liable to a holder of the receipt who has made advances on the eggs, in case he delivers them to the depositor without the surrender of the receipt, although he retains other eggs belonging to the latter to answer the receipt. *Fifth Nat. Bank v. Providence Warehouse Co.* (R. L.) 260

NOTES AND BRIEFS.

Warehouseman; duties of. 837

WARRANTS. See BONDS, 6; MUNICIPAL CORPORATIONS, 14.

WATER COMPANIES.

NOTES AND BRIEFS.

Water companies; franchise not exclusive; words coupled or associated, how understood. 193

WATERS AND WATERCOURSES.

See also COVENANT, 4; EMINENT DOMAIN, 1, 2; FISHERIES, 1; NEGLIGENCE, 1, 2; TAXES, 3, 15, 16.

1. The title to a Great Pond which had been granted to a town previously to the passage of Mass. Code 1647, but which had not at that time passed to a private person, could not thereafter be transferred to any private person or persons; and any deed attempting to make such transfer is void. *Attorney-General, Mann, v. Revere Copper Co. (Mass.)* 510

2. Private rights in Great Ponds could be acquired by prescription during the interval between the passage of Mass. Rev. Stat. 1885, chap. 119, § 12, making the Statute of Limitations of real actions applicable to suits brought by or on behalf of the Commonwealth, and Mass. Stat. 1867, chap. 275, providing that such statute should not apply "to any property, right, title, or interest of the Commonwealth below high-water mark or in the Great Ponds. *Attorney-General, Mann, v. Revere Copper Co. (Mass.)* 510

NOTES AND BRIEFS.

Waters and watercourses; riparian right to use waters of stream; conveyance of privilege to use water; right to divert stream, damages for. 810

Paramount right of navigation over fishery rights. 807

Individual rights in Great Ponds. 510

WHARFAGE AND WHARVES.

The owner of a landing on a navigable river is authorized to prohibit its use for unusual and unaccustomed purposes, such as the storage and keeping of timber to be rafted which may obstruct free access to and from vessels. *Compton v. Hawkins (Ala.)* 887

WILLS. See also ACTION OR SUIT, 6; EXECUTORS AND ADMINISTRATORS, 2; JOINT TENANTS AND TENANTS IN COMMON, 1; PARTITION, 2; REAL PROPERTY, 1, 3, 4; TRUSTS, 1, 4.

1. A nuncupative testament by public act need contain no other description of the witnesses than their names, their number, and their residence. It need not expressly negative the existence of incapacities, which are matters for exterior proof, as ground of nullity. *Del Escobar's Succession (La.)* 829

2. Where a nuncupative will describes the witnesses as domiciled in the place, that sufficiently declares their residence, because domicile, *ex vi termini*, includes residence. *Del Escobar's Succession (La.)* 829

3. Ga. Code 1863, § 2161, making all property acquired subsequent to making of the will pass under it if its provisions be sufficiently broad, is prospective only; and after-acquired real estate does not pass under a will made before this provision went into operation, even though the testator did not die until afterwards. *Morgan v. Huggins (C. C. N. D. Ga.)* 540

4. The word "issue," in a clause in a will providing that issue of a deceased legatee shall take its parent's share, will not be restricted to mean simply "children," but will be extended

to mean "grandchildren" whose parents are deceased also, unless the testator's intention was clearly otherwise. *Hills v. Barnard (Mass.)* 211

5. Where a will which creates a trust in real estate, and provides that the legal heirs of each beneficiary shall succeed to his share in case of his death, contemplates a change of the real estate to personal property in the hands of the trustees, and that it should go to the heirs in its changed form, the words "legal heirs" mean those who would take personal property under the Statute of Distribution. *Kendall v. Gleason (Mass.)* 509

6. A will which, after providing for testator's burial expenses, gives "so much of my worldly estate" to a certain person, and does not otherwise dispose of any property, but revokes all previous wills, gives the persons named the whole estate. *Morgan v. Huggins (C. C. N. D. Ga.)* 540

7. If a will gives a portion of whatever of testator's estate remains at the death of a person named to certain persons in fee, and the remainder to such as may be living of the children of certain other persons, "the issue of any deceased legatee to take its parent's legacy," the latter clause will be confined in its operation to the second class named, and will not be extended to the first class, who at the death of the testator will take vested interests in the shares given them. *Hills v. Barnard (Mass.)* 211

8. Where a testator gives a portion of whatever of his estate remains at the death of a certain person to such as may be living of the children of four other persons, "the issue of any deceased legatee to take its parent's share" at such person's death, the estate given will be divided into as many parts as there are children of the four persons who are living and who have deceased leaving issue who are still living, and each living child will take one part, and the part representing each deceased child will be divided among his issue, excluding issue of living issue. *Hills v. Barnard (Mass.)* 211

9. The words "deceased legatee," in a will giving property to such of a class of persons as may be living at the death of a certain person, "the issue of any deceased legatee to take its parent's legacy," mean a person who was within the class and who would have been a legatee if he had not deceased. *Hills v. Barnard (Mass.)* 211

10. A will which provides that the residue of the testator's estate shall be equally divided between his children, but directs that when the division is made one of the children, naming her, shall have her share set off to her in other kind of property than slaves, does not vest the legal title of the residue of his real estate in his executors, but vests it in the children as tenants in common until the partition shall be made. *Simmons v. Sprutt (Fla.)* 843

11. The acceptance by a woman of the provisions of her husband's will, giving her the use of his real estate so long as she remains his widow, will cause all her interest in such property to cease when she remarries, although the will makes no disposition of the property to take

effect upon the happening of such event; and in case she sells the property and then remarries, testator's heirs at law may recover it from the possession of the purchasers. *Knight v. Mahoney* (Mass.) 578

12. Where a widow has power to accept or reject the provision made for her by will in lieu of dower, in case she accepts she can take only what the will gives and in the mode in which it is given. In such case, if the will fixes some date other than that of the death of the testator as the one from which interest will begin to run, the rule which regards the widow as a purchaser for value, entitled to interest from testator's death, will be disregarded. *Welch v. Adams* (Mass.) 244

13. A devise of a farm conditioned that the devisee shall support and maintain testator's daughter out of the farm during her life, does not make the support contingent upon the daughter residing on the farm. *Dickson v. Field* (Wis.) 587

14. Delivering specific articles necessary for her maintenance, to the testator's daughter, with due regard to the condition in life of testator and his family at the time of his death, fulfills the condition in a devise of a farm which requires the devisee to support such daughter out of the property; and the devisee cannot be required to pay her a cash annuity or deliver such articles elsewhere. *Dickson v. Field* (Wis.) 587

15. The failure of a devisee to inform one whose support out of the property devised was made a condition to his receiving it, of his readiness to furnish such support, puts him in default and renders him liable to pay a cash commutation for past support, even though no demand therefor was made upon him. Such failure will not, however, have such effect as to future support; nothing short of absolute refusal or neglect to furnish the support, after the obligation to do so and the manner of doing it have been authoritatively adjudicated, will entitle the one to whom the support is due to receive a cash annuity for life. *Dickson v. Field* (Wis.) 587

16. One entitled to a life support out of lands devised to another subject to such support waives her right thereto by relying upon her husband for her support; but upon the latter's death, the obligation of the devisee revives as to future support and maintenance. *Dickson v. Field* (Wis.) 587

17. A legatee who seeks to charge the payment of his legacy upon land specifically devised must, in case the will does not expressly or impliedly make the legacy a charge upon the land, show that the testator did not, at the time of the execution of the will, have personal property out of which the legacy could be paid. Such fact need not be shown, however, where the land is not specifically devised and the legacy is made a charge thereon. *Davidson v. Coon* (Ind.) 584

18. A legacy is made a charge upon the whole residuary estate, including land, by a will which gives the legacy and directs that it shall be made out of testator's estate, and then proceeds: "When the above amount of money

shall have been paid, I direct that the remainder of my whole estate shall be equally divided among my heirs." *Davidson v. Coon* (Ind.) 584

19. Payment of legacies may be enforced out of land devised by a residuary clause and upon which they are made a charge, even after final settlement of the estate, where, upon such settlement, there is no personal property applicable thereto. *Davidson v. Coon* (Ind.) 584

20. If a will is silent as to the time when a legacy is to be paid, the legatee, in case he stands in the position of a purchaser for value, is entitled to have the time of payment determined by the legal presumption of the testator's intent. *Welch v. Adams* (Mass.) 244

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Bequest to nephews and nieces; instances; residuary estates; residuary bequest; what passes; what passes by general residuary bequest; action or suit to recover legacy; equity jurisdiction, amount in controversy. 200

Vested and contingent remainders distinguished and defined; intervention of trustees; suspending time of vesting of estate; when estates vest; rule which governs. 211

Testamentary charge on land, how created; directions in will; effect of acceptance of devise; directions for sale of land; legacy chargeable on residuary estate; exoneration of personalty; intention of testator to govern. 584

Nuncupative will defined. 829

Devise to widow during widowhood, with contingent authority to sell. 573

Devise for support, construction of. 537

What legacies bear interest; in lieu of dower. 244

WITNESSES.

1. A question on cross-examination as to how many men plaintiff owes besides defendant in the city where he lives is not proper in a suit for libel in publishing him as a delinquent debtor. *Muetze v. Tuteur* (Wis.) 86

2. A party has no right to cross-examine a witness except as to facts and circumstances connected with matters stated in his direct examination. *Rosum v. Hodges* (S. D.) 817

WRIT AND PROCESS. See also CONSTITUTIONAL LAW, 11; COURTS, 2; LIMITATION OF ACTIONS, 8.

An objection that a notice to a nonresident was not published for three successive weeks as required by law, but only for three insertions during two weeks, is not valid where three full weeks after the first publication expired more than thirty days before the first day of the term at which he was notified to appear. *Horn v. Indianapolis Nat. Bank* (Ind.) 676

L. R. A. CASES AS AUTHORITIES.

CASES IN 9 L. R. A.

9 L. R. A. 33, *PEOPLE v. NORTH RIVER SUGAR REF. CO.* 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834.

Action by receiver to recover profits from other party to illegal combination in *Gray v. Oxnard Bros. Co.* 59 Hun, 388, 13 N. Y. Supp. 86.

Forfeiture of franchise and dissolution of corporation.

Cited in *People ex rel. Union P. R. Co. v. Colorado Eastern R. Co.* 8 Colo. App. 307, 46 Pac. 219, holding that, to support action by people for redress of wrong, injury must have been done to people; *People ex rel. McIlhany v. Chicago Live Stock Exchange*, 170 Ill. 570, 39 L. R. A. 377, 62 Am. St. Rep. 404, 48 N. E. 1062, holding that, to warrant forfeiture of charter, misconduct must tend to injure public by affecting welfare of people; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 318, 52 L. R. A. 543, 83 Am. St. Rep. 754, 60 N. E. 220, granting judgment of ouster against corporation for issuing and selling investment certificates in nature of lottery; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 486, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding agreement of gas lighting company with competing corporation, fixing price to consumers, sufficient warrant for declaring forfeiture of franchise; *People v. Equitable Mut. F. Ins. Co.* 12 Misc. 560, 33 N. Y. Supp. 708, holding that temporary receiver will not be appointed in action to dissolve corporation when public injury not shown imminent; *State ex rel. Crowe v. National School of Osteopathy*, 76 Mo. App. 445, holding issue of diploma by school of osteopathy in violation of law not ground for forfeiture of charter.

Cited in footnotes to *State ex rel. Sheets v. Mt. Hope College Co.* 52 L. R. A. 365, which authorizes dissolution of educational institution for sale of diplomas without regard to merit; *People v. Buffalo Stone & Cement Co.* 15 L. R. A. 240, which holds manufacturing corporation liable to forfeiture of charter for failure to make annual report required by statute; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 53 L. R. A. 413, which authorizes forfeiture of corporate charter for combination to fix price for gas; *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 328, which upholds statute empowering state auditor to institute proceedings for dissolution of insolvent corporation.

Cited in note (9 L. R. A. 275) on dissolution of corporation.

Combinations, legal and illegal.

Cited in *Chevra Bnai Israel v. Chevra Bikur Cholim*, 24 Misc. 190, 52 N. Y. Supp. 712, holding that corporations cannot consolidate without legislative au-

thority; *Davis v. Congregation Beth Tephila Israel*, 40 App. Div. 426, 57 N. Y. Supp. 1015, holding consolidation of religious corporations under statutory authority invalid, where conditions as to exercise of power not complied with; *State ex rel. Walker v. Equitable Loan & Invest. Asso.* 142 Mo. 341, 41 S. W. 916, and *McCutcheon v. Merz Capsule Co.* 31 L. R. A. 420, 19 C. C. A. 114, 37 U. S. App. 586, 71 Fed. 793, holding any conduct destroying separate activity of corporations by taking away right freely and independently to exercise franchise, contrary to public policy; *Bishop v. American Preservers' Co.* 157 Ill. 313, 48 Am. St. Rep. 317, 41 N. E. 765, and *Unckles v. Colgate*, 148 N. Y. 533, 43 N. E. 59, holding partnership agreement between manufacturing corporations, whereby corporate management is surrendered to directors selected by board of trustees, unlawful; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 488, 47 Am. St. Rep. 200, 41 N. E. 188, holding agreement between distilling corporations, intrusting to trustees conduct of business, with view of controlling manufacture and sale of all distillery products, illegal; *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 362, 9 L. R. A. 761, 3 Inters. Com. Rep. 395, 22 Am. St. Rep. 593, 26 N. E. 159, holding contract for combination of common carriers to stifle competition illegal; *National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 267, holding combination between business corporations to suppress competition, fix prices, limit production, and restrain trade unlawful; *DeWitt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 532, 14 N. Y. Supp. 277, holding combination of manufacturers binding members not to sell, under penalty, below price fixed, against public policy; *American Preservers' Trust v. Taylor Mfg. Co.* 46 Fed. 155, holding corporation will not be restrained from violating trust agreement, whereby exercise of its powers is committed to board of trustees representing parties to trust contract; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.* 85 Me. 540, 35 Am. St. Rep. 385, 27 Atl. 525, holding damages not be recovered for breach of covenants in lease of gas lighting plant to competing corporation; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 43, 36 L. R. A. 670, 45 N. E. 390 (dissenting opinion), majority holding lease by gas lighting corporation of entire plant to competing company for twenty-five years not illegal so as to preclude action for rent accrued under it; *Stockton v. Central R. Co.* 50 N. J. Eq. 76, 17 L. R. A. 107, 24 Atl. 964, holding lease of railroad to nominal lessee to evade statute forbidding lease to foreign railway corporation invalid; *Bishop v. American Preservers' Co.* 157 Ill. 315, 48 Am. St. Rep. 317, 41 N. E. 765, holding evidence that bill of sale to illegal trust was obtained by threats admissible in action to enforce same; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 38, 62 L. R. A. 648, 96 Am. St. Rep. 598, 67 N. E. 136 (dissenting opinion), majority upholding agreement between manufacturers and wholesalers made to fix jobbing and retail prices of proprietary medicines; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 391, 61 L. R. A. 474, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination to fix and maintain price of meat illegal; *Strait v. National Harrow Co.* 18 N. Y. Supp. 233, holding illegal, combination of all manufacturers of harrows in the United States to regulate price and control production.

Cited in footnotes to *State ex rel. Watson v. Standard Oil Co.* 15 L. R. A. 145, which holds agreement by which stock of corporations is transferred to trustees, who elect directors of several corporations, and thereby control affairs in interest of trust, against public policy; *Stockton v. Central R. Co.* 17 L. R. A. 97, which

holds lease of railroad franchises and roads tends to monopoly; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful.

Cited in note (53 L. R. A. 380, 381, 387) on right of corporations to consolidate.

Distinguished in *Oakdale Mfg. Co. v. Garst*, 18 L. R. A. 486, 23 L. R. A. 640, 49 Am. St. Rep. 784, 28 Atl. 973, upholding agreement of individual manufacturers to unite in corporation and not engage in same business individually for five years; *Queen Ins. Co. v. State*, 86 Tex. 270, 22 L. R. A. 492, 24 S. W. 397, holding combination of insurance companies to increase rates not within rule making agreements to increase price of merchandise illegal.

Right to question validity of corporate acts.

Cited in *People v. Ulster & D. R. Co.* 128 N. Y. 248, 28 N. E. 635, holding wilful neglect of railway corporation to exercise all its franchises not of itself ground for forfeiture unless state so elects; *Willoughby v. Chicago Junction R. & Union Stock-Yards Co.* 50 N. J. Eq. 676, 25 Atl. 277, holding invalidity of original incorporation on ground that object is to hold stock of another corporation can be questioned only by state; *Booth Bros. v. Baird*, 83 App. Div. 500, 82 N. Y. Supp. 432, holding vendees receiving benefit of contract estopped from asserting that it was *ultra vires* as to vendor.

Distinguished in *Stockton v. American Tobacco Co.* 55 N. J. Eq. 376, 36 Atl. 971, holding that purpose of incorporators to create monopoly cannot be inquired into in action to restrain exercise of corporate powers.

Identity of corporation.

Cited in *Vesta Mills v. Charleston*, 60 S. C. 9, 38 S. E. 226, holding newly organized corporation composed of new incorporators, purchasing plant of old corporation, within ordinance granting exemption from taxation for five years from time of establishment.

Liability for acts of corporate agents.

Cited in *Michigan Slate Co. v. Iron Range & H. B. R. Co.* 101 Mich. 28, 59 N. W. 646, holding corporation bound by acts of agent appointed by officers of company to conduct its business.

Cited in footnote to *Leinkauf v. Lombard*, 20 L. R. A. 48, which holds that irregular way of conducting business by corporate managers does not relieve corporation from liability.

Cited in note (12 L. R. A. 168) on estoppel of corporation to deny liability on its contracts.

Exercise of police power over corporations.

Cited in note (13 L. R. A. 454) on telegraph companies subject to police power of municipalities.

9 L. R. A. 45, *QUEEN INS. CO. v. LESLIE*, 47 Ohio St. 409, 24 N. E. 1072.

Statutes regulating insurance contracts.

Cited in *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 56, 19 C. C. A. 292, 37 U. S. App. 692, 72 Fed. 418, upholding statute providing policy not forfeitable by insured's misrepresentations made in good faith, and not material to risk; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 255, 28 L. R. A. 799, 32 S. W. 5, upholding statute making void, stipulations in insur-

ance policies limiting liability to less than full amount; *Daggs v. Orient Ins. Co.* 136 Mo. 390, 35 L. R. A. 228, footnote, p. 227, 58 Am. St. Rep. 638, 38 S. W. 85, holding statute requiring payment of full amount of insurance for total loss constitutional; *Continental F. Ins. Co. v. Whitaker (Tenn.)* 64 L. R. A. 453, 78 S. W. 119, holding statute prohibiting forfeitures of policies in certain cases, justifiable as exercise of police power.

Waiver of provisions of statute.

Cited in *Dennis v. Moses*, 18 Wash. 579, 40 L. R. A. 310, 52 N. W. 333, holding mortgagor's statutory right to remain in possession during period of redemption cannot be waived by instrument creating debt; *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. 781, holding stockholder in building and loan association cannot waive statutory right of withdrawal; *Berteche v. Equitable Loan & Invest. Asso.* 147 Mo. 362, 71 Am. St. Rep. 571, 48 S. W. 954, holding recitals in mortgage as to maturity of stock in building and loan association yield to statutory provisions.

— Insurance laws.

Cited in *Havens v. Germania F. Ins. Co.* 123 Mo. 417, 26 L. R. A. 110, 45 Am. St. Rep. 570, 27 S. W. 718, holding stipulations of insurance policy must yield to provisions of statute; *Home F. Ins. Co. v. Weed*, 55 Neb. 151, 75 N. W. 539, holding provision in policy limiting liability on total loss in case of coinsurance yields to statute; *Western Assur. Co. v. Phelps*, 77 Miss. 660, 27 So. 745, holding statute not waived by accepting policy prescribing different rule for fixing amount of loss; *Insurance Co. v. Luce*, 11 Ohio C. C. 480, holding submission of loss to arbitration not waiver of statutory right to full value insured; *German Ins. Co. v. Eddy*, 36 Neb. 466, 19 L. R. A. 709, 54 N. W. 856, and *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 54, 81 Am. St. Rep. 608, 57 N. E. 962, holding insured not bound by waiver of statute making whole insurance payable for total loss; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 47, 33 S. W. 992, and *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 256, 56 L. R. A. 161, footnote p. 159, 62 N. E. 338, holding void, condition giving insurer option to rebuild in case of total loss.

Forfeiture of policy.

Cited in *United Firemen's Ins. Co. v. Kukral*, 7 Ohio C. C. 359, holding occupancy other than stated in policy, known to agent, in absence of intentional fraud does not avoid policy; *Moody v. Amazon Ins. Co.* 52 Ohio St. 23, 26 L. R. A. 317, 49 Am. St. Rep. 699, 38 N. E. 1011, and *Phillips v. Ohio Farmers' Ins. Co.* 13 Ohio C. C. 684, holding nonoccupancy of insured premises without insurer's consent not invalidate insurance unless increasing risk; *United Firemen's Ins. Co. v. Kukral*, 7 Ohio C. C. 358, holding failure to disclose mortgage at time of insuring not avoid policy in absence of intentional fraud; *New York L. Ins. Co. v. Block*, 12 Ohio C. C. 230, holding misrepresentations, not fraudulently made nor material to risk, do not avoid life insurance; *People's Mut. F. Ins. Co. v. Bowersox*, 5 Ohio C. C. 449, holding judgment liens not materially increasing risk do not avoid policy; *Henderson v. Ohio Farmers' Ins. Co.* 2 Ohio N. P. 21, holding encumbrance of building without insurer's consent, not increasing risk, does not avoid policy; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 569, 30 L. R. A. 722, 53 Am. St. Rep. 658, 42 N. E. 546, Affirming 7 Ohio C. C. 528, holding subsequent mortgage without insurer's consent avoids policy.

Distinguished in *Sun Fire Office v. Clark*, 53 Ohio St. 426, 3 N. E. 248, holding additional insurance without insurer's consent avoiding policy; *Doten v. Aetna Ins. Co.* 77 Minn. 477, 80 N. E. 1116, holding clause in insurance law providing for avoidance of policy for vacant without insurer's consent not affected by clause providing for change increasing risk whole amount payable in case of total loss; *Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 150, 39 N. E. 757, holding that statute to contrary, breach of condition against future event insurance, though risk not increased.

Effect of "valued policy statutes."

Cited in *Lancashire Ins. Co. v. Bush*, 60 Neb. 121 82 N. W. 3; *Co. v. Hock*, 8 Ohio C. C. 344; *Springfield F. & M. Ins. Co. v. ...* 278, 25 L. R. A. 40, 46 Am. St. Rep. 571, 37 N. E. 1116,—holding that clause in insurance policy entitling insured to full amount of insurance; *McCollum v. ...* Ins. Co. 67 Mo. App. 79, holding statute prescribing amount payable does not render proof of loss unnecessary; *Schild v. Phoenix Ins. Co.* 135, holding that insured's estimate in proof of loss does not cover total insurance as fixed by statute; *Hubbard v. Winshel*, holding insured entitled to whole insurance on total loss, irrespective of interest in absence of intentional fraud.

Distinguished in effect in *Zalesky v. Home Ins. Co.* 108 Iowa, holding that insurance law as not rendering inoperative, provision for appraisal as condition precedent to action.

Existing laws as part of contract.

Cited in *People's Bldg. & L. Asso. v. Hanson*, 5 Ohio N. P. 16, holding that assessment upon liquor traffic superior, by virtue of existing law mortgage; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 153, 36 L. R. A. 715, 26 S. E. 421, holding that existing laws entered into contract of life insurance.

Distinguished in *Hewins v. London Assur. Corp.* 184 Mass., holding that foreign insurance policy issued in violation of state law is not binding upon company in form issued.

9 L. R. A. 50, *NEWTON v. TOLLES*, 66 N. H. 136, 49 Am. St. Rep. 1092.

Rescission of contract.

Cited in *Bigham v. Madison*, 103 Tenn. 363, 47 L. R. A. 26, holding that contract of sale can be rescinded where there is mutual agreement; *Hoops v. Fitzgerald*, 204 Ill. 330, 68 N. E. 105, 105 Ill. App. 541, holding lease made with mutual understanding to support two additional stories will be rescinded if not for purpose; *Loudon v. Carroll*, 130 Mich. 81, 89 N. W. 578, holding that grantee is liable at law for recovery of purchase price by grantor wishing tendering reconveyance.

9 L. R. A. 52, *ELLIOTT v. CALDWELL*, 43 Minn. 357, 45 N. W. 100.

Substantial performance as condition precedent to recovery.

Cited in *Birch Cooley v. First Nat. Bank*, 86 Minn. 388, 90 N. W. 100, 101 L. R. A. 40.—VOL. II.—10.

railroad company's right to municipal bonds where road was not finished until eighteen months after expiration of time limit; *Peterson v. Mayer*, 46 Minn. 470, 13 L. R. A. 74, 49 N. W. 245, holding embezzlement by agent hired to make collections bar to recovery for wages, contract to remit being unfulfilled.

Distinguished in *Hoffman v. Independent District*, 96 Iowa, 323, 65 N. W. 322, holding vendee must show breach of warranty before relief from payment will be granted.

— On building contracts.

Cited in *Taylor v. Marcum*, 60 Minn. 295, 62 N. W. 330, holding substantial compliance with contract to build grain bins necessary to right of recovery for contract price; *Anderson v. Todd*, 8 N. D. 160, 77 N. W. 599, denying builder's right to recover where deviations important, and not susceptible of remedy without reconstruction; *Perry v. Quackenbush*, 105 Cal. 308, 38 Pac. 740, denying right of builder to recover, where evidence shows intentional and fraudulent deviation from contract; *Anderson v. Pringle*, 79 Minn. 435, 82 N. W. 682, holding rule as to substantial compliance without application where performance of building contract essentially different from agreement; *McDermott v. Grimm*, 4 Colo. App. 42, 34 Pac. 909, raising, but not deciding, question as to effect of noncompliance with contract.

Cited in footnote to *Spence v. Ham*, 51 L. R. A. 238, which denies substantial compliance with building contract where omission cannot be remedied without partial reconstruction.

Occupancy as waiver of substantial performance.

Cited in *MacKnight Flintie Stone Co. v. New York*, 31 App. Div. 234, 52 N. Y. Supp. 747, denying that occupancy by municipal corporation of building on its land is waiver of substantial performance of contract to furnish water-tight cellar; *Anderson v. Todd*, 8 N. D. 161, 77 N. W. 599, holding occupancy of building not acceptance according to conditions of contract.

9 L. R. A. 55, *MOORE v. NORMAN*, 43 Minn. 428, 19 Am. St. Rep. 247, 45 N. W. 857.

Sufficiency of tender.

Cited in *Moore v. Norman*, 52 Minn. 85, 18 L. R. A. 360, footnote p. 359, 38 Am. St. Rep. 526, 53 N. W. 809, holding tender not good if coupled with condition of surrender of notes; *Lillenthal v. McCormick*, 54 C. C. A. 483, 117 Fed. 97, holding tender, to be effectual, must be unconditional, bona fide, and sufficient; *Malone v. Wright*, 90 Tex. 57, 36 S. W. 420, holding refusal of pledgee to deliver property not conversion, unless tender made in good faith; *Bank of Benson v. Howe*, 45 Minn. 42, 47 N. W. 449, holding tender of amount of deficiency after chattel mortgage foreclosure, not including expenses and sheriff's fees, insufficient to discharge lien on unsold property; *Leet v. Armbruster*, 143 Cal. 670, 77 Pac. 653, holding purchaser's title at foreclosure sale divested by valid tender of amount required for redemption.

Cited in note (33 L. R. A. 235) on effect of unaccepted tender on lien of mortgage or pledge.

Necessity of keeping tender good.

Cited in *Dunn v. Hunt*, 63 Minn. 485, 65 N. W. 948, holding that tender must be kept good to be effectual in subsequent suit to compel redemption.

Acts of mortgagor as affecting mortgagee.

Cited in *Blyth & F. Co. v. Houtz*, 24 Utah, 69, 66 Pac. 611, denying mortgagee bound by warranties, where mortgagor exercises statutory right to sell property before default.

9 L. R. A. 58, *MOORE v. RUGG*, 44 Minn. 28, 20 Am. St. Rep. 539, 46 N. W. 141.

Ownership of photographic negative.

Cited in note (50 L. R. A. 397) on use of negative or engraved plates without consent of party who has paid for same.

Distinguished in *Press Pub. Co. v. Falk*, 59 Fed. 325, holding that one photographing actress in her public character free of charge, owns photograph and negative.

9 L. R. A. 59, *WALCOTT v. WELLS*, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367.

Cause removed to Federal court on ground of local prejudice in *Walcott v. Watson*, 46 Fed. 529.

Writ of prohibition.

Cited in *Eastham v. Holt*, 43 W. Va. 619, 27 S. E. 883, holding writ will not be granted to prevent further proceedings upon indictment for murder, on ground that court abused its power; *State ex rel. Spalding v. Benton*, 12 Mont. 79, 29 Pac. 425, refusing writ commanding judge to refrain from further proceedings in administration of estate, where there was adequate remedy by appeal; *Overland Gold Min. Co. v. McMaster*, 19 Utah, 187, 56 Pac. 977, refusing writ to prevent enforcement of judgment of justice of peace for want of jurisdiction, where there was adequate remedy by appeal; *Mason v. Grubel*, 64 Kan. 841, 68 Pac. 660, holding writ enjoining justice of peace from taking jurisdiction of complaint against liquor dealer for maintaining nuisance improperly issued, where other statutory remedies available.

Cited in footnotes to *Bullard v. Thorpe*, 25 L. R. A. 605, which grants prohibition against splitting actions before justice into amounts too small to permit appeal; *Havemeyer v. Superior Court*, 10 L. R. A. 627, which granted prohibition to prevent receiver from proceeding under order appointing him.

De facto officer.

Cited in *Sawyer v. Dooley*, 21 Nev. 397, 32 Pac. 439, holding acts of governor as *de facto* member of board of equalization valid as to public; *Tower v. Whip*, 53 W. Va. 164, 63 L. R. A. 946, 44 S. E. 179, holding judgment by judge regularly elected, but failing to take constitutional oath, neither void nor reversible.

Cited in note (21 L. R. A. 142) on *de facto* officers and offices under unconstitutional statutes.

9 L. R. A. 67, *CENTRAL TRUST CO. v. SHEFFIELD & B. COAL, IRON & R. CO.* 42 Fed. 106.

Mechanic's lien.

Cited in *Meek v. Parker*, 63 Ark. 372, 58 Am. St. Rep. 119, 38 S. W. 900, upholding mechanic's lien for boxes and wheels built for dry kiln; *New England Engineering Co. v. Oakwood Street R. Co.* 75 Fed. 166, holding that Ohio statute, giving liens for work done on railways, etc., applies to street railroads; *Carv*

Hardware Co. v. McCarty, 10 Colo. App. 222, 50 Pac. 744, holding matte pots and ore cars sold smelting company "fixtures" subject to lien.

Limited in Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co. 11 C. C. A. 15, 23 U. S. App. 537, 63 Fed. 15, holding lien given for materials used in buildings and machinery not available when materials are used in construction of railroad.

9 L. R. A. 69, JACKSONVILLE v. LEDWITH, 26 Fla. 163, 23 Am. St. Rep. 558, 7 So. 885.

Second appeal in 32 Fla. 4, 13 So. 454, as to validity of defense set up by new cross-bill.

Right to regulate sale of articles of food.

Followed in Blanchard v. Ivers, 40 Fla. 120, 24 So. 66, upholding power of city to confine sale of marketable articles to public market under reasonable regulations.

Cited in State v. Sarradat, 46 La. Ann. 703, 24 L. R. A. 588, 15 So. 87, upholding city's right to establish, regulate, and lease space in, public market.

Cited in footnote to State v. Layton, 62 L. R. A. 164, which upholds constitutionality of statute prohibiting sale of baking powder-containing alum.

Cited in notes (24 L. R. A. 584) on market regulations restricting sales; (53 L. R. A. 784) on constitutionality of statutes attempting to grant monopoly.

Delegation of authority to regulate and license.

Cited in Walsh v. Denver, 11 Colo. App. 528, 53 Pac. 458, holding ordinance delegating city council's power to regulate butcher business void.

Right to impose license tax.

Cited in *Ex parte* Sims, 40 Fla. 440, 25 So. 280, denying city's power to impose special additional tax on wholesale malt liquor dealers holding state license to sell spirituous, vinous, or malt liquors; Canova v. Williams, 41 Fla. 515, 27 So. 30, upholding right of city, under special charter, to impose liquor-license tax exceeding 50 per cent of state tax.

Ordinances void for partiality.

Cited in *Ex parte* Theisen, 30 Fla. 535, 32 Am. St. Rep. 36, 11 So. 901, holding ordinance forbidding sale of liquor within certain distance of school or church without consent of council void for discrimination; Sherlock v. Stuart, 96 Mich. 208, 21 L. R. A. 590, 55 N. W. 845 (dissenting opinion), majority upholding discretionary power of council to grant application for liquor license.

Limitation of amount of license fees.

Cited in Atkins v. Phillips, 26 Fla. 298, 10 L. R. A. 161, 8 So. 429, holding monthly license tax of \$5 on meat business outside of public market, valid.

Cited in footnote to Littlefield v. State, 28 L. R. A. 588, which holds that license for sale of milk should not be disproportionate to cost of issuing license and regulating business.

Cited in notes (30 L. R. A. 416, 427, 429) on limit of amount of license fees.

Right to change location of market.

Cited in Petz v. Detroit, 95 Mich. 181, 54 N. W. 644, holding city may discontinue market, regardless of terms of tenants.

Ordinance invalid in part.

Cited in *Canova v. Williams*, 41 Fla. 512, 27 So. 30, holding that invalidity of part of ordinance does not affect validity of portion not dependent thereon.

9 L. R. A. 81, *CONTINENTAL INS. CO. v. KYLE*, 124 Ind. 132, 19 Am. St. Rep. 77, 24 N. E. 727.

Vacant or unoccupied premises.

Cited in *Hoover v. Mercantile Town Mut. Ins. Co.* 93 Mo. App. 118, 69 S. W. 42, holding use should be considered in determining whether premises "unoccupied;" *Schuermann v. Dwelling House Ins. Co.* 161 Ill. 440, 52 Am. St. Rep. 377, 43 N. E. 1093, holding house from which tenants have moved, leaving a few articles in one room, unoccupied; *Limburg v. German F. Ins. Co.* 90 Iowa, 713, 23 L. R. A. 100, 48 Am. St. Rep. 468, 57 N. W. 626, holding building vacated by tenant leaving counter and small quantity of liquor, without owner's knowledge, unoccupied; *Home Ins. Co. v. Boyd*, 19 Ind. App. 193, 49 N. E. 285, holding house vacant or unoccupied where tenant stores household goods in one room and departs without intention of returning to eat or sleep; *Agricultural Ins. Co. v. Hamilton*, 92 Md. 94, 30 L. R. A. 635, 51 Am. St. Rep. 457, 33 Atl. 429, holding house where employees occasionally sleep and where provisions are kept, but not used as fixed abode, unoccupied; *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 338, 49 N. E. 471, holding house from which tenant is moving on day of fire not vacant.

Cited in footnotes to *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds house not vacant because custodian has access to only one room; *Hampton v. Hartford F. Ins. Co.* 52 L. R. A. 344, which holds church in which services held, though windows are boarded up, not unoccupied as matter of law; *Stone v. Howard Ins. Co.* 11 L. R. A. 771, which holds that custom to cease operations in shoe factory in dull season does not render nugatory provision avoiding policy if operations cease; *Louck v. Orient Ins. Co.* 33 L. R. A. 712, which holds policy on idle distillery not void because not in operation; *German Ins. Co. v. Russell*, 58 L. R. A. 234, which holds policy absolutely forfeited by premises remaining vacant for time specified in policy; *Limburg v. German F. Ins. Co.* 23 L. R. A. 99, which holds altering or repairing insured building not occupancy; *Moody v. Amazon Ins. Co.* 26 L. R. A. 313, which holds nonoccupancy, without increase of risk or fraud, insufficient to avoid policy; *Henderson Trust Co. v. Stuart*, 48 L. R. A. 49, which holds executor liable for loss of insurance from failure to apply for extension of vacancy permit.

Forfeiture by breach of stipulation.

Cited in *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 368, 28 N. E. 868, holding that breach of agreement in policy not to change use so as to increase hazard defeats policy.

Validity of provisions against encumbrances.

Cited in *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 625, 39 N. E. 534; *Shaffer v. Milwaukee Mechanics' Ins. Co.* 17 Ind. App. 215, 46 N. E. 557; *Traders Ins. Co. v. Cassell*, 24 Ind. App. 242, 56 N. E. 259; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 146, 39 N. E. 757.—holding condition in policy against present or future encumbrance of personalty valid.

Parol evidence to modify policy.

Cited in *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 82, 38 N. E. 865, holding stip-

ulation that vacancy without consent will avoid policy not modifiable by parole evidence.

Effect of entry of finding or judgment.

Cited in *Williams v. Freshour*, 136 Ind. 365, 36 N. E. 280, holding that finding made and entered cannot be changed; *Burnett v. Milnes*, 148 Ind. 237, 46 N. E. 464, holding trial court cannot, after finding and judgment, hear additional evidence.

9 L. R. A. 86, *MUEITZE v. TUTEUR*, 77 Wis. 236, 20 Am. St. Rep. 115, 46 N. W. 123.

What constitutes publication of libel.

Cited in *Monson v. Lathrop*, 96 Wis. 389, 65 Am. St. Rep. 54, 71 N. W. 596, holding that writing and delivering libelous telegram for transmission constitute publication.

Libelous publications and threatening letters.

Cited in *Brown v. Vannaman*, 85 Wis. 454, 39 Am. St. Rep. 860, 55 N. W. 183, holding letter advising shipper to "look out for" consignee libelous *per se*; *State v. Armstrong*, 106 Mo. 416, 13 L. R. A. 426, 27 Am. St. Rep. 361, 16 S. W. 604, holding words "Bad Debt Collecting Agency" on envelope sent through mails, libelous; *Burton v. O'Niell*, 6 Tex. Civ. App. 616, 25 S. W. 1013, holding letters imputing dishonesty to person addressed, sent in open envelopes, indorsed "Bad Debt Collecting Agency," libelous *per se*; *White v. Parks*, 93 Ga. 634, 20 S. E. 78, holding publication of name in list of delinquent debtors libelous *per se*.

Cited in footnotes to *State v. McCabe*, 34 L. R. A. 127, which denies right to send threatening letters or circulars to debtor; *State v. Brady*, 9 L. R. A. 606, which holds false publication that member of certain family had been convict, libelous.

Cited in note (49 L. R. A. 613) on blacklisting dealer, as libel.

Privileged communication.

Cited in footnote to *Mitchell v. Bradstreet Co.* 20 L. R. A. 138, which holds voluntary publication by mercantile agency of false statement that firm has assigned not privileged.

Evidence to support charge of unworthiness of credit.

Cited in *State v. Armstrong*, 106 Mo. 417, 13 L. R. A. 426, 27 Am. St. Rep. 361, 16 S. W. 604, holding evidence of specific indebtedness of prosecutrix to other persons inadmissible in action for libel in imputing unworthiness of credit.

Impeachment of witness.

Cited in *Goodwin v. State*, 114 Wis. 323, 90 N. W. 170, holding evidence as to witness's illegitimate pregnancy inadmissible upon question of credibility; *Kolb v. Union R. Co.* 23 R. I. 76, 54 L. R. A. 648, footnote p. 646, 91 Am. St. Rep. 614, 49 Atl. 392, which denies right to cross-examine plaintiff in suit for husband's death as to subsequent birth of illegitimate child.

9 L. R. A. 90, *BURNHAM v. HESELTON*, 82 Me. 495, 20 Atl. 80.

Transactions between persons in fiduciary relation.

Cited in *Appleton v. Turnbull*, 84 Me. 81, 24 Atl. 592, holding purchase by pledgee on sale of pledged property presumptively void.

— Attorney and client.

Cited in *Lewis v. Broun*, 36 W. Va. 7, 14 S. E. 444, holding assignment by client to attorney of interest in property in litigation voidable; *Riegi v. Phelps*, 4 N. D. 277, 60 N. W. 402, holding attorney liable for money collected, when he has settled with client without disclosing true amount; *United States v. Coffin*, 83 Fed. 344, holding burden of showing fairness of transaction between attorney and client on attorney; *French v. Cunningham*, 149 Ind. 637, 49 N. E. 797, holding burden on attorney to show fairness of contract for fees, entered into after employment.

Cited in footnote to *Kidd v. Williams*, 56 L. R. A. 879, which holds independent advice unnecessary to enable client to make binding settlement with attorney for past services.

What contracts with attorney champertous.

Cited in footnotes to *Johnson v. Van Wyck*, 41 L. R. A. 520, which holds agreement by attorney to prosecute suit at own expense for half of recovery champertous; *Newman v. Freitas*, 50 L. R. A. 548, which holds void, contract to pay attorney one third of all amounts recovered in divorce suit; *Irwin v. Curie*, 58 L. R. A. 830, which sustains right of person placing demands in attorney's hands to recover agreed compensation, though statute forbids such agreements; *Reece v. Kyle*, 16 L. R. A. 723, which holds attorney's agreement to advance costs of collecting judgment not champertous; *Croco v. Oregon Short-Line R. Co.* 44 L. R. A. 285, which authorizes agreement that attorney's compensation shall depend on success and be payable out of proceeds of litigation.

9 L. R. A. 94, *PILLSBURY v. BROWN*, 82 Me. 450, 19 Atl. 858.

Width of highways.

Approved in *Bowers v. Barrett*, 85 Me. 386, 27 Atl. 260, holding way of usual width acquired, though but part used for thirty years; *Webb v. Butler County*, 52 Kan. 379, 34 Pac. 973, holding abutter's encroachment upon highway with fence or by use will not lessen public's right to entire width of highway when public exigencies require; *Marchand v. Maple Grove*, 48 Minn. 275, 51 N. W. 606, holding width of highway obtained by adverse user to be measured by extent of user, with adjacent land needed for ordinary repairs and improvements; *Bayard v. Standard Oil Co.* 38 Or. 446, 63 Pac. 614, holding width of highway established by public user, not necessarily confined to thread or course of actual travel.

Establishment of highway by user.

Cited in *Coakley v. Boston & M. R. Co.* 159 Mass. 35, 33 N. E. 930, holding town way not made country way by long-continued use by public.

Submission on evidence.

Approved in *Elm City Club v. Howes*, 92 Me. 214, 42 Atl. 392, holding that defendant cannot object to insufficient account annexed, where case is submitted to law court on evidence.

Variance between pleading and proof.

Cited in *Eveleth v. Gill*, 97 Me. 318, 54 Atl. 756, holding variance, consisting of declaration under one statute and proof under another, substantial.

9 L. R. A. 96, *EISNER v. HEILEMAN*, 52 N. J. L. 378, 19 Am. St. Rep. 449, 20 Atl. 46.

9 L. R. A. 97, *WILDER v. WILDER*, 89 Ala. 414, 18 Am. St. Rep. 130, 7 So. 767.

Estoppel of married women.

Approved in *Vincent v. Walker*, 93 Ala. 169, 9 So. 382, holding recital of consideration not estop married women to show absence of consideration, in transaction not within enabling statute; *Vansandt v. Weir*, 109 Ala. 108, 32 L. R. A. 203, 19 So. 424, holding equitable estoppel not operate to deprive married women of statutory separate estate; *Jackson v. Knox*, 119 Ala. 323, 24 So. 724, holding parol sale of land by married woman owning same not enforceable, though possession given and consideration received; *Brooks v. Laurent*, 39 C. C. A. 211, 98 Fed. 656, holding statutory right to sue and be sued as *feme sole* subjects married women to estoppel by pleadings.

Cited in footnote to *Arthur v. Israel*, 10 L. R. A. 693, which holds divorced woman estopped to set up invalidity of decree by subsequently marrying.

Distinguished in *Curry v. American Freehold Land Mortg. Co.* 107 Ala. 437, 54 Am. St. Rep. 105, 18 So. 328, holding wife's joinder in mortgage not estop her from asserting priority of her lien reserved in original conveyance to husband.

9 L. R. A. 100, *EAST END STREET R. CO. v. DOYLE*, 88 Tenn. 747, 17 Am. St. Rep. 933, 13 S. W. 936.

Additional servitudes.

Cited in *Detroit City R. Co. v. Mills*, 85 Mich. 673, 48 N. W. 1007 (dissenting opinion), majority holding electric street railway not additional servitude upon highway.

Cited in note (17 L. R. A. 478) on what use of street or highway constitutes additional burden.

Distinguished in *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 142, 43 L. R. A. 235, 24 So. 502, holding electric street railway not additional servitude upon highway.

Disapproved in *Howe v. West End Street R. Co.* 167 Mass. 50, 44 N. E. 386, holding duly authorized trolley railway in street not additional servitude.

Meaning of term "railroad."

Approved in *Katzenberger v. Lawo*, 90 Tenn. 239, 13 L. R. A. 186, 25 Am. St. Rep. 681, 16 S. W. 611, holding passenger train, propelled by dummy engine within statute regulating use of "railroads."

Cited in *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 698, 9 C. C. A. 672, 22 U. S. App. 220, 61 Fed. 611, holding horse railway not within statutes requiring stopping of every engine or train before crossing intersecting railroad.

Rights in street.

Cited in footnotes to *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488, which holds maintenance of water tank in street not authorized by grant of right to operate railroad; *Lostutter v. Aurora*, 12 L. R. A. 259, which authorizes city to fit up for use abandoned well in street without abutting owner's consent.

Damages.

Cited in *Stewart v. Ohio River R. Co.* 38 W. Va. 450, 18 S. E. 604, holding depreciation of market value of abutting property, measure of damages for railway in street; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.*

93 Tenn. 522, 27 L. R. A. 243, 29 S. W. 104, holding street railway liable for cost of return wires as substitute for telephone company's ground circuit destroyed by conduction.

9 L. R. A. 102, POLLASKY v. MINCHENER, 81 Mich. 280, 21 Am. St. Rep. 516, 46 N. W. 5.

Privileged communications and libel of merchants.

Cited in *Brewer v. Chase*, 121 Mich. 537, 46 L. R. A. 402, 80 Am. St. Rep. 527, 80 N. W. 575, holding answer to libel, published without malice to repel charge, privileged; *Mitchell v. Bradstreet Co.* 116 Mo. 238, 20 L. R. A. 142, footnote, p. 138, 38 Am. St. Rep. 592, 22 S. W. 358, holding voluntary publication by mercantile agency of false statement that firm has assigned not privileged; *Wolff v. Smith*, 112 Mich. 365, 70 N. W. 1010 (dissenting opinion), majority holding privilege no defense for reiteration of alleged slander after occasion for privilege has ceased.

Cited in footnotes to *Douglass v. Daisley*, 57 L. R. A. 475, which denies privilege, as matter of law, to communication by commercial agency that assignor, to secure indorser, had made assignment for creditors; *Dun v. Weintraub*, 50 L. R. A. 670, which holds publication by commercial agency of false statement reflecting upon merchant's responsibility and standing in community, libelous *per se*.

Master's liability for acts of servant.

Cited in note (27 L. R. A. 199) on master's civil responsibility for wrongful or negligent act of servant or agent towards one having no claim on master by reason of contract, incipient or perfected.

9 L. R. A. 106, PEOPLE v. BOUCHARD, 82 Mich. 156, 46 N. W. 232.

Municipal jurisdiction.

Approved in *State v. Eason*, 114 N. C. 794, 23 L. R. A. 524, 41 Am. St. Rep. 811, 19 S. E. 88, holding ordinance prohibiting throwing of fish or offal into river void where municipality bounded by low-water line.

Cited in note (46 L. R. A. 280) on jurisdiction over sea.

9 L. R. A. 108, FIDELITY TRUST & S. V. Co. v. MERCHANT'S NAT. BANK, 90 Ky. 225, 13 S. W. 910.

Right of set-off.

Approved in *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 91, 47 Am. St. Rep. 576, 58 N. W. 826, holding insolvency ground for equitable set-off, although assignment for benefit of creditors made under statutes; *Hodgin v. Peoples' Nat. Bank*, 124 N. C. 542, 32 S. E. 887, upholding right of bank to set off debt of insolvent partnership against partnership deposit; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 354, 15 L. R. A. 716, 18 S. W. 822, and *Thomas v. Exchange Bank*, 99 Iowa, 208, 35 L. R. A. 380, 68 N. W. 780, holding bank may set off against deposit, unmatured debts of insolvent depositors; *Georgia Seed Co. v. Talmadge*, 96 Ga. 256, 22 S. E. 1001, holding that bank may apply in satisfaction unmatured notes due from insolvent bank, amount deposited by latter bank in former; *Kortjohn v. Continental Nat. Bank*, 63 Mo. App. 171, holding debt by maker of voluntary assignment, not then due, will not operate as set-off to claim

acquired by assignee under the assignment; *Thompson v. Union Trust Co.* 130 Mich. 510, 97 Am. St. Rep. 494, 90 N. W. 294, holding depositor entitled to set off amount of deposit against notes payable to insolvent bank; *Neely v. Grayson County Nat. Bank*, 25 Tex. Civ. App. 516, 61 S. W. 559, holding that bank may set off deposit against unmatured notes of depositor.

Cited in notes (10 L. R. A. 380) on what constitutes set-off; (15 L. R. A. 710, 711) on right of bank to set off unmatured claim against deposit account of insolvent debtor.

Distinguished in *Merchants' Nat. Bank v. Robinson*, 97 Ky. 556, 28 L. R. A. 761, 31 S. W. 136, denying right of bank to set off deposit against unmatured debt of insolvent depositor, so as to defeat payment of latter's check to third person; *Stone v. Dodge*, 96 Mich. 516, 21 L. R. A. 284, 56 N. W. 75, denying right to set off certificate of deposit procured from creditor after suspension and before application for receiver, against debt due at suspension.

9 L. R. A. 110, *SULLIVAN v. HERGAN*, 17 R. I. 109, 20 Atl. 232.

Contracts promotive of illegal transactions.

Cited in *Edwards County v. Jennings*, 89 Tex. 621, 35 S. W. 1053, holding void, bond executed to secure performance of contract creating monopoly; *Haddock v. Salt Lake City*, 23 Utah, 527, 65 Pac. 491, holding it error to refuse amendment of answer setting up illegality of contract sued upon; *Miller v. Maguire*, 18 R. I. 771, 30 Atl. 966, holding lease not invalidated by knowledge of lessor that lessee intended to use premises for illegal purpose; *Teoli v. Nardolillo*, 23 R. I. 94, 49 Atl. 489, refusing to confirm master's report in partnership accounting upon objection showing illegality in partnership business.

Distinguished in *Atwood v. Lester*, 20 R. I. 665, 40 Atl. 866, holding fraudulent intent to deprive equitable owner of interest in note unavailable to guarantors as defense; *Hatch v. Hanson*, 46 Mo. App. 330, holding that part owner of successful lottery ticket cannot set up illegality of contract as defense to claim of other owner.

9 L. R. A. 111, *HUNTLEY v. HOLT*, 58 Conn. 445, 20 Atl. 469.

Liability for mechanic's lien.

Followed in *Lyon v. Champion*, 62 Conn. 77, 25 Atl. 392, denying that mechanic's lien attaches to wife's property "by virtue of agreement," where she consented to improvement, another assuming liability.

Cited in *Alderman v. Hartford & N. Y. Transp. Co.* 66 Conn. 53, 33 Atl. 589, holding acquiescence in use of stone in building insufficient under statute to charge owner for materials furnished by "agreement;" *National Wall Paper Co. v. Sire*, 37 App. Div. 407, 55 N. Y. Supp. 1009, denying liability of landlord for mechanic's lien for repairs made at instigation of tenant, though he saw work in progress; *Cawley v. Day*, 4 S. D. 225, 56 N. W. 749, denying wife's property chargeable with mechanic's lien for improvement, contract being made by husband in his own name; *Foskett & B. Co. v. Swayne*, 70 Conn. 75, 38 Atl. 893, holding non-suit error, where evidence sufficient to prove that materials furnished "by virtue of agreement;" *Coorsen v. Ziehl*, 103 Wis. 387, 79 N. W. 562, holding neglect of wife to advise contractor of her ownership not consent to improvement of property; *Hillhouse v. Pratt*, 74 Conn. 120, 49 Atl. 905, holding mechanic's liens superior to purchase price mortgage, where deed was to be withheld until partial

completion of building by vendee; *Hanson v. News Pub. Co.* 990, denying right to mechanic's lien against building, for to put in by tenant.

9 L. R. A. 113, *CAREY v. MACKEY*, 82 Me. 516, 17 Am. St. 1
Liquidated damages and penalty.

Cited in footnotes to *State v. Larson*, 54 L. R. A. 487, which liquor license bond a penalty, instead of liquidated damage; *Wrecking Co. v. United States*, 53 L. R. A. 122, which holds certain sum as damages for failure to remove building by cert when actual damages easily assessable; *Salem v. Anson*, 56 L. R. A. 275, which holds stipulated amount to be paid city for failure to complete plant within specified time liquidated damages; *Kilbourne v. Co.* 55 L. R. A. 275, which holds provision for retaining 15 feet for logs not delivered by specified date, one for liquidated damages; *Agreements governed by law of place of execution.*

Cited in *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 39 of place where note made governs as to capacity of parties; *Marshall*, 108 Iowa, 521, 79 N. W. 282, holding married woman's contract where executed, not enforceable in state of domicile.

Contracts for separation.

Cited in *Wootte v. Nickerson*, 70 N. H. 514, 54 L. R. A. 56 48 Atl. 1088, holding man and wife cannot make valid agreement for separation.

9 L. R. A. 117, *SEARS v. KINGS COUNTY ELEV. R. CO.* N. E. 98.

Notice and acceptance of corporate action.

Cited in *Benton v. Springfield Y. M. C. A.* 170 Mass. 537 320, 49 N. E. 928, holding vote by building committee of corporation architect, not officially communicated to him, no contract; *N. & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 97 Fed. 23 exchange bonds contemplated by corporate action cannot be a contract until officially communicated to them.

Parol evidence.

Cited in *Thomas v. Barnes*, 156 Mass. 584, 31 N. E. 683, 1 holding parol evidence of delivery and acceptance of written contract sufficient.

Right of directors to compensation.

Cited in footnotes to *Bassett v. Fairchild*, 52 L. R. A. 61 251, 10 N. E. 101, holding director's right, without direct contract, to compensation for services rendered with office; *Huffaker v. Germania Safety Vault & T. Co.* which holds directors entitled to compensation for extraordinary large expense, saving company from bankruptcy.

9 L. R. A. 118, *SOUTHWORTH v. EDMANDS*, 152 Mass. 203, 16 N. E. 101, holding property assessable.

Cited in footnote to *Minneapolis & N. Elevator Co. v. Traill*

A. 267, which sustains statute taxing grain in elevators, etc., in proprietor's name.

Distinguished in *Kerslake v. Cummings*, 180 Mass. 67, 61 N. E. 760, holding sale of property, occupied by widow and children and owned by children, for taxes assessed to widow, void.

Possession of premises in marital and parental relations.

Cited in *Trefethen v. Lyman*, 90 Me. 383, 38 L. R. A. 193, 60 Am. St. Rep. 271, 38 Atl. 335, holding rent of wife's premises occupied by herself and husband not chargeable to latter; *Kirchgassner v. Rodick*, 170 Mass. 545, 49 N. E. 1015, denying liability of stepfather to stepchild for use and occupation of premises inherited from her father; *Kerslake v. Cummings*, 180 Mass. 68, 61 N. E. 760, holding property of intestate, partly occupied by widow and minor children and partly rented in name of widow, not in latter's possession for purpose of taxation.

Delinquent tax sales.

Cited in *Rothchild Bros. v. Rollinger*, 32 Wash. 313, 73 Pac. 367, holding officer selling land for delinquent irrigation assessments not required to designate in writing, particular portion to be sold.

9 L. R. A. 122, *PROCTOR v. NATIONAL BANK*, 152 Mass. 223, 25 N. E. 81.

Action to enjoin collection of notes against insolvent without accounting for amount already received, in *Batcheller v. National Bank*, 157 Mass. 34, 31 N. E. 481.

Effect of assignment as to residents where transfer made.

Sustained in *Batcheller v. National Bank*, 157 Mass. 34, 31 N. E. 481, upholding right of creditor to prove balance of claim against insolvent, without accounting for amount received from property of debtor out of state.

Approved in *Thompson v. Tetley*, 68 N. H. 482, 41 Atl. 179, denying right of assignee to recover funds obtained by creditor by suit in another state prior to insolvency.

Cited in *King v. Cross*, 175 U. S. 408, 44 L. ed. 216, 20 Sup. Ct. Rep. 131, holding that attachment by resident, of debt due insolvent nonresident, prevails over assignment; *Allen v. Buchanan*, 97 Ala. 403, 38 Am. St. Rep. 187, 11 So. 777, holding that equity will enjoin seizure by resident creditor of exempt property of resident debtor in another state; *Bloomington v. Weil*, 29 Wash. 624, 70 Pac. 94, denying right of foreign creditor to attach real estate of foreign debtor after voluntary general assignment to foreign assignee, properly recorded.

Cited in note (23 L. R. A. 41) on assignments under statute as to residents where insolvency transfer was made.

Distinguished in *Crippen v. Rogers*, 67 N. H. 211, 25 L. R. A. 822, 50 Atl. 346, holding that sale of notes by nonresident to avoid insolvency laws of his state gives transferee no superior rights.

9 L. R. A. 124, *Re THIRD AVE. R. CO.* 121 N. Y. 536, 24 N. E. 951.

Motive power and change of same.

Cited in *People ex rel. Luckings v. Railroad Comrs.* 30 App. Div. 74, 51 N. Y. Supp. 781, holding consent to change of motive power irrevocable in absence of

statutory authority; *Re Rochester & L. O. R. Co.* 51 App. Div. 67, 64 N. Y. Supp. 429, holding lineal foot frontage rule not adopted by omitting "in value" after "property" in provision for consent of owners to proposed change of motive power; *Louisville Trust Co. v. Cincinnati*, 73 Fed. 733, holding municipal consent to change of motive power does not create or renew grant of railway franchise; *St. Michael's P. E. Church v. Forty-Second Street M. & St. N. Ave. R. Co.* 26 Misc. 605, 57 N. Y. Supp. 881, holding that under authorization to maintain street railway, change of motive power can only be made as provided by law; *Potter v. Collis*, 19 App. Div. 402, 46 N. Y. Supp. 471, holding injunction will not issue to restrain authorized change of motive power, where only formal permit unobtained.

Cited in footnotes to *Hooper v. Baltimore City Pass. R. Co.* 38 L. R. A. 509, which authorizes use of trolley system for street railway without sanction of municipal authorities; *Chicago General R. Co. v. Chicago City R. Co.* 50 L. R. A. 734, which denies liability for collision with cars of other company because of running cable cars under authority to use animal power only.

Cited in note (10 L. R. A. 176) on regulations as to motive power for street railroads.

9 L. R. A. 126, *Re GILL*, 79 Iowa, 296, 44 N. W. 553.

Inheritance by or from aliens.

Cited in notes (21 L. R. A. 243) on right of nonresident widow to statutory allowance; (31 L. R. A. 93) on effect of state Constitutions and statutes on question of inheritance by or from alien; (31 L. R. A. 179) on alien's right to inherit.

Purchasers or lienors.

Approved in *Bennett v. Hibbert*, 88 Iowa, 164, 55 N. W. 93, holding acquisition by devise within statute permitting aliens to acquire land by "purchase;" *Boggs v. Douglass*, 105 Iowa, 347, 75 N. W. 185, holding judgment plaintiff in possession of land cannot apply rents and profits therefrom to satisfaction of judgment as against owner thereof not judgment defendant.

9 L. R. A. 127, *HANNAN v. WILLIAMSBURGH CITY F. INS. CO.* 81 Mich. 556, 45 N. W. 1120.

What insurance policy covers.

Followed without discussion in *Hannan v. Westchester F. Ins. Co.* 81 Mich. 561, 45 N. W. 1122.

9 L. R. A. 129, *WOOLDRIDGE v. STERN*, 42 Fed. 311.

Statute of frauds.

Cited in footnotes to *Hand v. Osgood*, 30 L. R. A. 379, which holds void, oral lease of land for one year with privilege of three; *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds; *Weatherford, M. W. & N. W. R. Co. v. Wood*, 28 L. R. A. 526, which holds not within statute of frauds, contract to give pass to man and his family annually for ten years; *Brown v. Throop*, 13 L. R. A. 646, which holds parol agreement in March for lease of ice-house for one year from April, to be left full on surrendering possession, valid.

Cited in note (10 L. R. A. 727) on lease within statute of frauds.

Ejection of passenger; refusal to take ticket.

Cited in *Callaway v. Mellett*, 15 Ind. App. 369, 57 Am. St. Rep. 238, 44 N. E. 198, holding railroad liable for expulsion of one presenting expired ticket, accepted without fault upon application and payment for proper ticket; *Price v. Chesapeake & O. R. Co.* 46 W. Va. 542, 35 N. E. 255, holding railroad not liable for damages for ejection of passenger not showing ticket or conductor's check; *Hot Springs R. Co. v. Deloney*, 65 Ark. 181, 67 Am. St. Rep. 913, 45 S. W. 351, holding that passenger may recover damages when ejected upon presenting ticket improperly made out, and refusing to pay fare; *Trezona v. Chicago G. W. R. Co.* 107 Iowa, 27, 43 L. R. A. 139, 77 N. W. 486; *Grogan v. Chesapeake & O. R. R. Co.* 39 W. Va. 416, 19 S. E. 563,—holding that passenger presenting expired ticket may be ejected with necessary force, upon refusal to pay fare or get off; *Western Maryland R. Co. v. Stocksedale*, 83 Md. 254, 34 Atl. 880, holding railroad not liable for expulsion of passenger presenting return coupon dependent for validity upon known condition unperformed; *Kiley v. Chicago City R. Co.* 189 Ill. 390, 52 L. R. A. 628, 82 Am. St. Rep. 460, 59 N. E. 794, holding tender of transfer which should be valid, but is not, because of conductor's mistake, will not prevent expulsion with reasonable force; *Mahoney v. Detroit Street R. Co.* 93 Mich. 616, 18 L. R. A. 337, 32 Am. St. Rep. 528, 53 N. W. 793, holding passenger failing to ask or obtain transfer may be ejected from car to which he changes; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 181, 66 N. E. 950 (dissenting opinion), majority holding street car company liable for ejection of passenger through mistake of conductor on another car in giving transfer.

Cited in footnotes to *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round-trip ticket unstamped from inability to find agent; *Atkinson v. Southern R. Co.* 55 L. R. A. 223, which holds carrier liable for ejection of passenger because train does not stop at his station as ticket seller had incorrectly told him; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, which holds face of ticket conclusive evidence to conductor as to terms of contract; *Wardwell v. Chicago, M. & St. P. R. Co.* 13 L. R. A. 596, which authorizes ejection for refusal to make up deficiency of one from whom less than full fare mistakenly received; *Kansas City, M. & B. R. Co. v. Riley*, 13 L. R. A. 38, which holds carrier liable for conductor's refusal to accept return coupon; *United Railways & Electric Co. v. Hardesty*, 57 L. R. A. 275, which denies carrier's duty to accept coupon detached from commutation book; *Mahoney v. Detroit Street R. Co.* 18 L. R. A. 335, which authorizes ejection of one refusing to pay fare without having previously obtained transfer; *Illinois C. R. Co. v. Harper*, 64 L. R. A. 283, which holds passenger entitled to damages from carrier for wrongful ejection due to error of ticket agent.

Cited in note (12 L. R. A. 824) on ejection of passenger for refusal to pay fare. Distinguished in *Moore v. Ohio River R. Co.* 41 W. Va. 172, 23 N. E. 539, holding that conductor may take up mileage known to passenger to be invalid, and eject passenger with necessary force upon refusal to pay fare; *Trice v. Chesapeake & O. R. Co.* 40 W. Va. 275, 21 S. E. 1022, holding railroad liable for ejection of passenger who tenders unexpired mileage book as indicated by correction of date thereon, where conductor does not avail himself of means to ascertain who made correction.

Denied in *O'Rourke v. Citizens' Street R. Co.*, 103 Tenn. 131, 46 L. R. A. 615, 76 Am. St. Rep. 639, 52 S. W. 872, holding mistake of conductor in punching wrong hour on transfer ticket will not defeat his right of passage.

Disapproved in *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 173, 41 N. E. 712, holding railroad liable for damages in ejecting passenger with ticket to intermediate station, sold through agent's fault.

Remedy for expulsion.

Cited in *Lovings v. Norfolk & W. R. Co.* 47 W. Va. 592, 35 S. E. 962, sustaining recovery of damages for wrong by passenger ejected upon failure to produce ticket wrongfully taken up by another conductor, and refusal to pay fare.

Distinguished in *Boster v. Chesapeake & O. R. Co.* 36 W. Va. 327, 15 S. E. 158, holding trespass lies for ejection, without force, of passenger offering to pay fare; *Sheets v. Ohio River R. Co.* 39 W. Va. 478, 20 S. E. 566, holding case lies for ejection of passenger by conductor, acting through want of necessary information.

Disapproved in *Poulin v. Canadian P. R. Co.* 47 Fed. 861, holding action *ex delicto* lies for expulsion of passenger presenting ticket, invalid because of agent's mistake.

9 L. R. A. 135, *HEARTT v. KRUGER*, 121 N. Y. 386, 18 Am. St. Rep. 829, 24 N. E. 841.

Party walls and easements.

Approved in *Duncan v. Rodecker*, 90 Wis. 4, 62 N. W. 533, holding destruction of buildings terminates party-wall agreement; *Bonney v. Greenwood*, 96 Me. 342, 52 Atl. 786, holding covenant that grantor's wall shall forever remain partition wall terminated by destruction of wall; *Shirley v. Crabb*, 138 Ind. 203, 46 Am. St. Rep. 376, 37 N. E. 130, holding right under reservation of necessary use of stairway and hall extinguished by burning of building; *Odd Fellows' Asso. v. Hegele*, 24 Or. 24, 32 Pac. 679, holding party-wall agreement, to run so long as such wall shall stand, not creative of perpetual easement; *Corn v. Bass*, 43 App. Div. 54, 59 N. Y. Supp. 315, holding party-wall agreement running with land, providing for contribution toward repairing and rebuilding same, an encumbrance; *De Baun v. Moore*, 22 App. Div. 487, 48 N. Y. Supp. 16, holding purchaser of interest in party wall cannot require closing of existing windows not interfering with his beneficial use; *Schaefer v. Blumenthal*, 51 App. Div. 519, 64 N. Y. Supp. 687, holding title to premises not marketable where party walls of house not upon lot; *North Powder Mill. Co. v. Coughanour*, 34 Or. 18, 54 Pac. 223, holding permanent right to divert not created by grant of land with apurtenant water rights for growing wheat; *McKenna v. Eaton*, 182 Mass. 348, 94 Am. St. Rep. 661, 65 N. E. 382, holding right of support and shelter on dividing line of double house lost by destruction of other half by lawful order of board of health; *Johnston v. Long Island Invest. & Improv. Co.* 85 App. Div. 64, 82 N. Y. Supp. 961, holding conveyance, subject to encroachment of frame building, not a reservation of the fee; *Deeves v. Constable*, 87 App. Div. 358, 84 N. Y. Supp. 592, holding easement requiring setting back of buildings from street line extinguished by change of residential into business street.

Cited in footnotes to *Clemens v. Speed*, 19 L. R. A. 240, which denies to party-wall owners easement from support of buildings; *Putzell v. Drovers & M. Nat. Bank*, 22 L. R. A. 632, which upholds right to remove boundary wall for erec-

tion of better wall; *Burr v. Lamaster*, 9 L. R. A. 637, which holds party wall and agreement to pay for same on using it an encumbrance; *Harber v. Evans*, 10 L. R. A. 41, which authorizes injunction against making openings in party wall.

Distinguished in *Douglas v. Coonley*, 156 N. Y. 525, 66 Am. St. Rep. 580, 51 N. E. 283, Reversing 84 Hun, 162, 32 N. Y. Supp. 444, holding that reconstruction of party wall destroyed by fire operates to revive easement of door therein and passage upon adjoining stairs.

9 L. R. A. 138, *AMERICAN EXP. CO. v. PEOPLE*, 133 Ill. 649, 23 Am. St. Rep. 641, 24 N. E. 758.

Fish and game laws.

Approved in *Organ v. State*, 56 Ark. 270, 19 S. W. 840, holding prohibition of exportation of game and fish not violation of commerce clause; *State v. Rodman*, 58 Minn. 401, 59 N. W. 1098, sustaining prohibition of possession during closed season of game lawfully killed; *Smith v. State*, 155 Ind. 614, 51 L. R. A. 406, footnote, p. 404, 58 N. E. 1044, holding prohibition of possession of quail during closed season, although same lawfully killed, valid; *Ex parte Kenneke*, 136 Cal. 529, 89 Am. St. Rep. 177, 69 Pac. 261, upholding statute making buying or selling of quail, a misdemeanor; *Geer v. Connecticut*, 161 U. S. 528, 40 L. ed. 796, 16 Sup. Ct. Rep. 600, Affirming *State v. Geer*, 61 Conn. 152, 13 L. R. A. 806, 3 Inters. Com. Rep. 734, 22 Atl. 1012, holding prohibition of fowling for purpose of conveying beyond state limits, valid; *State v. Harrub*, 95 Ala. 185, 15 L. R. A. 764, 4 Inters. Com. Rep. 103, 36 Am. St. Rep. 195, 10 So. 752, holding act prohibiting exportation of oysters in shells, taken in public waters, or taking thereof by nonresident, valid; *State v. Dow*, 70 N. H. 288, 53 L. R. A. 316, 47 Atl. 734, holding statute prohibiting fishing for trout with intent to sell or trade, proper protection of public right of fishery; *People v. O'Neil*, 110 Mich. 328, 33 L. R. A. 697, 68 N. W. 227, sustaining prohibition of sale of game or fish during closed season or during year, although same applies to imported game or fish; *Javins v. United States*, 11 App. D. C. 350, holding possession of game during closed season violates prohibition thereof, although same taken or killed in foreign state; *Stevens v. State*, 89 Md. 674, 43 Atl. 929, holding statute prohibiting possession of or trading in specified game in certain localities during closed season valid; *People v. Van Pelt*, 130 Mich. 625, 90 N. W. 424, upholding power of state to make such restrictions for protection of game as it sees fit.

Cited in footnote to *State v. Snowman*, 50 L. R. A. 544, which sustains statute requiring license for business of guiding in inland fishing and forest hunting.

Cited in note (13 L. R. A. 804) on game laws as affecting interstate commerce.

9 L. R. A. 140, *MANCHESTER LOCOMOTIVE WORKS v. TRUESDALE*, 44 Minn. 115, 46 N. W. 301.

Priority of lien.

Cited in footnote to *Illinois Trust & Sav. Bank v. Doud*, 52 L. R. A. 481, which holds claim for money loaned to pay interest on mortgage debt inferior to lien of prior mortgage.

9 L. R. A. 145, *ALFF v. RADAM*, 77 Tex. 530, 19 Am. St. Rep. 792, 14 S. W. 164.

Trade-mark; unfair competition in business.

Reaffirmed in *Radam v. Microbe Destroyer Co.* 81 Tex. 129, 26 Am. St. Rep. 783, 16 S. W. 990, holding use of words "microbe killer" as trade-mark not prevent use of words, "microbe destroyer" by another company.

Cited in *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.* 70 Fed. 707, refusing to enjoin use of name "Baco-Curo" and of advertising bearing general resemblance only to that of concern selling similar article called "No-To-Bac;" *Goodman v. Bohls*, 3 Tex. Civ. App. 191, 22 S. W. 11, holding goodwill and business injured by use of tobacco package so similar to another as to deceive public.

Cited in footnotes to *Cady v. Schultz*, 29 L. R. A. 524, which holds no property right acquirable in words "scientific dentistry at higher prices;" *McVey v. Brendel*, 13 L. R. A. 377, which holds equity will not protect labor union in use of non-trade-mark label; *American Waltham Watch Co. v. United States Watch Co.* 43 L. R. A. 826, which authorizes injunction against deceptive use of word "Waltham" by other manufacturer of watches at same place; *Schmidt v. Brieg*, 22 L. R. A. 790, which holds words "Sarsaparilla and Iron" not claimable as trade-mark; *Kyle v. Perfection Mattress Co.* 50 L. R. A. 628, which holds word "perfection" as name or mattress valid trade-mark; *Hygeia Distilled Water Co. v. Hygeia Ice Co.* 49 L. R. A. 147, which holds use of word "Hygeia," as indicating name of goddess, but not in natural signification of healthfulness, protected as trade-mark; *Koehler v. Sanders*, 9 L. R. A. 576, which denies right to appropriate word "international" as trade-mark; *Bolander v. Peterson*, 11 L. R. A. 350, which holds words "Svenska Snusmagasinet" cannot be exclusively claimed as trade-mark; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, which authorizes injunction against use of geographical name on flour made elsewhere, of wheat of different grade.

Cited in notes (19 L. R. A. 56) on invalidity of deceptive trade-mark; (17 L. R. A. 129-131) on competition in business, use of trade-mark.

9 L. R. A. 152, *BARDWELL v. ANDERSON*, 44 Minn. 97, 20 Am. St. Rep. 547, 46 N. W. 315.

Due process of law.

Cited in *State v. Sponaugle*, 45 W. Va. 421, 43 L. R. A. 731, 32 S. E. 283, holding forfeiture of land for nonpayment of taxes, due process.

— As to service, notice, and hearing.

Cited in *Hinckley v. Kettle River Co.* 70 Minn. 109, 72 N. W. 835, holding service on domestic corporation, without officer in state, by depositing summons in office of secretary of state, sufficient; *Easton v. Childs*, 67 Minn. 245, 69 N. W. 903, holding sheriff's return on summons, that defendant cannot be found, need not be filed as prerequisite to publication; *Davis v. St. Louis County*, 65 Minn. 313, 33 L. R. A. 434, 60 Am. St. Rep. 475, 67 N. W. 997, holding act providing for location of land by county surveyor on application of resident owners without notice to nonresident owners, void; *McNamara v. Casserly*, 61 Minn. 345, 63 N. W. 880, holding resident owners of land, under decree of distribution by probate court, entitled to personal notice of direct attack on that decree; *Carlson v. Phinney*, 56 Minn. 478, 58 N. W. 38, holding that nonresident defendant, failing to plead within prescribed time after substituted service, will not be permitted to

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defend; *State ex rel. Blaisdell v. Billings*, 55 Minn. 473, 43 Am. St. Rep. 524, 57 N. W. 794, holding act providing for commitment of insane persons, without hearing of any kind, not due process of law; *Smith v. Hurd*, 50 Minn. 506, 36 Am. St. Rep. 661, 52 N. W. 922, holding section of act providing for service by publication in foreclosing mechanic's lien void, although defendants are nonresidents; *Irwin v. Pierro*, 44 Minn. 491, 47 N. W. 154, holding "decree of heirship," obtained by simply presenting *ex parte* affidavit to judge, without due process of law; *State ex rel. Andreu v. Canfield*, 40 Fla. 65, 42 L. R. A. 82, 23 So. 591 (dissenting opinion), majority holding that record of writ of error in minute-book of court serves as notice to defendants in error that writ removed.

Cited in notes (50 L. R. A. 586, 588) on what service of process is sufficient to constitute due process of law; (16 L. R. A. 233) on validity of personal judgments rendered on constructive service of process.

Distinguished in *Shepherd v. Ware*, 46 Minn. 177, 24 Am. St. Rep. 212, 48 N. W. 773, holding service of summons by publication under statute, in action to quiet title against party named and parties unknown, sufficient as action *in rem*; *McClymond v. Noble*, 84 Minn. 331, 87 Am. St. Rep. 354, 87 N. W. 838, holding service by publication sufficient in action to determine adverse claims to land against defendant named and owners unknown.

Statute of Limitations.

Cited in *Carson v. Cochran*, 52 Minn. 75, 53 N. W. 1130, holding right to foreclose mortgage not barred by statute of limitations when payments made within fifteen years.

9 L. R. A. 155, *FERGUSON v. NEILSON*, 17 R. I. 81, 33 Am. St. Rep. 855, 20 Atl. 229.

Liability of owner of building for injuries.

Cited in *Collier v. Struby*, 99 Tenn. 251, 47 S. W. 90, holding married woman not liable for negligence of agent of her building, by which passenger in elevator is injured; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 673, 46 S. W. 63, holding owner of leased building liable for death of person rightfully in house, who stepped through door into open space.

9 L. R. A. 156, *HOVEY v. EAST PROVIDENCE*, 17 R. I. 80, 20 Atl. 205.

Mechanics' liens on public buildings.

Cited in *Atascosa County v. Angus*, 83 Tex. 203, 29 Am. St. Rep. 637, 18 S. W. 563, holding grant of lien against "all buildings" does not include public buildings unless specified; *Phillips v. University of Virginia*, 97 Va. 473, 47 L. R. A. 285, 34 S. E. 66, holding lien cannot be asserted upon state university unless so provided; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533, holding lien for labor cannot be established upon public schoolhouse.

Cited in footnote to *Steger v. Arctic Refrigerating Co.* 11 L. R. A. 580, which holds lien for laying pipes on land of strangers for refrigerating company enforceable against entire plant of company.

Cited in note (35 L. R. A. 143) on mechanics' liens on public property.

Liability of state to garnishment.

Cited in *Tucker v. Pollock*, 21 R. I. 320, 43 Atl. 369, holding state cannot be sued in garnishment, by making agent a nominal defendant.

9 L. R. A. 157, **BECKE v. MISSOURI P. R. CO.** 102 Mo. 544, **Imputed negligence.**

Cited in *Dickson v. Missouri P. R. Co.* 104 Mo. 504, 16 S. negligence of driver of wagon, not under control of injured party to him; *Profit v. Chicago G. W. R. Co.* 91 Mo. App. 375, negligence in driving over railroad tracks not imputable to infant St. Joseph, 96 Mo. App. 671. 71 S. W. 106, holding concurrent of wagon, not shown to have been in employ of injured woman; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 417, negligence of driver of vehicle not imputable to child being *v. Lindell R. Co.* 142 Mo. 352, 44 S. W. 254, holding negligence way, one of whose passengers was injured by car of another railroad to passenger.

Cited in footnotes to *East Tennessee, V. & G. R. Co. v. Mark* which holds hack driver's negligence in colliding with train not passenger; *Union P. R. Co. v. Lapsley*, 16 L. R. A. 800, which holds carriage owner in driving team not imputable to passenger; *Mull R. A.* 693, which holds negligence of driver of private car woman voluntarily riding with him; *Illinois C. R. Co. v. McLe* which holds hirer of team and of driver bound to check latter track without stopping and listening for train; *Kopplitz v. St* 74, which holds negligence of omnibus driver not imputable to party carried.

Cited in notes (12 L. R. A. 282) on imputing carrier's negligence (37 L. R. A. 74), on which of two or more persons is the master is conceded to be the servant of one of them, as bearing on due negligence.

Distinguished in *Bailey v. Citizens R. Co.* 152 Mo. 462, 52 railroad company, repairing crossing without negligence, not conductor of another company due to negligence of his gripman; *Munger v. Sedalia*, 66 Mo. App. 632, holding negligence of with wife when buggy overturned, cannot be imputed to her by of marriage.

Question for jury as to negligence.

Cited in *Schroeder v. Chicago & A. R. Co.* 108 Mo. 333, 18 W. 1094, holding declaration by court that servant's obedience negligence justifiable only where no other conclusion fairly deducible

Speed at railway crossing.

Cited in *McGhee v. Campbell*, 42 C. C. A. 98, 101 Fed. 940, engine at rapid speed at night without headlight, negligence.

Cited in footnotes to *Evison v. Chicago St. P. & M. & O. R. Co.* which holds ordinance limiting speed of railway trains in city void in suburbs.

Contributory negligence.

Cited in footnotes to *Keenan v. Union Traction Co.* 58 L. R. failure to look for train when within 35 feet of track, negligence *R. Co. v. Webb*, 11 L. R. A. 674, which holds failure to use set track not excused by unlawful speed of train and watchman's

Passman v. West Jersey & Seashore R. Co. 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution.

9 L. R. A. 165, CONGER v. LOWE, 124 Ind. 368, 24 N. E. 889.

Conditions attached to legacy.

Cited in Overton v. Lea, 108 Tenn. 556, 68 S. W. 250, upholding conditional limitation that devisee should not alien to certain persons; Zillmer v. Landguth, 94 Wis. 609, 69 N. W. 568, holding condition against alienation after devise of fee void for repugnancy.

Cited in footnotes to *Re Jones*, 48 L. R. A. 580, which sustains legacy conditioned on legatee being declared reformed man at expiration of specified time; Glover v. Condell, 35 L. R. A. 360, which holds ownership of fund, subject to limitation, given by bequest to son, and over in case of death without living heirs.

Construction of word "heirs" in devise or conveyance.

Cited in Bonner v. Bonner, 28 Ind. App. 151, 62 N. E. 497, holding devise for life "and to heirs in fee" passes fee to first taker; Perkins v. McConnell, 136 Ind. 385, 36 N. E. 120, holding devise to person for life and, after decease, "to lawful heirs." passes fee, context not showing contrary intention; Granger v. Granger, 147 Ind. 101, construing devise to one for life, then to "heirs of his body . . . him surviving," as devise for life with remainder to children, and not to heirs; Tinder v. Tinder, 131 Ind. 385, 30 N. E. 1077, construing and "heirs" in deed describing grantees as "heirs" of person living, as meaning "children;" Wescott v. Binford, 104 Iowa, 649, 65 Am. St. Rep. 530, 74 N. W. 18, holding devise not governed by rule in *Shelley's Case* where testator clearly intended otherwise; Plummer v. Shepherd, 94 Md. 469, 51 Atl. 173, and Essick v. Caple, 131 Ind. 209, 30 N. E. 990, construing "heir" to mean "child" where evidently used by testator in that sense.

9 L. R. A. 170, STATE v. HIRSCH, 125 Ind. 207, 24 N. E. 1062.

Interpretation of statutes.

Approved in *State v. Indiana & I. S. R. Co.* 133 Ind. 73, 18 L. R. A. 505, 32 N. E. 817, looking to statute as a whole for its construction, and giving effect to legislative object where reasonable construction of words permit; Gustave v. State, 153 Ind. 617, 54 N. E. 123, holding other waters intended by word "waters" in statute prohibiting catching of fish during specified months in any of the streams of the state, or except with hook and line in any of the "waters" of the state.

Distinguished in *Austin v. State*, 22 Ind. App. 230, 53 N. E. 481, holding statute prohibiting selling, bartering, or giving away of intoxicants, to be drunk as beverage, does not apply to person not a dealer giving away champagne as act of hospitality in private office.

9 L. R. A. 173, WOOD v. WOOD, 124 Ind. 545, 24 N. E. 751.

Knowledge of intended illegal use of loan.

Cited in *Plank v. Jackson*, 128 Ind. 429, 26 N. E. 568, holding mere knowledge of borrower's intention as to unlawful use of money no bar to recovery.

9 L. R. A. 176, *McPHEETERS v. WRIGHT*, 124 Ind. 560, 24 N. E. 734.

Purchase of adverse claim by cotenant.

Cited in *Ladd v. Kuhn*, 27 Ind. App. 543, 61 N. E. 747, and *Jennings v. Moore*, 135 Ind. 177, 34 N. E. 996, holding one tenant in common cannot acquire title against another upon foreclosure of lien created by common grantor; *Stevens v. Reynolds*, 143 Ind. 476, 52 Am. St. Rep. 422, 41 N. E. 931, holding cotenant, standing in relation of trust, cannot assert title against another under redemption from tax sale.

9 L. R. A. 182, *HERMAN v. PEOPLE*, 131 Ill. 594, 22 N. E. 471.

Right to join counts in indictment.

Cited in *Com. v. Shissler*, 7 Pa. Dist. R. 343, holding good, indictment with four counts, each charging separate larceny, although indorsed as larceny and receiving stolen goods; *State v. Edmunds*, 49 La. Ann. 273, 21 So. 266, holding that count charging attempt to commit murder may be joined with count charging attempt to commit murder in attempt to commit rape; *George v. People*, 167 Ill. 451, 47 N. E. 741, holding that same indictment may join counts for felonies and for misdemeanors, where all relate to same transaction.

Cited in footnote to *State v. Hoskins*, 27 L. R. A. 412, which holds only one offense charged in indictment for libel on more than one person by single writing.

Prosecution by indictment.

Cited in *Paulsen v. People*, 195 Ill. 518, 63 N. E. 144, holding misdemeanor, punishable only by imprisonment in penitentiary, must be prosecuted by indictment.

Election between counts.

Cited in *Looney v. People*, 81 Ill. App. 373, holding right to compel election between counts of indictment arises where distinct charges, not a part of same transaction, are joined.

Application of indeterminate sentence act.

Cited in *Towne v. People*, 89 Ill. App. 286, holding that indeterminate sentence act does not apply to offense punishable either by imprisonment in penitentiary or by fine alone.

Conviction of lesser crime than acts charged involve.

Cited in *Graff v. People*, 208 Ill. 321, 70 N. E. 299, holding that accused may be convicted of conspiracy although one of the overt acts be a higher crime.

9 L. R. A. 187, *LEIGHTON v. CAMPBELL*, 17 R. I. 51, 20 Atl. 14.

Liability for corporate debts.

Cited in *Wing v. Slater*, 19 R. I. 600, 33 L. R. A. 567, 35 Atl. 302, holding stockholder not liable on ground of failure to file certificate required by statute, for debt of corporation under contract for goods to be delivered in instalments when certificate filed before delivery of goods.

Cited in footnote to *Tradesman Pub. Co. v. Knoxville Car-Wheel Co.* 31 L. R. A. 593, which requires consent by directors to creation of indebtedness in excess of corporate assets, to have been given by them as directors, to make them individually liable.

Survival of action.

Cited in *Aylsworth v. Curtis*, 19 R. I. 520, 33 L. R. A. 111, 61 Am. St. Rep. 785, 34 Atl. 1109, holding statutory right of action given to owner of property against one stealing it survives owner's death.

9 L. R. A. 189, *DENNIS v. MASSACHUSETTS BEN. ASSO.* 120 N. Y. 496, 17 Am. St. Rep. 660, 24 N. E. 843.

Forfeiture of insurance.

Cited in *Sieburg v. Massachusetts Ben. Asso.* 87 Hun, 205, 33 N. Y. Supp. 1064, holding defense of forfeiture waived by insurer renewing policy upon receipt of payment and approval of risk; *Modern Woodmen v. Jameson*, 48 Kan. 722, 30 Pac. 460, holding benefit certificate not void for nonpayment of assessment, where no notice of suspension made, and insured subsequently treated as member; *Greenwald v. United L. Ins. Asso.* 18 Misc. 97, 42 N. Y. Supp. 973, denying forfeiture where insured attempted to pay by check and promptly paid upon learning of omission of signature, where member's intention to terminate, essential element of forfeiture; *Beatty v. Mutual Reserve Fund Life Asso.* 21 C. C. A. 232, 44 U. S. App. 527, 75 Fed. 69, holding insurance not forfeited by delay in paying assessment in accordance with course of dealing; *Mutual Reserve Fund Life Asso. v. Beatty*, 35 C. C. A. 579, 93 Fed. 753, raising, without deciding, question as to forfeiture by delay in paying assessment in accordance with course of dealing.

Distinguished in *Kentucky Life & Acci. Ins. Co. v. Kaufman*, 102 Ky. 12, 42 S. W. 1104, holding policy not forfeited by death within time allowed for payment of assessment.

Reinstatement of policy.

Cited in *Teeter v. United Life & Acci. Ins. Asso.* 11 App. Div. 262, 42 N. Y. Supp. 119, holding reinstatement to be a renewal and continuation of policy upon faith of statements then made; *McNeil v. Southern Tier Masonic Relief Asso.* 40 App. Div. 584, 58 N. Y. Supp. 119, holding that insanity is "satisfactory excuse" for nonpayment of dues and assessments.

Cited in note (14 L. R. A. 284) on reinstatement of policy after death of insured.

Arbitrary refusal to be satisfied.

Cited in *Jay v. Wilson*, 91 Hun, 395, 36 N. Y. Supp. 186 (dissenting opinion), majority denying right arbitrarily to object to title under agreement to make loan, if title "satisfactory."

9 L. R. A. 193, *CHAVANNES v. PRIESTLY*, 80 Iowa, 316, 45 N. W. 766.

Rights of insane persons.

Cited in *Re Bresee*, 82 Iowa, 578, 48 N. W. 991, holding person not entitled to jury trial upon issue of insanity; *Bumpus v. French*, 179 Mass. 133, 60 N. E. 414, holding appointment of temporary guardian for insane person, without notice, valid; *Re Dowdell*, 169 Mass. 389, 61 Am. St. Rep. 290, 47 N. E. 1033, holding that insane person will not be discharged from asylum to which he has been committed under provisions of statute, on ground that he is deprived of liberty without due process of law.

Cited in notes (23 L. R. A. 740) on necessity of notice of lunacy proceeding to

alleged lunatic; (64 L. R. A. 526) on right of insane person to institute proceedings by next friend.

9 L. R. A. 195, *Re BARRE WATER CO.* 62 Vt. 27, 20 Atl. 109.

Construction of word "other."

Approved in *Cross v. Frost*, 64 Vt. 182, 23 Atl. 916, holding excavations prima facie not within covenant not to put upon premises any buildings, timber, trees, or "other" nuisances.

What constitutes public use.

Approved in *Smith v. Barre Water Co.* 73 Vt. 312, 50 Atl. 1055, holding use of water for polishing granite not public use.

Cited in *Avery v. Vermont Electric Co.* 75 Vt. 239, 59 L. R. A. 824, 98 Am. St. Rep. 818, 54 Atl. 179, holding generation of electricity by water power for operation of railroad not public use.

Cited in footnote to *Fallsburg Power & Mfg. Co. v. Alexander*, 61 L. R. A. 129, which denies right to exercise power of eminent domain of corporation authorized to use water power of river and generate electric light, heat, etc., for itself and other persons.

Cited in note (61 L. R. A. 40) on establishment and regulation of municipal water supply.

9 L. R. A. 198, *STATE, SISTERS OF CHARITY, PROSECUTOR, v. CHATHAM TWP.* 52 N. J. L. 373, 20 Atl. 292.

Exemption from taxation.

Followed in *Cooper Hospital v. Burdsall*, 63 N. J. L. 89, 42 Atl. 853, holding hospital exempt under statute.

Approved in *Paterson Rescue Mission v. High*, 64 N. J. L. 121, 44 Atl. 974, holding association furnishing food and clothing to needy, turning into funds of institution profits of work, exempt.

Cited in *Litz v. Johnston*, 65 N. J. L. 170, 46 Atl. 776, holding society organized to aid missionary priesthood exempt, under statute; *Academy of Sacred Heart v. Irely*, 51 Neb. 757, 71 N. W. 752, holding, under statute, all property used exclusively for school purposes exempt; *State, Long Branch Firemen's Relief Asso., Prosecutor, v. Johnson*, 62 N. J. L. 627, 43 Atl. 573, holding funds of exempt firemen's relief association not taxable, although in excess of needs; *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 142, 23 Atl. 305, holding nontaxable municipal bonds, issued after repeal of tax-exemption law, taxable.

Distinguished in *Children's Seashore House v. Atlantic City*, 68 N. J. L. 391, 59 L. R. A. 949, 53 Atl. 399, holding land purchased by charitable institution temporarily occupied by tents and frame kitchen and laundry, not exempt; *Cooper Hospital v. Camden*, 68 N. J. L. 700, 54 Atl. 419, holding lands held by hospital as part of endowment not exempt.

9 L. R. A. 200, *GALE v. NICKERSON*, 151 Mass. 428, 24 N. E. 400.

Vesting of legacies.

Cited in footnote to *Wengerd's Appeal*, 13 L. R. A. 360, which holds legacies vest at testator's death, under will converting estate into money and directing distribution between children of son.

Cancellation of instruments.

Cited in footnote to *Ada County v. Bullen Bridge Co.* 36 L. R. A. 367, which denies right to maintain equitable action to cancel county warrants.

9 L. R. A. 204, *Re CHUNG TOY HO*, 42 Fed. 398.

Chinese exclusion.

Followed in *United States v. Gue Lim*, 176 U. S. 464, 44 L. ed. 546, 20 Sup. Ct. Rep. 415, Affirming 83 Fed. 137, in similar case.

Cited in *Tsoi Sim v. United States*, 54 C. C. A. 156, 116 Fed. 922, holding Chinese woman not liable to deportation after marriage to American citizen.

9 L. R. A. 205, *BULGER v. EDEN*, 82 Me. 352, 19 Atl. 829.

Municipal liability for negligence of officers.

Cited in footnotes to *Potter v. Jones*, 12 L. R. A. 160, which holds city not liable for negligence in blasting for schoolhouse; *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in note (19 L. R. A. 454) on distinction between public and private functions of municipalities in respect to liability for negligence.

Duty and liability of municipality as to sewers and drainage.

Cited in *Hamlin v. Biddleford*, 95 Me. 311, 49 Atl. 1100, holding officers in constructing sewers act as public officers, and not for municipality; *Gilpatrick v. Biddeford*, 86 Me. 539, 30 Atl. 99, holding town not liable for misconduct of officers constructing sewer; *Brunswick Gaslight Co. v. Brunswick*, 92 Me. 495, 43 Atl. 104, holding village not liable for trespass of officers constructing sewer, acting through contractor; *Bryant v. Westbrook*, 86 Me. 451, 29 Atl. 1109, holding town not responsible for repair of private sewer built before acceptance of street.

Cited in footnotes to *Uppington v. New York*, 53 L. R. A. 551, which denies city's liability for failure to select best possible route or adopt best possible plan for sewer; *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Williams v. Greenville*, 57 L. R. A. 207, which denies city's liability for sickness, etc., from permitting filth from drainage ditch to flow on adjoining land; *Huffmire v. Brooklyn*, 48 L. R. A. 421, which sustains city's liability for destruction of oysters by sewage cast on beds; *Nevins v. Fitchburg*, 47 L. R. A. 312, which denies city's right to discharge sewer into private tailrace.

Cited in note (61 L. R. A. 674, 710) on duty and liability of municipality with respect to drainage.

9 L. R. A. 211, *HILLS v. BARNARD*, 152 Mass. 67, 25 N. E. 96.

Further construction of same will in 152 Mass. 126, 25 N. E. 40.

Who take under designation of classes.

Cited in *Jackson v. Jackson*, 153 Mass. 377, 11 L. R. A. 308, 25 Am. St. Rep. 643, 26 N. E. 1112, holding bequest in trust for benefit of one for life, and then to his issue living, goes to all lineal descendants; *Harrison v. Weatherby*, 180 Ill. 446, 54 N. E. 237, holding devise for benefit of one for life and then to her children surviving, passes fee determinable by her leaving children at her death, and becoming absolute on her death without children; *Townsend v. Townsend*, 156

Mass. 457, 31 N. E. 632, holding grandchildren excluded from bequest of remainder of testator's estate to the "families" of his children; **Bragg v. Carter**, 171 Mass. 328, 50 N. E. 640, holding that great grandchildren will not be included in distribution of estate to "my grandchildren who may be then living."

Cited in footnotes to **Starnes v. Hill**, 22 L. R. A. 598, which holds indefeasible fee not vested in one to whom life estate given with estate in fee to his "heirs;" **Drake v. Drake**, 17 L. R. A. 664, which construes words "lawful issue" as embracing grandchild; **Green v. Grant**, 18 L. R. A. 381, which holds woman's issue without vested interest in land devised to her for life, with direction to convey to such issue as she shall appoint; **McIlhinny v. McIlhinny**, 24 L. R. A. 489, which holds word "issue" one of purchase, and not of limitation; **Schuyler v. Hanna**, 11 L. R. A. 321, which holds that present capacity of taking effect in possession if possession were to become vacant, distinguishes vested from contingent remainder.

Cited in note (11 L. R. A. 85) on rule against perpetuities.

9 L. R. A. 218, GARA v. AUSTIN, 79 Iowa, 178, 44 N. W. 352.

Right of administrator to proceeds of real estate.

Distinguished in **Dexter v. Hayes**, 88 Iowa, 497, 55 N. W. 491, holding administrator not entitled to rents and profits of land occupied by heirs during period of redemption from foreclosure; **Smith v. Smith**, 174 Ill. 59, 43 L. R. A. 407, 50 N. E. 1083, holding proceeds of partition sale not transmissible to administrator in another state to pay creditors.

Ancillary administration.

Cited in footnotes to **McCully v. Cooper**, 35 L. R. A. 492, which sustains right of ancillary administratrix to recover certificate of deposit from domiciliary administrator temporarily within state where former appointed; **Hopper v. Hopper**, 12 L. R. A. 237, which holds foreign executor taking out ancillary letters liable to suit as domestic executor.

Cited in notes (9 L. R. A. 246) on incapacity of foreign executor or administrator; (9 L. R. A. 244) on foreign letters of administration.

9 L. R. A. 221, SCHWENK v. WYCKOFF, 46 N. J. Eq. 560, 19 Am. St. Rep. 438, 20 Atl. 259.

Contracts against public policy and exemptions.

Cited in **Brooks v. Cooper**, 50 N. J. Eq. 770, 21 L. R. A. 620, 35 Am. St. Rep. 793, 26 Atl. 978, holding agreement to divide public printing between rival papers, lacking required circulation, void.

Distinguished in **Forrest v. Price**, 52 N. J. Eq. 25, 29 Atl. 215, denying that private moneys repaid by government to former purser in Navy are exempt from creditors.

As to salaries of public officers.

Cited in **National Bank v. Fink**, 86 Tex. 304, 40 Am. St. Rep. 833, 24 S. W. 256, holding assignment by public officer to bank, of unearned salary, void; **State v. Williamson**, 118 Mo. 151, 21 L. R. A. 829, footnote p. 827, 40 Am. St. Rep. 358, 23 S. W. 1054, denying mail clerk's guilt of embezzlement by collection of salary after assignment; **State use of Perkins v. Barnes**, 10 S. D. 311, 73 N. W. 80, holding county auditor liable to district attorney for salary warrant paid to mortgage company under assignment; **Chicago v. People**, 98 Ill. App. 521, ordering city

officers to pay salary checks to policeman, although same had been assigned by him for debts; *Spencer v. Morris*, 67 N. J. L. 502, 51 Atl. 470, denying authority of judge, under execution act, to require payment of debts with salary earned by public officer; *United States v. Phillips*, 5 App. D. C. 389, holding salary of army officer absent from post assigned by him after it was earned, not recoverable by government from assignee who furnished proof of authority for his absence; *Blake v. Bolte*, 10 Misc. 335, 31 N. Y. Supp. 124, holding that salary of justice, after received by him, may be reached by creditors.

Cited in footnotes to *White v. Cook*, 57 L. R. A. 417, which holds void, sale by sheriff to deputy of all work of office in one district and compensation for same; *Edwards v. Randle*, 36 L. R. A. 174, which holds sale by postmaster of postoffice furniture, and agreement to resign office, void; *Cansler v. Penland*, 48 L. R. A. 441, which holds void, contract by which sheriff turns over tax list to another to collect taxes on specified commission; *Re Worthington*, 23 L. R. A. 97, which holds void, assignment of commissions by executor before accounting.

9 L. R. A. 223, *NANZ v. OAKLEY*, 120 N. Y. 84, 24 N. E. 306.

Liability of sureties on bond of administrator, etc.

Approved in *Re Adams*, 30 Misc. 186, 61 N. Y. Supp. 751, holding sureties liable to illiterate administratrix for funds lost by coadministrator through failure of his private bank.

Cited in *McCoun v. Sperb*, 53 Hun. 166, 6 N. Y. Supp. 106, holding surety upon bond of two administrators may call upon either principal for indemnity, although one thereby made liable for other's torts; *Municipal Court v. Whaley*, 25 R. I. 292, 63 L. R. A. 237, 55 Atl. 750, holding action maintainable by legatee who is also an executor, for default of coexecutor on joint and several bond; *Palmer v. Ward*, 91 App. Div. 451, 86 N. Y. Supp. 990, holding that sureties consenting that administratrix take no active part in management of estate cannot hold her liable for devastavit by coadministrator.

Cited in footnotes to *Probate Judge v. Salloway*, 49 L. R. A. 347, which holds sureties on insolvent executor's bond liable for his personal debt to testator; *Abshire v. Salyer*, 56 L. R. A. 936, which holds sureties on guardian's bond, given to obtain relief from future liabilities of surety on prior bond, liable for past defalcations.

Distinguished in *Sperb v. McCoun*, 110 N. Y. 610, 1 L. R. A. 491, 18 N. E. 441, holding action maintainable by administrator, as such, on joint and several bond given by himself and coadministrator, with sureties, for coadministrator's breach.

Liability of joint administrator, etc.

Approved in *Re Westerfield*, 32 App. Div. 343, 53 N. Y. Supp. 25, holding joint trustee joining in accounts rendered, and accepting commissions for administration, not liable for act of other trustee under division of duty in administration; *Re Johnson*, 42 Misc. 655, 87 N. Y. Supp. 733, holding executor not liable for default of coexecutor in wrongfully using money of estate without former's knowledge.

Cited in footnote to *Re Osborn*, 11 L. R. A. 264, which holds personally liable, executor leaving matters entirely to coexecutor.

Distinguished in *Meldon v. Devlin*, 31 App. Div. 163, 53 N. Y. Supp. 172,

Reversing 20 Misc. 61, 46 N. Y. Supp. 333, holding joint executor liable for illegal acts of other executor so far as he participated therein.

Waiver of objection to capacity.

Cited in *Van Zandt v. Grant*, 67 App. Div. 73, 73 N. Y. Supp. 600, holding objection that infant's action upon administrator's bond can only be maintained by guardian *ad litem* waived by failure to demur.

9 L. R. A. 228, *BIERBOWER v. MILLER*, 30 Neb. 161, 46 N. W. 431, 47 N. W. 1.

Removal of causes.

Cited in *Beach v. Southern R. Co.* 131 N. C. 400, 42 S. E. 856, holding foreign corporation which was "domesticated" under statute cannot remove action against it to Federal court.

Cited in footnote to *Herndon v. Aetna F. Ins. Co.* 10 L. R. A. 53, which holds petition for removal of cause not aided by allegations as to residence in complaint.

Cited in note (11 L. R. A. 568, 572) on removal of cause for prejudice or local influence.

9 L. R. A. 236, *COM. v. MANCHESTER*, 152 Mass. 230, 23 Am. St. Rep. 820, 25 N. E. 113.

Affirmed in effect in 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

Title to land under navigable stream.

Cited in *Shively v. Bowlby*, 152 U. S. 19, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding that donor of land claim, bounded by navigable river, does not hold below high-water mark, as against state.

Fishery rights.

Cited in *State v. Thompson*, 85 Me. 192, 27 Atl. 99, holding jurisdiction of state over shore fisheries not in contravention of authority of United States.

Cited in footnote to *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during close season fish previously caught not an offense.

Cited in notes (9 L. R. A. 807) on fishery rights; (39 L. R. A. 582) on governmental control over right of fishery; (46 L. R. A. 278) on jurisdiction over sea; (60 L. R. A. 503) on right to fish.

9 L. R. A. 244, *WELCH v. ADAMS*, 152 Mass. 74, 25 N. E. 34.

Jurisdiction over affairs of nonresident decedent.

Cited in *Callahan v. Woodbridge*, 171 Mass. 596, 51 N. E. 176, sustaining jurisdiction of probate court over property of nonresident found in state.

Ancillary administration.

Cited in footnotes to *Hopper v. Hopper*, 12 L. R. A. 237, which holds foreign executor taking out ancillary letters liable to suit as domestic executor; *McCully v. Cooper*, 35 L. R. A. 492, which sustains right of ancillary administratrix to recover certificate of deposit from domiciliary administrator temporarily within state where former appointed.

Cited in note (9 L. R. A. 218) on ancillary administration of estates.

Right of legatees to interest and income.

Cited in *Re Williams*, 112 Cal. 525, 53 Am. St. Rep. 224, 44 Pac. 808, denying

that suspension of payment of legacy till convenient time prevents interest running from year of death of testator; *Re Bartlett*, 163 Mass. 521, 40 N. E. 899, denying that provision extending time of payment of legacies prevents interest running from death of testator; *Forbes v. Allen*, 166 Mass. 574, 44 N. E. 1065, directing that portions of money paid *cestui que trust*, not specially applied, should be applied to interest on fund; *Phelps v. Fitch*, 178 Mass. 453, 59 N. E. 1031, denying interest to those entitled to residue of estate.

Cited in notes (56 L. R. A. 308) on conflict of laws as to interest by way of damages; (62 L. R. A. 41) on conflict of laws as to date from which legacy carries interest.

Distinguished in *Edwards v. Edwards*, 183 Mass. 585, 67 N. E. 658, holding that upon delay in converting realty into personalty, life tenant is to be allowed only actual income that would have been obtainable by prompt investment; *Loring v. Thompson*, 184 Mass. 105, 68 N. E. 45, holding bequest of income entitles beneficiary to actual income producible upon proper investment.

Rate of interest on legacy.

Cited in *Loring v. Massachusetts Horticulture Soc.* 171 Mass. 404, 50 N. E. 936, holding that trust funds draw interest at statutory rate; *Daniels v. Benton*, 180 Mass. 560, 62 N. E. 960, raising, but not deciding, question as to rate of interest on legacy.

Sufficiency of tender.

Cited in footnote to *Moore v. Norman*, 18 L. R. A. 359, which holds tender, coupled with demand of surrender of notes, ineffectual to discharge chattel mortgage.

9 L. R. A. 255, *SANDERS v. BRYER*, 152 Mass. 141, 25 N. E. 86.

When interest recoverable.

Cited in *Morrissey v. Morrissey*, 180 Mass. 483, 62 N. E. 972, holding one advancing money on faith of agreement to devise, entitled to recover interest on advances.

Effect of tender.

Cited in *National Mach. & Tool Co. v. Standard Shoe Mach. Co.* 181 Mass. 281, 63 N. E. 900, holding that tender, not kept good, does not stop interest; *Thompson v. Lyon*, 40 W. Va. 98, 20 S. E. 812 (dissenting opinion), majority holding tender, unqualifiedly refused, stops interest.

Cited in footnote to *Moore v. Norman*, 18 L. R. A. 359, which holds tender, coupled with demand of surrender of notes, ineffectual to discharge chattel mortgage.

9 L. R. A. 258, *KENT v. BOTHWELL*, 152 Mass. 341, 25 N. E. 721.

To whom right of action belongs.

Cited in *Kaul v. Henke*, 2 Pa. Dist. R. 237, holding that equity will not grant restitution of note to administrator, since action at law sufficient remedy; *Seaver v. Weston*, 163 Mass. 204, 39 N. E. 1013, holding that administrator may make contract in his own name for benefit of estate, and sue on it, without defendant being permitted to set off advances to intestate.

Cited in footnote to *Mitchell v. Georgia & A. R. Co.* 51 L. R. A. 622, which holds that possession of property as agent does not authorize action for its conversion.

9 L. R. A. 259, CASEY v. SMITH, 152 Mass. 294, 23 Am. St. Rep. 842, 25 N. E. 734.

Imputed negligence.

Cited in *Cotter v. Lynn & B. R. Co.* 180 Mass. 147, 91 Am. St. Rep. 267, 61 N. E. 818, holding negligence of parent imputed to child of four, permitted by mother to play with boy of five in yard with open gate; *Gunn v. Ohio River R. Co.* 42 W. Va. 686, 36 L. R. A. 580, 26 S. E. 546, holding negligence of young children, killed on trestle, cannot be imputed to parents who had sent them on errand by route away from track; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 682, holding negligence of parents in permitting girl of seven to cross railroad tracks at public crossing cannot be imputed to her.

Cited in footnotes to *Bunting v. Hogsett*, 12 L. R. A. 268, which holds carrier's negligence not imputable to passenger; *Smith v. Davenport*, 11 L. R. A. 429, which holds father not liable for wrongful acts of minor son.

Cited in notes (21 L. R. A. 79) on contributory negligence of parent or custodian as bar to action by child for negligent injuries; (37 L. R. A. 74) on imputing negligence in case of servants delegated to perform work contracted for by their master; (10 L. R. A. 653, 654) on obligation of parents to protect children from danger.

Contributory negligence of, or as to, children.

Cited in *Wiswell v. Doyle*, 160 Mass. 43, 39 Am. St. Rep. 451, 35 N. E. 107, holding it not negligence *per se* where little child crossed street in front of horse standing quietly, but which was suddenly started by driver while looking away; *Hayes v. Norcross*, 162 Mass. 548, 39 N. E. 282, holding boy of five attempting to cross street, and knocked under horses feet, after going a few feet, negligent.

Distinguished in *Hewitt v. Taunton Street R. Co.* 167 Mass. 485, 46 N. E. 106, holding it for jury whether due care was exercised by parent leaving child in yard, who crossed street and was struck while returning.

9 L. R. A. 260, FIFTH NAT. BANK v. PROVIDENCE WAREHOUSE CO. 17 R. I. 112, 20 Atl. 203.

Warehouse receipt.

Cited in *Providence Warehouse Co. v. Providence & W. R. Co.* 19 R. I. 424, 34 Atl. 739, holding that mere non-negotiability of warehouse receipt does not make carrier liable for storage of goods.

Conversion.

Cited in *Putnam's Sons v. MacLeod*, 23 R. I. 376, 50 Atl. 646, holding it a conversion, to sell single volume of set books not paid for, bought under agreement that title remain in vendor until entire set paid for.

9 L. R. A. 263, NATIONAL BANK OF COMMERCE v. CHICAGO, B. & N. R. CO. 44 Minn. 224, 20 Am. St. Rep. 566, 46 N. W. 342, 560.

Negotiable instrument as payment.

Cited in *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 570, 38 Am. St. Rep. 615, 22 S. W. 313, holding giving of worthless check not payment preventing recovery of wheat from subvendee; *Hall v. Missouri P. R. Co.* 50 Mo. App. 183, denying that giving of unhonored check is payment for wheat, preventing replevin; *National L. Ins. Co. v. Goble*, 51 Neb. 8, 70 N. W. 503,

denying liability of insurance company for cancelation of policy, where worthless draft remitted in payment of premium; Baumgardner v. Henry, 131 Mich. 244, 91 N. W. 169, holding mere mailing of check not payment, under agreement to accept check in payment; Goodall v. Norton, 88 Minn. 4, 92 N. W. 445, holding burden upon creditor agreeing to credit amount of check, to show that it was returned or not paid.

Cited in footnotes to Bank of Antigo v. Union Trust Co. 23 L. R. A. 611, which holds that bank takes risk of accepting check in payment of note received for collection; State Bank v. Byrne, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment.

Cited in note (12 L. R. A. 492) on effect of certification of checks.

Conditions of cash sale as affecting title.

Cited in Carter v. Cream of Wheat Co. 73 Minn. 318, 76 N. W. 55, holding failure of vendee to comply with conditions of cash sale of printing press prevents title from vesting; Strauss v. Hirsch, 63 Mo. App. 105, holding title to whiskey not divested by vendee's mortgage, conditions of cash sale being unfilled; Freeman v. Kraemer, 63 Minn. 246, 65 N. W. 455, holding innocent purchaser acquiring possession before purchase price paid on cash sale holds subject to right of vendor.

Bills of lading and warehouse receipts.

Cited in Commercial Bank v. Hurt, 99 Ala. 140, 19 L. R. A. 705, 42 Am. St. Rep. 38, 12 So. 568, denying that unauthorized transfer of warehouse receipts makes pledgee's title superior to that of true owner; First Nat. Bank v. Mt. Pleasant Mill. Co. 103 Iowa, 522, 72 N. W. 689, holding bank discounting draft, with bill of lading attached, acquires interest in property shipped superior to that of attaching creditor; Security Bank v. Minneapolis Cold Storage Co. 55 Minn. 109, 56 N. W. 582, denying that warehouseman is estopped from collecting "advance" charges, space for charges in receipt being left blank.

Cited in notes (10 L. R. A. 416) on bills of lading; (38 L. R. A. 364) as to whom delivery may be made under bill of lading.

Distinguished in Ratzer v. Burlington, C. R. & N. R. Co. 64 Minn. 248, 58 Am. St. Rep. 530, 66 N. W. 988, holding carrier liable to innocent pledgee for failure to cancel bill of lading when goods delivered to another.

Goods taken from carrier by legal process.

Followed in Merz v. Chicago & N. W. R. Co. 86 Minn. 34, 90 N. W. 7, holding removal of goods from carrier by one having paramount title, perfect defense to action for conversion.

9 L. R. A. 270, F. J. DEWES BREWERY CO. v. MERRITT, 82 Mich. 198, 46 N. W. 379.

Conditional sales and bailments.

Approved in Hirsch v. Steele, 10 Utah, 21, 36 Pac. 49, holding conditional sale of liquors, to be resold by vendee, valid against vendee's attaching creditors.

Cited in Knights v. Piella, 111 Mich. 13, 66 Am. St. Rep. 375, 69 N. W. 92, holding jewels sent to dealer with privilege of purchase, bailment requiring ordinary care.

Cited in note (10 L. R. A. 235) on what constitutes conditional sale.

Agreement to resell goods.

Cited in *Triplett v. Mansur & T. Implement Co.* 68 Ark. 234, 82 Am. St. Rep. 284, 57 S. W. 261, holding agreement to resell goods sold vendee, title remaining in vendor until second sale, valid.

9 L. R. A. 271, *LOW v. STREETER*, 66 N. H. 36, 20 Atl. 247.

9 L. R. A. 273, *Re OSHKOSH MUT. F. INS. CO.* 77 Wis. 366, 46 N. W. 441.

Liquidation of affairs of corporation.

Approved in *Gager v. Bank of Edgerton*, 101 Wis. 596, 77 N. W. 920, denying right of creditor to maintain action to settle affairs of insolvent bank, when another action pending.

Cited in *Davis v. Shearer*, 90 Wis. 254, 62 N. W. 1050, denying right to contest validity of appointment of receiver in collateral proceedings.

Cited in footnote to *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 328, which holds corporation in suit to wind it up entitled to object to order directing suits for unpaid stock subscriptions.

Liability as member of mutual insurance company.

Distinguished in *Davis v. Parcher & J. & A. Stewart Co.* 82 Wis. 494, 52 N. W. 771, denying that payment of whole insurance in cash relieves insured from further liability as member of mutual company.

Right of minority stockholders to sue.

Cited in footnote to *Shaw v. Davis*, 23 L. R. A. 294, which denies minority stockholder's right to enjoin legal contract.

9 L. R. A. 277, *WILLIAMSON v. JOHNSON*, 62 Vt. 378, 22 Am. St. Rep. 117, 20 Atl. 279.

Gifts.

Cited in *Re Neiman*, 109 Fed. 116, holding separate property of wife, placed in husband's hands, not presumed gift; *Chambers v. McCreery*, 45 C. C. A. 326, 106 Fed. 368, holding allowing wife right of access to safe-deposit box containing bonds which husband continued to control not gift of such security; *Goelz v. People's Sav. Bank*, 31 Ind. App. 71, 67 N. E. 232, holding deposit made in bank for and in name of donee, donor retaining pass book until her death, valid gift; *Martin v. Martin*, 202 Ill. 388, 67 N. E. 1, holding legal liability for collections on securities not discharged by gift of other securities.

Recovery of money advanced.

Distinguished in *Hudson v. Archer*, 9 S. D. 245, 68 N. W. 541, holding money paid upon performance of preliminary conditions of contract, as agreed, not recoverable on subsequent breach.

9 L. R. A. 279, *DICKINSON'S APPEAL*, 152 Mass. 184, 25 N. E. 99.

Investment of trust funds.

Cited in *State v. Washburn*, 67 Conn. 194, 34 Atl. 1034, holding trustee liable for loss of ward's funds invested in notes secured by mortgage in another state; *Mattocks v. Moulton*, 84 Me. 552, 24 Atl. 1004, holding investment of trust funds in second mortgage, failure to exercise honest judgment; *Re Hall*, 164 N. Y. 200,

58 N. E. 11, denying that will giving trustee discretion over investments authorizes investment in speculative ventures; *Drake v. Crane*, 127 Mo. 106, 27 L. R. A. 659, 29 S. W. 990, upholding donation from trust fund to build hotel, thereby increasing value of trust property; *Pine v. White*, 175 Mass. 590, 56 N. E. 967, denying trustee's liability to estate for failure to purchase property when cheap; *Re Davis*, 183 Mass. 501, 67 N. E. 604, disallowing investment of trust funds in railroad bonds and stock beyond a quarter of whole estate.

9 L. R. A. 282, *MORRISON v. CITIZENS NAT. BANK*, 65 N. H. 253, 23 Am. St. Rep. 39, 20 Atl. 300.

Application of collateral on several obligations.

Cited in *California Nat. Bank v. Ginty*, 108 Cal. 153, 41 Pac. 38, upholding right of creditor holding two notes to apply collateral upon the one less secured; *First Nat. Bank v. Finck*, 100 Wis. 453, 76 N. W. 608, sustaining right of creditor having judgment embracing joint and individual notes to apply proceeds of execution on individual note; *Hutchings v. Reinhalter*, 23 R. I. 524, 28 L. R. A. 683, footnote p. 680, 51 Atl. 429, which sustains mortgagee's right to apply to notes not due, proceeds of sale under mortgage, to obtain benefit of attachment of other property to matured notes.

Liability of surety of debt otherwise secured.

Cited in *Bingham v. Mears*, 4 N. D. 440, 27 L. R. A. 259, 61 N. W. 808, holding creditor not bound to resort to security before suing surety; *Bank Comrs. v. Security Trust Co.* 70 N. H. 538, 49 Atl. 113, holding action against maker of note not prerequisite to action against guarantor; *Stevens v. Hood*, 70 N. H. 178, 46 Atl. 29, holding failure to present claim against estate of insolvent deceased principal does not bar suit against surety.

Distinguished in *Thomas v. Wason*, 8 Colo. App. 455, 46 Pac. 1079, holding surety having indemnity bond, released to extent of principal's property levied on and subsequently relinquished.

9 L. R. A. 287, *BROCK v. BROCK*, 90 Ala. 86, 8 So. 11.

Parol trusts.

Cited in *Moore v. Campbell*, 102 Ala. 448, 14 So. 780, holding trust in lands devised cannot be established by parol; *Tolleson v. Blackstock*, 95 Ala. 511, 11 So. 284, holding verbal direction to executors to execute deed to donee not enforceable.

Trusts ex maleficio.

Cited in *Brown v. Doane*, 86 Ga. 39, 11 L. R. A. 383, 12 S. E. 179, holding land conveyed upon faith of fraudulent oral promise, impressed with constructive trust; *Manning v. Pippen*, 95 Ala. 541, 11 So. 56, holding that trust *ex maleficio* arises only upon clear proof of fraudulent intent in promise to devise lands conveyed.

9 L. R. A. 292, *BEXAR BLDG. & L. ASSO. v. ROBINSON*, 78 Tex. 163, 22 Am. St. Rep. 36, 14 S. W. 227.

Usurious contracts.

Cited in *Garza v. Sullivan*, 10 Tex. Civ. App. 190, 30 S. W. 240, defining usurious interest as amount in excess of legal rate; *Abbott v. International*

Bldg. & L. Asso. 86 Tex. 474, 25 S. W. 620, holding building and loan association contract usurious, where premium and stipulated interest exceed statutory limit.

Cited in footnote to *Lindsay v. United States Sav. & L. Co.* 51 L. R. A. 393, which sustains power of equity to compel payment of legal interest as condition of canceling usurious contract.

Recovery of usurious interest paid.

Cited in *Baum v. Thoms*, 150 Ind. 382, 65 Am. St. Rep. 368, 50 N. E. 357, holding interest exceeding legal rate, voluntarily paid, recoverable, independent of statute; *Smith v. Stevens*, 81 Tex. 465, 16 S. W. 986, holding interest in excess of legal rate recoverable as counterclaim to another indebtedness.

Distinguished in *Henry v. Sansom*, 2 Tex. Civ. App. 154, 21 S. W. 69, holding usurious interest collected by legal proceeding not recoverable.

9 L. R. A. 295, *LYON v. McDONALD*, 78 Tex. 71, 14 S. W. 261.

For what purposes land may be condemned.

Cited in *Foster v. Chicago, R. I. & T. R. Co.* 10 Tex. Civ. App. 477, 31 S. W. 529, denying right to apply land to other uses than those for which condemned; *Muhle v. New York, T. & M. R. Co.* 86 Tex. 464, 25 S. W. 607, holding land condemned for a depot cannot be appropriated for different use; *Olive v. Sabine & E. T. R. Co.* 11 Tex. Civ. App. 213, 33 S. W. 139, upholding railroad company's right to compel lessee to remove, at expiration of lease, buildings erected upon land conveyed by lessor for right of way, although lessee has purchased; *Buford v. Smith*, 2 Tex. Civ. App. 181, 21 S. W. 168, denying right of private ferry to land passengers upon land condemned for use as public road.

Cited in footnotes to *Ryan v. Louisville & N. Terminal Co.* 45 L. R. A. 303, which holds taking of land for railroad terminal facilities to be for public purpose; *Gurney v. Minneapolis Union Elevator Co.* 30 L. R. A. 534, which holds perpetual easement acquired by railroad condemnation proceedings.

Distinguished in *Stevens v. St. Louis Merchants Bridge Terminal R. Co.* 152 Mo. 219, 53 S. W. 1066, holding use of depot by second railroad not new servitude.

Easements.

Cited in *Sanborn v. Van Duyne*, 90 Minn. 224, 96 N. W. 41, holding invalid, lease, for private use, of land deeded city for levee.

9 L. R. A. 208, *GAINESVILLE, H. & W. R. CO. v. HALL*, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. 259.

Compensation for land taken or injured.

Followed in *Ft. Worth & R. G. R. Co. v. Downie*, 82 Tex. 386, 17 S. W. 620, sustaining right to recover for injury to lots by operation of railroad in front of them, though not in street.

Approved in *Gray v. Dallas Terminal R. & Union Depot Co.* 13 Tex. Civ. App. 164, 36 S. W. 332, holding authorized appropriation by railroad of way over streets not a taking from abutter requiring previous compensation or deposit; *Root v. Butte, A. & P. R. Co.* 20 Mont. 358, 51 Pac. 155, holding one damaged by running of trains, in excess of community at large, has action for special damages; *Cooper v. Dallas*, 83 Tex. 242, 29 Am. St. Rep. 645, 18 S. W. 565, holding city liable for damages to lots overflowed by reason of change in grade of streets; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 539, 22 S. W. 1059, upholding

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abutter's right to compensation for damages from excavation in grading highway, which renders his property inaccessible; *Rosenthal v. Taylor*, B & H. R. Co. 79 Tex. 328, 15 S. W. 268, holding railway liable for obstruction of surface water by use of right of way; *Dallas v. Kahn*, 9 Tex. Civ. App. 26, 29 S. W. 98, distinguishing injuries received by property owner in common with others on street, from such as he suffers with community generally.

Cited in footnotes to *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755, which denies recovery for depreciation in value of property by noise, smoke, and cinders of railroad; *Jacksonville, T. & K. R. Co. v. Adams*, 14 L. R. A. 533, which authorizes condemnation of land irregularly entered upon.

Measure of damages for injury to real property.

Cited in *San Antonio v. Mackey*, 14 Tex. Civ. App. 214, 36 S. W. 760, holding that measure of damages for use of lands as dumping ground is loss of rental value and other accrued special damages up to time of trial; *Brown v. Southwestern Teleg. & Teleph. Co.* 17 Tex. Civ. App. 435, 44 S. W. 59, holding that entire damages should be assessed for injury from authorized telephone line.

Cited in note (11 L. R. A. 605) on market price as element of damages in condemnation proceedings.

Distinguished in *Baugh v. Texas & N. O. R. Co.* 80 Tex. 59, 15 S. W. 587, holding depreciation not measure of damages for temporary nuisances.

Prejudicial error.

Approved in *Denison & P. Suburban R. Co. v. O'Malley*, 18 Tex. Civ. App. 203, 45 S. W. 225, holding exclusion of evidence without prejudice, where already admitted in another form; *Dallas v. Kahn*, 9 Tex. Civ. App. 24, 29 S. W. 98, holding ruling upon objection to question not prejudicial where appellant not injured by answer thereto.

Opinions as evidence.

Approved in *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.* 23 Tex. Civ. App. 339, 57 S. W. 575, holding that where witness has stated all facts within his knowledge, his opinion concerning more is properly excluded.

Nuisances.

Cited in footnote to *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds that noise from boiler works, causing physical discomfort to occupants of dwelling, may be enjoined.

Distinguished in *Daniel v. Ft. Worth & R. G. R. Co.* 96 Tex. 329, 72 S. W. 578, holding compensation for personal annoyance and discomfort recoverable for coal-hoist nuisance.

9 L. R. A. 302, *GRUBER v. BAKER*, 20 Nev. 453, 23 Pac. 858.

Attorney and client; privileged communications.

Cited in *Minard v. Stillman*, 31 Or. 167, 65 Am. St. Rep. 815, 49 Pac. 976, holding that attorney may be compelled to disclose to what clients he paid funds alleged by another client to have been converted.

Cited in footnotes to *Bruley v. Garvin*, 48 L. R. A. 839, which holds conversation with attorney without paying fee, asking opinion on contemplated suit, privileged; *Koeber v. Somers*, 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged.

Evidence of fraud.

Cited in *Pederson v. Seattle Consol. Street R. Co.* 6 Wash. 205, 33 Pac. 351, holding evidence of fraud must be clear and convincing.

Loss of profits as element of damage.

Cited in note (52 L. R. A. 59) on damages for tort as affected by loss of profits.

Real party in interest.

Cited in note (64 L. R. A. 585) as to who is real party in interest, within meaning of statutes defining parties by whom action must be brought.

9 L. R. A. 313, *PENSO v. McCORMICK*, 125 Ind. 116, 21 Am. St. Rep. 211, 25 N. E. 166.

Liability for maintaining premises in dangerous condition.

Cited in *Elwood Electric Street Co. v. Ross*, 26 Ind. App. 265, 58 N. E. 535, and *Citizens' Street R. Co. v. Stoddard*, 10 Ind. App. 283, 37 N. E. 723, holding that street car company owes greater care to children than to older persons: *Kinchlow v. Midland Elevator Co.* 57 Kan. 378, 46 Pac. 703, holding it question for jury whether company used due care in leaving barrel of hot water uncovered.

Cited in note (26 L. R. A. 687) on liability for dangerous condition of private grounds lying open beside highway or frequented path.

— To one entering by invitation.

Cited in *Howe v. Ohmart*, 7 Ind. App. 36, 33 N. E. 466, upholding recovery by student attending meeting of literary society by invitation, and falling down unguarded passageway; *North Manchester Tri-County Agri. Asso. v. Wilcox*, 4 Ind. App. 143, 30 N. E. 202, holding owner of race track liable for injury to horse caused by obstruction of track; *Chicago & I. Coal R. Co. v. De Baum*, 2 Ind. App. 284, 28 N. E. 447, upholding liability of carrier to one loading cars, whose horse fell into hole near track; *Indianapolis Street R. Co. v. Dawson*, 31 Ind. App. 607, 68 N. E. 909, holding street railway company liable for not preventing assault upon colored man by persons in park to which it had invited public.

— To licensees and trespassers.

Cited in *Carskaddon v. Mills*, 5 Ind. App. 27, 31 N. E. 559, denying right of owner to erect dangerous obstruction on roadway used by public without objection; *Travell v. Bannerman*, 71 App. Div. 445, 75 N. Y. Supp. 866, holding owner liable to boy injured by explosion of powder removed from dumping ground by other boys; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 427, 57 L. R. A. 568, 90 N. W. 95, holding railroad company liable for injury to child inflicted by unguarded turntable near street; *Stalcup v. Louisville, N. A. & C. R. Co.* 16 Ind. App. 588, 45 N. E. 802, holding one riding on train without permission of company not entitled to recover for injuries; *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 580, 39 N. E. 672, denying liability for death of child killed while walking along track without consent of company; *Feehan v. Dobson*, 10 Pa. Super. Ct. 11, 44 W. N. C. 68, denying liability of one depositing cinders on out lot, to child injured while gathering coal; *Faris v. Hoberg*, 134 Ind. 276, 39 Am. St. Rep. 261, 33 N. E. 1028, denying that owner owes protection to one entering storehouse to look for drayman, and falling down elevator shaft; *Thiele v. McManus*, 3 Ind. App. 134, 28 N. E. 327, denying liability of merchant to trespasser falling into hatchway in storeroom.

Cited in footnotes to *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 231, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Paolino v. McKendall*, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish to guard young children accustomed to play there, from fire; *Missouri. K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Uttermohlen v. Bogg's Run Min. & Mfg. Co.* 55 L. R. A. 911, which denies liability of mine owner for injury to trespassing child by cable and pulleys hauling coal cars; *Ryan v. Towar*, 55 L. R. A. 310, which denies landowner's duty to make premises safe for attempt to rescue trespassing child caught in water wheel in unused building; *Brinkley Car Works Mfg. Co. v. Cooper*, 57 L. R. A. 724, which denies liability for injury to six year old boy from carelessly walking into pool of hot water.

Distinguished in *Stendal v. Boyd*, 73 Minn. 56, 42 L. R. A. 239, 72 Am. St. Rep. 597, 75 N. W. 735, denying that landowner is bound to guard open excavation to prevent injury to children trespassing.

9 L. R. A. 317, *PHOENIX INS. CO. v. TOMLINSON*, 125 Ind. 84, 21 Am. St. Rep. 203, 25 N. E. 126.

Avoidance or cancelation of insurance contract.

Cited in *Continental Ins. Co. v. Vanlue*, 126 Ind. 418, 10 L. R. A. 847, 26 N. E. 119, holding mortgage conditioned to secure support of mortgagee during life, encumbrance avoiding policy; *Metropolitan L. Ins. Co. v. McCormick*, 19 Ind. App. 52, 65 Am. St. Rep. 392, 49 N. E. 44, upholding right of insured to enforce contract wrongfully canceled by company; *Supreme Lodge, K. of H. v. Metcalf*, 15 Ind. App. 162, 43 N. E. 893 (dissenting opinion), majority holding that purchaser may recover amount paid for speculative certificate though ineligible for membership; *Tibbits v. Mutual Ben. L. Ins. Co.* 159 Ind. 675, 65 N. E. 1033, holding policy forfeited by failure to pay premium upon day due.

Waiver of forfeiture.

Cited in *Lime City Bldg. Loan & Sav. Asso. v. Black*, 136 Ind. 560, 35 N. E. 829, holding acceptance of dues from delinquent stockholders, waiver of by-law forfeiting stock; *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 628, 33 So. 504, holding insurer estopped by retention of premium from claiming forfeiture for breach of condition as to other insurance; *Union Cent. L. Ins. Co. v. Whetzel*, 29 Ind. App. 665, 65 N. E. 15, holding that stipulation as to modification of terms of policy may be waived.

— Of life insurance policy.

Cited in *Kerlin v. National Acci. Asso.* 8 Ind. App. 633, 35 N. E. 39, holding extension of time to pay premium on life policy waives forfeiture clause; *Michigan Mut. L. Ins. Co. v. Custer*, 128 Ind. 32, 27 N. E. 124, holding mutual agreement extending time of payment of premium waiver of forfeiture incurred by nonpayment of note; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 39, 59 N. E. 873, holding company waiving payment of premium in advance liable upon death of insured; *Union Cent. L. Ins. Co. v. Jones*, 17 Ind. App. 600, 47 N. E. 342, holding forfeiture of policy waived by enforcing collection of notes by foreclosure of mortgage; *Union Cent. L. Ins. Co. v. Woods*, 11 Ind. App. 352, 37

N. E. 180, holding forfeiture of policy waived by execution and sale upon judgment for premium note; *Supreme Tent, K. of M. v. Volkert*, 25 Ind. App. 640, 57 N. E. 203, holding society estopped from forfeiting policy, by sending blank forms for proof of death to beneficiary.

Cited in footnotes to *Stewart v. Union Mut. L. Ins. Co.* 42 L. R. A. 147, which holds provision against policy taking effect till first premium paid ineffectual, where premium note given, though unpaid; *Kocher v. Supreme Council C. B. L.* 52 L. R. A. 861, which denies power of officers of benefit society to waive payment of assessments for death benefits; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default, without notice of any condition affixed.

— Of fire insurance policy.

Cited in *Replogle v. American Ins. Co.* 132 Ind. 367, 31 N. E. 947, holding that insurer waived forfeiture of policy by calling for additional proofs of loss; *Continental Ins. Co. v. Chew*, 11 Ind. App. 331, 54 Am. St. Rep. 506, 38 N. E. 417, holding that acceptance of overdue premium, with knowledge of loss, restores force of policy from beginning; *Milkman v. United Mut. Ins. Co.* 20 R. I. 12, 36 Atl. 1121; *Marshall Farmers' Home F. Ins. Co. v. Liggett*, 16 Ind. App. 602, 45 N. E. 1062; *Farmers' Mut. Relief Asso. v. Koontz*, 4 Ind. App. 544, 30 N. E. 145,—holding acceptance by association of delinquent payments after loss establishes liability under policy; *Frasier v. New Zealand Ins. Co.* 39 Or. 351, 64 Pac. 814, holding return of ratable portion of premium for part of policy canceled, retaining balance, waiver of condition as to vacancy.

Cited in footnotes to *German Ins. Co. v. Shader*, 60 L. R. A. 918, which holds provision against loss occurring before premium paid waived by receiving premium after all property destroyed; *Johnston v. Phelps County Farmers' Mut. Ins. Co.* 56 L. R. A. 127, which holds receipt of delinquent assessment not waiver of forfeiture if any of insured property in existence.

9 L. R. A. 321, *DUGAN v. STATE*, 125 Ind. 130, 25 N. E. 171.

Followed without discussion in *Dorsey v. State*, 125 Ind. 600, 25 N. E. 350.

Jurisdiction over boundary waters.

Approved in *Welsh v. State*, 126 Ind. 75, 9 L. R. A. 665, 25 N. E. 883, and *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 310, 40 N. E. 527, holding that Indiana courts have concurrent jurisdiction with those of Kentucky of causes arising on Ohio river; *Meyler v. Wedding*, 107 Ky. 700, 60 S. W. 20 (dissenting opinion), majority holding Indiana process served above low-water mark on Kentucky side of Ohio river void; *Roberts v. Fullerton*, 117 Wis. 239, 65 L. R. A. 971, 93 N. W. 1111 (dissenting opinion), majority holding officer of Minnesota without authority to destroy fishing nets of citizen of Wisconsin in portion of lake within border of latter state.

Sunday laws.

Cited in footnotes to *Gross v. Miller*, 26 L. R. A. 605, which holds violation of Sunday law by hunting, no defense to action for negligent injury; *Com. v. Waldman*, 11 L. R. A. 563, which holds keeping barber shop open on Sunday not work of necessity.

Cited in notes (11 L. R. A. 63) on legality of contract made on Sunday; (14 L. R. A. 194) on Sunday labor.

9 L. R. A. 323, O'BRIEN v. STATE, 125 Ind. 38, 25 N. E. 137.

Presumption of regularity.

Cited in Davidson v. State, 135 Ind. 267, 34 N. E. 972, holding jurisdiction presumed, no irregularity appearing in record; Rinkard v. State, 157 Ind. 539, 62 N. E. 14, upholding presumption, in absence of record to contrary, that grand jury was duly impaneled.

Change of venue.

Cited in note (11 L. R. A. 75) on criminal practice as to change of venue.

Sufficiency of indictment.

Cited in Lay v. State, 12 Ind. App. 366, 39 N. E. 768, holding indictment charging removal of part of cemetery fence sufficient, although not specifying that cemetery was public or private; Brown v. State, 14 Ind. App. 26, 42 N. E. 244, holding that indictment charging defendant with acting "knowingly" sufficiently avers guilty knowledge.

Evidence of accused against himself.

Cited in Davidson v. State, 135 Ind. 260, 34 N. E. 972, holding defendant's voluntary statements before coroner, written and signed, admissible.

9 L. R. A. 326, MORRIS v. POWELL, 125 Ind. 281, 25 N. E. 221.

Right of suffrage.

Cited in Mills v. Green, 67 Fed. 831, denying power of legislature to add to constitutional qualifications of voters by registration act; Gougar v. Timberlake, 148 Ind. 41, 37 L. R. A. 648, 62 Am. St. Rep. 487, 46 N. E. 339, denying women's constitutional right to vote, where state Constitution grants privilege to "male citizens;" Brewer v. McClelland, 144 Ind. 426, 17 L. R. A. 846, footnote p. 845, 32 N. E. 299, which holds statute requiring notice of claim to be legal voter from persons residing less than six months in county, void.

Cited in footnote to Barret v. Taylor, 36 L. R. A. 129, upholding right to have name registered as voter, of unnaturalized minor who becomes qualified voter before revision of registry.

Cited in notes (25 L. R. A. 481, 482) on how far right to vote is absolute; (10 L. R. A. 225) on registration of voters.

Constitutional provision as to apportionment.

Cited in State *ex rel.* Lamb v. Cunningham, 83 Wis. 154, 17 L. R. A. 171, 35 Am. St. Rep. 27, 53 N. W. 35, holding act not in accordance with constitutional requirement for apportionment "according to number of inhabitants" invalid; Denney v. State, 144 Ind. 513, 31 L. R. A. 730, 42 N. E. 929, holding act at variance with constitutional provision prescribing time and mode of apportionment of members of legislature, unconstitutional.

9 L. R. A. 338, TYLER v. WILLISTON, 62 Vt. 269, 20 Atl. 304.

Constructive notice of defect in bridge.

Cited in footnote to Thomas v. Flint, 47 L. R. A. 499, which holds mere existence of defect in bridge for two or three days not constructive notice to city.

9 L. R. A. 339, CHASE'S PATENT ELEVATOR CO. v. BOSTON TOW BOAT CO. 152 Mass. 428, 28 N. E. 300.

Final determination on merits in 155 Mass. 212, 29 N. E. 470.

Failure of foreign corporation to file documents required by statute.

Cited in *Washburn Mill Co. v. Bartlett*, 3 N. D. 147, 54 N. W. 544, denying that failure of foreign corporation to file copy of charter precludes right to foreclose mortgage; *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 83, 120 Fed. 897, denying that rights under lease are impaired by failure of foreign corporation to file certificate before doing business; *Rogers v. Simmons*, 155 Mass. 260, 29 N. E. 580, holding statute requiring foreign corporation to appoint attorney for service of papers, and to file copy of charter, directory; *Atty. Gen. v. Massachusetts Pipe Line Gas Co.* 179 Mass. 20, 60 N. E. 389, denying that corporation failing to file certificate of paid up capital is relieved from franchise tax.

9 L. R. A. 341, *HAN v. SEAMAN*, 14 Colo. 536, 24 Pac. 461.

Estoppel.

Cited in *Matless v. Sundin*, 94 Iowa, 114, 62 N. W. 662, holding that owner of two judgments may sell land under junior, without affecting lien of senior, encumbrance.

Cited in footnote to *Gilbert v. American Surety Co.* 61 L. R. A. 253, which holds vendor in possession, after years of service as agent of vendee, estopped to reclaim property on ground that sale was illegal.

9 L. R. A. 343, *SIMMONS v. SPRATT*, 26 Fla. 449, 8 So. 123.

Bill of exceptions.

Approved in *Lovett v. State*, 29 Fla. 382, 11 So. 172, holding failure of record to show presence in court of defendant charged with murder not cured by statement in bill of exceptions.

Reversal for erroneous admission of evidence.

Approved in *Pensacola & A. R. Co. v. Anderson*, 26 Fla. 427, 8 So. 127, refusing new trial for admission of improper evidence on point as to which there was no conflict, where fact otherwise shown; *Livingston v. L'Engle*, 27 Fla. 517, 8 So. 728, and *Jacksonville. M. P. R. & Nav. Co. v. Warriner*, 35 Fla. 209, 16 So. 898, holding that judgment will not be reversed for error working no injury to party against whom ruling made; *Hays v. Ernest*, 32 Fla. 26, 13 So. 451, holding exclusion of competent evidence bearing on point on which evidence was conflicting, reversible error.

9 L. R. A. 348, *RICHARDSON v. WOODSTOCK IRON CO.* 90 Ala. 266, 8 So. 7.

Homestead conveyances.

Cited in *Woodstock Iron Co. v. Richardson*, 94 Ala. 630, 10 So. 144, denying on second appeal that deed of homestead, not delivered till another place is purchased, requires acknowledgment of wife; *Parks v. Barnett*, 104 Ala. 442, 16 So. 136, holding deed of homestead, signed by husband and wife, but not acknowledged by wife, a nullity; *Edinburgh American Land Mortg. Co. v. Peoples*, 102 Ala. 244, 14 So. 656, holding mortgage of homestead acknowledged by wife before officer outside of county where commissioned, void; *Horbach v. Tyrrell*, 48 Neb. 534, 37 L. R. A. 441, 67 N. W. 485 (dissenting opinion), majority denying that mortgage to corporation covering homestead, is void because acknowledged before its treasurer; *Havemeyer v. Dahn* (Neb.) 33 L. R. A. 337, 67 N. W. 489 (dissenting opinion), majority denying invalidity of homestead mortgage

acknowledged before attorney holding claim for collection; *Pipkin v. Williams*, 57 Ark. 249, 38 Am. St. Rep. 241, 21 S. W. 433, holding void, conveyance of homestead by deed poll, in which wife joins only to release her dower.

Delivery of deed after death of grantor.

Cited in *Kelly v. Richardson*, 100 Ala. 595, 13 So. 785, holding conveyance to be delivered at death of grantor, with use and occupation reserved during life, inoperative as deed.

9 L. R. A. 349, *MORRIS v. MISSOURI P. R. CO.* 78 Tex. 17, 22 Am. St. Rep. 17, 14 S. W. 228.

Venue of actions for damages to realty.

Cited in *Missouri P. R. Co. v. Cullers*, 81 Tex. 388, 13 L. R. A. 545, 17 S. W. 19, holding action not maintainable for injuries to land located outside of state.

Venue of transitory actions.

Cited in *Southern P. R. Co. v. Graham*, 12 Tex. Civ. App. 568, 34 S. W. 135, holding that court may take cognizance of action between nonresidents for injury to personal property occurring outside of state; *Western U. Teleg. Co. v. Russell*, 12 Tex. Civ. App. 85, 33 S. W. 708, sustaining jurisdiction of court over action by nonresident against corporation doing business in state, for failure to fulfil contract wholly performable in another state; *Smith v. Empire State Idaho Min. & Development Co.* 127 Fed. 464, holding action arising in Idaho maintainable against New York corporation in Washington, where its principal office located.

Distinguished in *Western U. Teleg. Co. v. Phillips* 2 Tex. Civ. App. 615, 21 S. W. 638, holding that courts will entertain jurisdiction of suit between citizen and domestic corporation for negligence in delivering telegram outside of state; *Eingartner v. Illinois Steel Co.* 94 Wis. 77, 34 L. R. A. 506, 59 Am. St. Rep. 859, 68 N. W. 664, sustaining nonresident's right to maintain transitory action against citizen of another state found within jurisdiction.

9 L. R. A. 351, *BOSQUETT v. HALL*, 90 Ky. 566, 29 Am. St. Rep. 404, 13 S. W. 244.

"Family" within exemption statutes.

Cited in *Louisville Bkg. Co. v. Anderson*, 106 Ky. 749, 44 S. W. 636, holding that married daughter's residence with her father does not constitute them a family within exemption statute as to father's creditors.

Cited in footnote to *Cross v. Benson*, 64 L. R. A. 560, which holds minor residing with grandparents and dependent upon them, member of their family.

9 L. R. A. 352, *CARTHAGE v. RHODES*, 101 Mo. 175, 14 S. W. 181.

Dogs as property.

Cited in *Hodges v. Causey*, 77 Miss. 356, 48 L. R. A. 95, 78 Am. St. Rep. 525, 26 So. 945, holding mere notice to keep off not justification for killing trespassing dog.

Cited in note (40 L. R. A. 506) on property rights in dogs.

9 L. R. A. 353, **WARREN v. LYONS**, 152 Mass. 310, 25 N. E. 721.

Renewal of lease as affecting guarantor.

Cited in *Woods v. Doherty*, 153 Mass. 558, 27 N. E. 676, holding that election to renew lease for further term discharges surety.

9 L. R. A. 356, **LOWELL v. MIDDLESEX**, 152 Mass. 372, 25 N. E. 469.

Equality of assessment and just valuation.

Approved in *Louisville R. Co. v. Com.* 105 Ky. 720, 49 S. W. 486, holding assessment of other property at less than cash value no objection to assessment of franchises at value; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 556, 60 U. S. App. 166, 88 Fed. 369, holding assessment of railroad property at full value, and other property at seventy-five per cent less, violation of statute as to equality of taxation; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 648, 33 N. E. 432, and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 537, 18 L. R. A. 740, 33 N. E. 421, holding assessment of railroad property by state board, while other property is assessed by local boards, no violation of constitutional provision as to just valuation; *Carroll v. Alsup*, 107 Tenn. 287, 64 S. W. 193, holding that fraudulent over-valuation opens way to assail assessment.

Cited in note (60 L. R. A. 369) on constitutional equality in the United States in relation to corporate taxation.

Method of ascertaining value.

Cited in *Haven v. Essex County*, 155 Mass. 471, 29 N. E. 1083, holding value of adjacent property not evidence as to valuation of property assessed; *Tremont & S. Mills v. Lowell*, 163 Mass. 284, 39 N. E. 1028, holding valuation erroneous, where separate values of land and buildings exceed value taken together.

Remedy for invalid assessment.

Cited in *Kelley v. Barton*, 174 Mass. 397, 54 N. E. 860, holding abatement remedy for assessment on land not owned by taxpayer.

Taxation of appurtenances.

Cited in *Troy Cotton & Woolen Manufactory v. Fall River*, 167 Mass. 522, 46 N. E. 99, holding that machinery used in manufacturing, which by statute is to be assessed where situated, is not necessarily confined to that so affixed as to become part of realty.

Where water power taxable.

Cited in *Union Water Power Co. v. Auburn*, 90 Me. 66, 37 L. R. A. 653, 60 Am. St. Rep. 240, 37 Atl. 331, denying that water power is assessable where dam is located, power being used elsewhere.

9 L. R. A. 363, **BATES v. RUTLAND**, 62 Vt. 178, 22 Am. St. Rep. 95, 20 Atl. 278.

Municipal liability for defect in street.

Approved in *Daniels v. Hathaway*, 65 Vt. 254, 21 L. R. A. 379, 26 Atl. 970, holding municipality not liable for defect in street, in absence of statute imposing liability.

Cited in *Lynch v. Rutland*, 66 Vt. 573, 29 Atl. 1015, holding that selectmen, in laying out roads, act as officers of state and not as agents of town.

Cited in footnote to *Teagar v. Flemingsburg*, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians.

Personal liability of municipal officer.

Approved in *Bates v. Horner*, 65 Vt. 474, 22 L. R. A. 827, 27 Atl. 134, holding municipal officer not liable to private person for damages resulting from carrying out plans for improving street.

Cited in note (22 L. R. A. 824) on personal liability of highway officer for negligence.

9 L. R. A. 366, *ROTHERMEL v. MEYERLE*, 136 Pa. 250, 3 Inters. Com. Rep. 315, 20 Atl. 583.

License tax.

Cited in footnotes to *McLaughlin v. South Bend*, 10 L. R. A. 357, which holds requirement of peddling license unenforceable against person negotiating for sale of property in another state; *San Bernardino v. Southern P. Co.* 29 L. R. A. 327, which denies power to impose license tax on right to operate branch forming part of interstate railroad; *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil.

Cited in notes (14 L. R. A. 579, 582, 583) on constitutional equality of privileges, immunities, and protection.

State tax on earnings, franchise, or business.

Cited in footnotes to *Vermont & C. R. Co. v. Vermont C. R. Co.* 10 L. R. A. 562, which holds state tax on interstate railroad earnings illegal; *San Francisco v. Western U. Teleg. Co.* 17 L. R. A. 301, which holds state tax on telegraph franchise void; *People ex rel. Pennsylvania R. Co. v. Wemple*, 19 L. R. A. 694, which holds state tax on franchise or business of foreign railroad company invalid, as regulation of commerce; *Osborne v. State*, 25 L. R. A. 120, which upholds taxation of local express business, though interstate commerce also carried on.

Interstate commerce.

Cited in *Com. v. Mooney*, 12 Lanc. L. Rev. 210, holding act prohibiting hawking and peddling violation of Federal Constitution relating to interstate commerce.

Equal protection and privileges.

Cited in *Com. v. Percival*, 11 Pa. Super. Ct. 614, and *Com. v. Deinno*, 20 Pa. Co. Ct. 372, upholding act forbidding peddling, excepting from its operation persons selling goods of their own manufacture; *Com. v. Finn*, 11 Pa. Super. Ct. 626, upholding act requiring license for physicians except licensed physicians of other state not opening office within state.

Statute unconstitutional in part.

Approved in *State v. Montgomery*, 94 Me. 200, 80 Am. St. Rep. 336, 47 Atl. 165, holding statute not wholly unconstitutional because single provision unconstitutional; *Ancona v. Becker*, 14 Pa. Co. Ct. 79, 3 Pa. Dist. R. 89, holding general tax act not invalidated by unconstitutional provisions as to municipal taxes; *Re Delaware River Road*, 6 Northampton Co. Rep. 218, holding act relating to roads not unconstitutional, if last section produced local results, the remainder being enforceable; *Com. v. Wickert*, 19 Pa. Co. Ct. 252, 6 Pa. Dist. R. 387, holding act in relation to adulteration of food, valid as to portions covered by title when independent of and readily separable from remainder; *South Bethlehem v. Hackett*, 12 Lanc. L. Rev. 198, holding portion of ordinance providing penalty for failure to pay license fee for peddling unconstitutional.

Self-executing provision.

Cited in note (16 L. R. A. 281) on self-executing constitutional provisions.

9 L. R. A. 369. MONTGOMERY v. PHILADELPHIA CITY PASS. R. CO. 136 Pa. 96, 20 Atl. 399.

Construction of terms "railroad" and "railway."

Approved in Old Colony Trust Co. v. Allentown & B. Rapid Transit Co. 192 Pa. 604, 44 Atl. 319, holding terms "railroad" and "railway" synonymous; Rafferty v. Central Traction Co. 147 Pa. 589, 30 Am. St. Rep. 763, 23 Atl. 884, Affirming 29 W. N. C. 548, holding "railroad" and "railway" synonymous terms, unless context indicates particular kind of road intended; Cheetham v. Atty. Gen. 38 W. N. C. 125, holding passenger railway a railway corporation in absence of context showing different intent; Com. v. McCaully, 2 Pa. Dist. R. 63, holding statute as to obstruction or injury to railroad includes street railways; Bammel v. Kirby, 19 Tex. Civ. App. 200, 47 S. W. 392, holding that words "any railroad," in statute giving action for death caused by negligence, includes street railroads.

Cited in Railroad Comrs. v. Market Street R. Co. 132 Cal. 682, 64 Pac. 1065, holding words "railroad and other transportation companies" do not, in light of context, include street railways; Massachusetts Loan & T. Co. v. Hamilton. 32 C. C. A. 50, 59 U. S. App. 403, 88 Fed. 592, holding that statutory term "any railway corporation" does not, in view of context, include street railroads; Philadelphia v. Philadelphia Traction Co. 206 Pa. 39, 55 Atl. 762, construing as synonymous, words "railroads" and "railways," as used in statute; Savannah, T. & I. of H. R. Co. v. Williams, (Ga.) 61 L. R. A. 251, footnote, p. 249, 43 S. E. 751, holding chartered street railroad a railroad company within statute imposing liability for negligence of fellow servant; Sams v. St. Louis & M. River R. Co. 174 Mo. 89, 61 L. R. A. 485, 73 S. W. 686 (dissenting opinion) majority holding railroad fellow-servant statute not applicable to street railways.

Cited in footnotes to Bloxham v. Consumers' Electric Light & Street R. Co. 29 L. R. A. 507, which holds "street railway" within provision for selling railroad property for delinquent taxes; Vail v. Broadway R. Co. 30 L. R. A. 626, which holds passenger on street car platform not passenger on "any railroad" so as to assume risk of injury.

Distinguished in Trust Co. v. State, 109 Ga. 754, 48 L. R. A. 527, 35 S. E. 323, holding street railway within constitutional provision affecting "any corporation."

Right to consolidate.

Approved in Louisville & N. R. Co. v. Kentucky, 161 U. S. 703, 40 L. ed. 860, 16 Sup. Ct. Rep. 714, holding prohibition by statute of consolidation of parallel and competing lines not violation of commerce clause; Robinson v. Wilkinsburg & E. P. Street R. Co. 32 Pittsb. L. J. N. S. 370, holding right of street railways to consolidate under Pennsylvania act of 1861 not affected by act of 1889; Pennsylvania R. Co. v. Inland Traction Co. 18 Montg. Co. L. Rep. 137, upholding consolidation of street railways under Pennsylvania act of 1861.

Cited in notes (45 L. R. A. 273) on restrictions on consolidation of parallel or competing railroads; (52 L. R. A. 374, 378) on right of corporations to consolidate.

Validity of lease.

Cited in *Watkin v. West Philadelphia Pass. R. Co.* 11 Pa. Co. Ct. 655, 1 Pa. Dist. R. 468, 31 W. N. C. 272, as establishing validity of lease of lines of Philadelphia passenger railway company.

9 L. R. A. 371, *HEALEY v. MUTUAL ACCI. ASSO.* 133 Ill. 556, 23 Am. St. Rep. 637, 25 N. E. 52.

Policy construed in favor of insured.

Approved in *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 646, 52 Am. St. Rep. 355, 43 N. E. 765; *Travelers Preferred Acci. Asso. v. Kelsey*, 46 Ill. App. 373; *Fidelity & C. Co. v. Waterman*, 59 Ill. App. 299; *Metropolitan Acci. Asso. v. Froiland*, 59 Ill. App. 525; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 47, 74 Am. St. Rep. 161, 55 N. E. 139, Affirming 77 Ill. App. 418; *Home Ins. Co. v. Peoria & P. U. R. Co.* 78 Ill. App. 139; *Railway Officials & E. Acci. Asso. v. Coady*, 80 Ill. App. 571; *Ziegler v. Clinton Mut. County F. Ins. Co.* 84 Ill. App. 444; *Fire Asso. v. Short*, 100 Ill. App. 559; *Provident Sav. Life Assur. Soc. v. Cannon*, 103 Ill. App. 545; *Terwilliger v. National Masonic Acci. Asso.* 197 Ill. 13, 63 N. E. 1034; *Supreme Lodge O. M. P. v. Meister*, 105 Ill. App. 474; *Northwestern Life Assur. Co. v. Schulz*, 94 Ill. App. 162; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.* 55 Ill. App. 334; *Niagara F. Ins. Co. v. Heenan*, 81 Ill. App. 688; *Teutonia Ins. Co. v. Bonner*, 81 Ill. App. 235; *Berliner v. Travelers' Ins. Co.* 121 Cal. 461, 41 L. R. A. 469, 66 Am. St. Rep. 49, 53 Pac. 918; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L. R. A. 626, 7 C. C. A. 592, 16 U. S. App. 290, 58 Fed. 956,—holding that policy of insurance will be liberally construed in favor of insured; *Traders' Mut. L. Ins. Co. v. Humphrey*, 109 Ill. App. 253, holding person elected, but not initiated, member of fraternity, within meaning of charter of fraternal insurance company.

Cause of death or injury.

Cited in footnote to *Humphreys v. National Benefit Asso.* 11 L. R. A. 564, which holds loss of sight of only one eye covered by provision for loss of sight of both eyes.

Cited in note (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

— Death by external, violent, and accidental means.

Approved in *Metropolitan Acci. Asso. v. Froiland*, 161 Ill. 37, 52 Am. St. Rep. 350, 43 N. E. 766, Affirming 59 Ill. App. 526, holding death due to accidental taking of poison covered by accident policy; *American Acci. Co. v. Reigart*, 94 Ky. 551, 21 L. R. A. 652, 42 Am. St. Rep. 374, 23 S. W. 191, holding death caused by piece of meat lodging in windpipe due to external, violent, and accidental means; *Mutual Acci. Asso. v. Tuggle*, 39 Ill. App. 514, holding death from accidental overdose of laudanum an injury received "through external, violent, and accidental means;" *Fidelity & C. Co. v. Waterman*, 59 Ill. App. 299, holding unintentional death by inhaling of illuminating gas, accidental; *Traveler's Ins. Co. v. Dunlap*, 160 Ill. 645, 52 Am. St. Rep. 355, 43 N. E. 765, Affirming 59 Ill. App. 516, holding accident insurance company, exempted under policy if insured "takes" poison, liable where poison is taken by accident.

Cited in *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 323, 60 U. S. App. 705, 89 Fed. 690 (dissenting opinion), majority holding death from poison, acci-

dentally taken, within exemption from liability where death results from poison; *Dezell v. Fidelity & C. Co.* 176 Mo. 288, 75 S. W. 1102, holding death from morphine, prescribed by physician, due to "external, violent, and accidental means;" *Travelers Ins. Co. v. Hunter*, 30 Tex. Civ. App. 493, 70 S. W. 798, holding company liable on accident policy where accident produced rheumatism, which caused heart failure; *Maryland Casualty Co. v. Hudgins* (Tex.) 64 L. R. A. 352, 72 S. W. 1047, holding death from eating spoiled oysters within exception of policy excluding liability for injuries "resulting from poison or anything accidentally or otherwise taken or absorbed."

Cited in footnote to *Fidelity & C. Co. v. Lowenstein*, 46 L. R. A. 450, which holds death from accidentally inhaling gas while asleep covered by accident policy.

Cited in notes (13 L. R. A. 265) on external, violent, and accidental means of death of insured; (30 L. R. A. 207) on what constitutes an accident within meaning of accident insurance policy.

Distinguished in *Early v. Standard Life & Acci. Ins. Co.* 113 Mich. 62, 67 Am. St. Rep. 445, 71 N. W. 500, holding death from poison administered through mistake of druggist, within exception of accident policy exempting company if death results from poison.

Disapproved in *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 323, 60 U. S. App. 705, 89 Fed. 687, holding that exemption from liability for death resulting from poison extends to poison accidentally taken.

Increase of risk.

Cited in note (10 L. R. A. 383) on conditions in policy as to increase of risk by change in occupation.

Notice before forfeiture.

Cited in footnote to *Eury v. Standard Life & Acci. Ins. Co.* 10 L. R. A. 534, which holds notice necessary before forfeiting policy for nonpayment of premium.

9 L. R. A. 373, *HAYS v. JORDAN*, 85 Ga. 741, 11 S. E. 833.

Power of married women to contract.

Cited in *Sams v. Thompson Hiles Co.* 110 Ga. 649, 36 S. E. 104, and *Goodrich v. Atlanta Nat. Bldg. & L. Asso.* 96 Ga. 803, 22 S. E. 585, holding that married woman, with or without separate estate, may contract; *Madden v. Blain*, 86 Ga. 782, 13 S. E. 128, holding that married women may contract, irrespective of separate estate, except as to suretyship; *Sidway v. Nichol*, 62 Ark. 154, 34 S. W. 529, holding married woman, without separate estate, liable for money borrowed.

Construction of contracts.

Cited in *Snelling v. Arbuckle Bros.* 104 Ga. 366, 30 S. E. 863, construing contract, nominally commissioning selling agent, as one of sale.

Distinguished in *National Bank v. Goodyear*, 90 Ga. 728, 16 S. E. 962, holding contract to receive goods on consignment to sell, goods and proceeds to belong to consignor until payment of invoice price, not contract of sale.

— Of contracts of lease as conditional sales.

Followed without special discussion in *Ross v. McDuffie*, 91 Ga. 121, 16 S. E. 648.

Cited in *Blicht v. Edwards*, 96 Ga. 610, 24 S. E. 147, construing contract to pay rent unless purchase money notes paid, as contract of sale; *Cottrell v. Mer-*

chants & M. Bank, 89 Ga. 519, 15 S. E. 944, holding contract which is substantially a conditional sale not changed into bailment for hire by denominating purchase money, "hire," and making it payable in instalments.

Cited in note (12 L. R. A. 447) on sale of personal property on instalment plan.

Conditional sale; retaking by vendor.

Cited in *Glisson v. Heggie Bros.*, 105 Ga. 33, 31 S. E. 118, holding that retaking of property to which title is reserved rescinds contract of sale; *Turk v. Carnahan*, 25 Ind. App. 128, 81 Am. St. Rep. 85, 57 N. E. 729, and *Perkins v. Grobben*, 116 Mich. 177, 39 L. R. A. 818, 72 Am. St. Rep. 512, 74 N. W. 469, holding that retaking of property sold with reservation of title precludes recovery of purchase price; *Commercial Pub. Co. v. Campbell Printing-Press & Mfg. Co.*, 111 Ga. 390, 36 S. E. 756, holding vendor reserving title and bringing action to recover property, bound to account for payment, less reasonable rent.

Cited in footnotes to *Puffer & Sons Mfg. Co. v. Lucas*, 19 L. R. A. 682, which denies right to retain payments made on retaking article conditionally sold; *Crompton v. Beach*, 18 L. R. A. 187, which holds that conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

Cited in notes (10 L. R. A. 235) on what constitutes conditional sales; (10 L. R. A. 237) on remedy of vendor on default of purchaser on conditional sale; (32 L. R. A. 465) on rights and liabilities of vendor and purchaser by conditional sale on default of payment; (12 L. R. A. 821) on sales not affected by oral conditions subsequent.

Damages for conversion of security.

Cited in *Halliday v. Bank of Stewart County*, 112 Ga. 464, 37 S. E. 721, raising, without deciding, measure of recovery for unauthorized sale of collateral security.

9 L. R. A. 376, *LOAIZA v. SUPERIOR COURT*, 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707.

Jurisdiction of courts.

Cited in *Epperly v. Ferguson*, 118 Iowa, 49, 91 N. W. 816, holding action against nonresident for specific performance maintainable in county where land in suit situated.

Certiorari.

Cited in *White v. Superior Court*, 110 Cal. 64, 42 Pac. 480, holding that only question involved on certiorari is whether lower court has exceeded its jurisdiction.

Fraud.

Cited in note (35 L. R. A. 430) on statements as to property at a distance.

9 L. R. A. 382, *STATE ex rel. PENNELL v. ARMSTRONG*, 30 Neb. 493, 46 N. W. 618.

Petition for organization of new county.

Cited in *State ex rel. Childs v. Red Lake County*, 67 Minn. 359, 69 N. W. 1083, holding petitions first filed for organization of new county should be submitted, others refused; *State ex rel. Douglas v. Larson*, 89 Minn. 126, 94 N. W. 226, holding submission of three petitions covering same territory illegal.

9 L. R. A. 385, *STATE ex rel. BOYLE v. BOARD OF EXAMINERS*, 21 Nev. 67, 24 Pac. 614.

Registration of electors.

Cited in *State ex rel. Wilson v. Stone*, 24 Nev. 310, 53 Pac. 497, denying authority of legislature to provide for registration of qualified electors.

Cited in footnote to *Barret v. Taylor*, 36 L. R. A. 129, upholding right to have name registered as voter, of unnaturalized minor who becomes qualified voter before revision of registry.

(Cited in notes (10 L. R. A. 226) on registration of voters; (25 L. R. A. 480, 481) on how far right to vote is absolute.

9 L. R. A. 387, *COMPTON v. HAWKINS*, 90 Ala. 411, 24 Am. St. Rep. 823, 8 So. 75.

Landings and docks.

Cited in *Sullivan Timber Co. v. Mobile*, 110 Fed. 194, to point that riparian owner may construct landing on navigable stream, subject to public easement or servitude; *Sullivan Timber Co. v. Mobile*, 124 Fed. 647, denying right of city to eject owner of uplands from possession of docks, constructed upon navigable river with acquiescence of city.

Presumption of dedication.

Cited in *Harper v. State*, 109 Ala. 69, 19 So. 901, holding dedication of road to public use not presumed unless owner's intent clearly shown, and acceptance by public.

9 L. R. A. 388, *ALABAMA G. S. R. CO. v. CARMICHAEL*, 90 Ala. 19, 8 So. 87.

Riding in violation of rules or without valid ticket.

Cited in *McGhee v. Reynolds*, 117 Ala. 420, 23 So. 68, denying liability of carrier for ejecting passenger tendering void ticket; *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229, holding one riding on construction car in violation of rules though with conductor's passive consent not a passenger; *Manning v. Louisville & N. R. Co.* 95 Ala. 395. 16 L. R. A. 56, 36 Am. St. Rep. 225, 11 So. 8, holding company justified in ejecting passenger refusing to pay fare for distance ridden without valid ticket.

9 L. R. A. 391, *SACKETT v. RUDER*, 152 Mass. 397. 25 N. E. 736.

Peremptory challenges.

Cited in *Waggoner v. Dodson*, 96 Tex. 7, 68 S. W. 813, holding each defendant having independent controversy in common action entitled to six peremptory challenges.

Proof of sale within time alleged.

Cited in *Edwards v. Woodbury*, 156 Mass. 26, 30 N. E. 175, upholding right to prove one sale of intoxicating liquor under count alleging sales on divers occasions.

Construction of penal statute as to damages.

Cited in *Doyle v. Fitchburg R. Co.* 162 Mass. 71, 25 L. R. A. 158, 44 Am. St. Rep. 335, 37 N. E. 770, denying that conditions on ticket released carrier from penalty to widow for death of husband through negligence.

9 L. R. A. 395, *TERRITORY v. AH LIM*, 1 Wash. 156, 24 Pac. 588.

Constitutional law; police powers.

Cited in *Ritchie v. People*, 155 Ill. 111, 29 L. R. A. 84, 46 Am. St. Rep. 315, 40 N. E. 454, holding statutory prohibition of employment of women in factories and workshops over eight hours per day invalid; *State v. Buchanan*, 29 Wash. 606, 59 L. R. A. 344, 92 Am. St. Rep. 930, 70 Pac. 52, holding statute prohibiting employment of females in mechanical or mercantile establishments over ten hours per day valid; *State v. Lee*, 137 Mo. 149, 38 S. W. 583, holding statute prohibiting maintenance of place for smoking of opium valid; *Ex parte Mon Luck*, 29 Or. 427, 32 L. R. A. 739, 54 Am. St. Rep. 804, 44 Pac. 693, holding criminal statute prohibiting possession of opium without license or prescription valid.

Disapproved in *Re Morgan*, 26 Colo. 428, 47 L. R. A. 58, 77 Am. St. Rep. 269, 158 Pac. 1071, holding statutory limitation of labor in mines or smelters to eight hours per day invalid.

9 L. R. A. 402, *SPEER v. ATHENS*, 85 Ga. 49, 11 S. E. 802.

Formalities requisite to passage of bill.

Followed in *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232, holding question of preliminary advertisement of local bills one for general assembly to determine.

Cited in *Jennings v. Russell*, 92 Ala. 606, 9 So. 421, holding that courts refuse to look outside of records of legislature on question of notice; *State v. Wray*, 109 Mo. 598, 19 S. W. 86, holding that acts of legislature may be overthrown where journal shows nonconformity with constitutional mandates.

Cited in note (11 L. R. A. 491) on passage of bill through legislature.

Assessment as tax.

Cited in *Denver v. Knowles*, 17 Colo. 209, 17 L. R. A. 141, 30 Pac. 1041, holding assessment for local improvement not a tax within meaning of constitutional provision; *Atlanta v. First Presby. Church*, 86 Ga. 737, 12 L. R. A. 854, 13 S. E. 252, denying that churches are exempt from taxation for pavement of street.

Due process of law.

Followed in *Bacon v. Savannah*, 86 Ga. 305, 12 S. E. 580, as to constitutional questions involved in affidavit.

Cited in *Bacon v. Savannah*, 86 Ga. 304, 12 S. E. 580, sustaining right of property owner to contest assessment by filing affidavit which gives opportunity to review law and facts; *Brumby v. Harris*, 107 Ga. 259, 33 S. E. 49, holding levy and sale of property other than that improved by pavement, for nonpayment of tax, void; *Atlanta v. Hamlein*, 96 Ga. 383, 23 S. E. 408, holding assessments for improvements, amounting to virtual confiscation of property, void; *Denver v. Knowles*, 17 Colo. 212, 17 L. R. A. 141, 30 Pac. 1041, approving assessment for improvement apportioned upon basis of frontage.

Cited in footnotes to *Brown v. Markham*, 30 L. R. A. 84, which holds valid statute authorizing logger's lien without notice to owner, but giving subsequent opportunity to intervene; *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice, for highway repairs, valid; *State v. Sponaugle*, 43 L. R. A. 727, which sustains forfeiture of land for five years' failure to enter for taxation.

Judicial interference with assessment for improvement.

Cited in *Bacon v. Savannah*, 105 Ga. 66, 31 S. E. 127, and *Burckhardt v. Atlanta*, 103 Ga. 309, 30 S. E. 32, holding necessity for repavement of streets question for city to determine, and courts will refuse to interfere, in absence of fraud; *Morse v. Westport*, 136 Mo. 288, 37 S. W. 932 (dissenting opinion), majority raising, without deciding, question whether court may declare paving ordinance void, because unreasonable.

9 L. R. A. 408, *HALLGREN v. CAMPBELL*, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381.

Trial of title to office.

Cited in *Pariseau v. Board of Education*, 96 Mich. 307, 53 N. W. 799, holding that acting officer, not a party, cannot be ousted by mandamus; *Keeler v. Deo*, 117 Mich. 5, 75 N. W. 145, holding mandamus to compel payment of school funds not maintainable where, in effect, it would oust assessor *de facto*, not a party.

Removal from office.

Cited in *Trainor v. Wayne County*, 89 Mich. 169, 15 L. R. A. 101, 50 N. W. 809, upholding power of supervisors, under statute, to remove officer without charges, notice, or hearing; *Speed v. Detroit*, 97 Mich. 210, 56 N. W. 570, upholding, pending quo warranto, mandamus to compel approval of bond of officer removed without notice; *Hartigan v. West Virginia University*, 49 W. Va. 51, 38 S. E. 698 (dissenting opinion), majority upholding removal of professor by board of regents, without notice or hearing; *State ex rel. Gallagher v. Brown*, 57 Mo. App. 204, and *Townsend v. Kurtz*, 83 Md. 350, 34 Atl. 1123, holding that general power of removal carries right to remove without notice of charges; *Todd v. Dunlap*, 99 Ky. 461, 36 S. W. 541, holding that mayor, authorized to remove on giving reasons therefor, cannot arbitrarily remove officers appointed for definite term; *Pratt v. Police & Fire Comrs.* 15 Utah, 12, 49 Pac. 747, holding chief of police, holding office during good behavior, not removable without charges and opportunity for hearing; *Hayden v. Memphis*, 100 Tenn. 588, 47 S. W. 182, holding, in absence of statute to contrary, municipal officer entitled to notice and fair hearing before removal; *Kimball v. Olmstead*, 20 Wash. 634, 56 Pac. 377 (dissenting opinion), majority holding health commissioner removable under statute, without charges or hearing; *State ex rel. Hitchcock v. Hewitt*, 3 S. D. 195, 16 L. R. A. 417, 44 Am. St. Rep. 788, 52 N. W. 875, holding trustee for definite term, removable for specified causes, entitled to specification of charges, and hearing; *State ex rel. Hastings v. Smith*, 35 Neb. 32, 16 L. R. A. 797, 52 N. W. 700, holding officers appointed for definite term, removable only for specified causes, entitled to notice and hearing.

Cited in note (15 L. R. A. 97) on right to remove officer summarily.

Acts of de facto officers.

Cited in *State ex rel. Baker v. Hobgood*, 126 N. C. 151, 35 S. E. 253, holding that in contest between rival appointees of *de facto* boards, the one named by board, afterward declared *de jure*, holds title; *Powers v. Com.* 110 Ky. 436, 53 L. R. A. 257, 61 S. W. 735 (dissenting opinion), majority holding pardon by one receiving certificate of election as governor void, on title being adjudged invalid.

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9 L. R. A. 411, *BUSHNELL v. BUSHNELL*, 77 Wis. 435, 46 N. W. 422.

Remedies of cosureties and coguarantors.

Cited in *Faurot v. Gates*, 86 Wis. 574, 57 N. W. 294, holding guarantor of note may recover at law from solvent coguarantors, same contributions as if they were the only guarantors; *Faires v. Cockerell*, 88 Tex. 436, 28 L. R. A. 531, 31 S. W. 190, holding cosurety, upon payment of debt, has action against the others upon implied promise of reimbursement; *Sparks v. Childers*, 2 Ind. Terr. 195, 47 S. W. 316, upholding upon theory of subrogation, action of surety against principal, barred as to contribution; *Smith v. Mason*, 44 Neb. 621, 63 N. W. 41, holding surety, in action for contribution, only entitled to legal rate of interest from time of payment; *Faires v. Cockerell*, 88 Tex. 437, 28 L. R. A. 531, 31 S. W. 190, holding that right of action of co-obligor or surety satisfying debt for contribution rests upon implied promise realised by law, and not on subrogation.

Cited in footnote to *Pace v. Pace*, 44 L. R. A. 459, which sustains right of surety, paying obligation, to receive dividend on entire debt from cosurety's insolvent estate.

9 L. R. A. 413, *GILLILAND v. FENN*, 90 Ala. 230, 8 So. 15.

Validity of voluntary conveyance.

Cited in *Howard v. Corey*, 126 Ala. 290, 28 So. 682, holding transfer of stock, in fraud of creditors, no obstacle to levy and sale under execution.

Notice as affecting subsequent creditors.

Approved in *Echols v. Peurrung Bros.* 107 Ala. 665, 18 So. 250, denying that notice to subsequent creditor of prior fraudulent conveyance bars right to avoid deed.

Cited in *Echols v. Orr*, 106 Ala. 240, 17 So. 677, denying that record of deed is defense to action by subsequent creditors to set aside same as fraudulent.

9 L. R. A. 421, *Re OLIVER*, 136 Pa. 43, 20 Am. St. Rep. 894, 20 Atl. 527.

Partnership.

Cited in *Morris v. Metalline Land Co.* 164 Pa. 330, 27 L. R. A. 307, 35 W. N. C. 189, 44 Am. St. Rep. 614, 30 Atl. 240, to point that unincorporated company, organized on joint-stock plan, is a partnership; *Cronkrite v. Trexler*, 20 Pa. Co. Ct. 470, 7 Pa. Dist. R. 65, to point that unincorporated joint stock company, organized to trade in land, is a partnership.

Cited in notes (27 L. R. A. 449, 481) as to when real estate will be considered partnership property; (28 L. R. A. 168) on rights and position of creditors, purchasers, and other third parties in partnership.

Capital or income.

Approved in *Knapp's Estate*, 17 Lanc. L. Rev. 326, 9 Pa. Dist. R. 718, 24 Pa. Co. Ct. 123, holding that purchase money of land, forfeited on failure to fulfil terms of sale, is principal and not income; *Wright's Estate*, 18 Pa. Co. Ct. 192, 5 Pa. Dist. R. 346, holding dividends arising from converting stock into cash and stock of new company, income to which life tenant is entitled; *Thomson's Estate*, 48 Phila. Leg. Int. 147, 20 Phila. 126, 28 W. N. C. 232, 9 Pa. Co. Ct. 640, holding that rise in value after testator's death, due to fact not known in his lifetime, constitutes income to which tenant for life is entitled; *Smith's Estate*,

140 Pa. 355, 23 Am. St. Rep. 237, 21 Atl. 438, holding life tenant of stock entitled to dividends made after testator's death, but not to surplus profits accumulated in testator's lifetime; *Thompson's Estate*, 153 Pa. 337, 31 W. N. C. 571, 26 Atl. 652, holding that shares in joint stock company, organized to trade in land, represent interest in venture, and that dividends declared are profits, if capital stock remains unimpaired; *Park's Estate*, 173 Pa. 195, 37 W. N. C. 447, 33 Atl. 884, holding profits arising from mortgage foreclosure and resale, income and profits to which life tenant is entitled.

Distinguished in *Re Smith*, 25 Pittsb. L. J. N. S. 308, holding profits arising from sale of land purchased on foreclosure, capital and not income; *Thomson's Estate*, 11 Pa. C. Ct. 200, 1 Pa. Dist. R. 140, 30 W. N. C. 24, holding proceeds of sale of options to subscribe to stock of new company guaranteed by old company, principal which does not go as income to life tenant of stock in guaranteeing company.

Shares in association as personalty.

Cited in *Re Jones*, 172 N. Y. 585, 60 L. R. A. 480, footnote p. 476, 65 N. E. 570, holding shares in joint stock company owning real estate only, personalty in applying transfer tax law.

9 L. R. A. 424, *WINCHESTER v. GLAZIER*, 152 Mass. 316, 25 N. E. 728.

Partner's compensation for services.

Cited in *McDowell v. North*, 24 Ind. App. 443, 55 N. E. 789, holding answer merely alleging refusal of one partner to devote time to business insufficient to establish right of other partner to compensation; *Hoag v. Alderman*, 184 Mass. 219, 68 N. E. 199, holding partner entitled to compensation for sale of real estate, although no express agreement to that effect.

Partnership accounting.

Cited in *Lockwood v. Roberts*, 171 Mass. 110, 50 N. E. 517, denying interest on surviving partner's share of assets; *McMurtrie v. Guiler*, 183 Mass. 454, 67 N. E. 358, holding partner entitled to accounting, although agreement is silent as to his share in profits.

Construction of instruments by parties thereto.

Cited in *Grubb v. Burford*, 98 Va. 558, 37 S. E. 4, holding admission of parol evidence as to construction of unambiguous contract by parties, error; *Atty. Gen. v. Algonquin Club*, 153 Mass. 452, 11 L. R. A. 502, 27 N. E. 2, holding that courts may properly consider construction of deed by parties where it allows "usual projections;" *Humphreys v. Old Colony R. Co.* 160 Mass. 328, 35 N. E. 859, holding that existence of beaten track and maintenance of planks between rails, prove that parties to deed considered place as highway crossing; *Menage v. Rosenthal*, 175 Mass. 361, 56 N. E. 579, holding evidence of voluntary act of salesman inadmissible to add to rights under contract.

9 L. R. A. 428, *CONNELLY v. MASONIC MUT. BEN. ASSO.* 58 Conn. 552, 18 Am. St. Rep. 296, 20 Atl. 671.

Decisions of voluntary associations affecting membership.

Cited in *Farmer v. Board of Trade*, 78 Mo. App. 565, holding that board of trade cannot arbitrarily and in bad faith dismiss member in violation of its own rules; *Sanborn v. Black*, 67 N. H. 539, 35 Atl. 942, holding that voluntary benefit association cannot withhold consent so as to defeat insured's right to

change beneficiary; *Brandenburger v. Jefferson Club Asso.* 88 Mo. App. 166, upholding expulsion of member of political club, made in good faith, after hearing; *Froelich v. Musicians Mut. Ben. Asso.* 93 Mo. App. 389, refusing relief to member, wrongfully expelled from voluntary association, where no property rights involved; *Mead v. Stirling*, 62 Conn. 595, 23 L. R. A. 230, 27 Atl. 591, holding that court will not interfere in removal from office in lodge, until remedies provided by the order are pursued.

Cited in footnotes to *Lavalle v. Société St. Jean Baptiste*, 16 L. R. A. 392, which holds member unlawfully expelled from benefit society no right of action for damages; *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 18 L. R. A. 191, which holds that chancery will not force member on corporation not engaged in commercial business.

Cited in note (49 L. R. A. 355) on conclusiveness of decisions of tribunals of associations or corporations.

Right to reinstatement as affected by death.

Cited in *Jackson v. Northwestern Mut. Relief Asso.* 78 Wis. 473, 47 N. W. 733, holding right to reinstatement fixed by mailing of application and money, so as not to be defeated by death of insured before receipt by association.

Dissolution of voluntary association.

Cited in footnote to *Industrial Trust Co. v. Green*, 17 L. R. A. 202, which holds illegal deposition of president not ground for subsequent dissolution of benevolent association.

9 L. R. A. 431, *METZ v. CALIFORNIA SOUTHERN R. CO.* 85 Cal. 329, 20 Am. St. Rep. 228, 24 Pac. 610.

Carrier's liability for loss of baggage.

Cited in *Southern Kansas R. Co. v. Clark*, 52 Kan. 402, 34 Pac. 1054, holding carrier not liable for loss of agent's sample case, checked as baggage without carrier's knowledge of contents.

Cited in footnote to *Oakes v. Northern P. R. Co.* 12 L. R. A. 318, which holds articles carried for business purposes not baggage.

Cited in note (11 L. R. A. 760) on carrier's liability for loss of baggage.

9 L. R. A. 433, *BLACK v. HENRY G. ALLEN CO.* 42 Fed. 618.

Motion to compel complainants to amend bill, in 43 Fed. 680.

Injunction granted on final hearing, in 56 Fed. 767.

Assignability of copyright.

Followed in *Black v. Henry G. Allen Co.* 56 Fed. 771, holding copyright assignable to nonresident foreigner.

Cited in *Davis v. Vories*, 141 Mo. 240, 42 S. W. 707, holding copyright assignable for the whole or any part of the country.

Protection of copyright.

Followed in *Black v. Henry G. Allen Co.* 56 Fed. 771, which holds copyright of single article bound up in volume, bulk of which is *publici juris*, valid against unpermitted reprint of copyrighted book.

Injunction against infringement.

Cited in *Ockenholdt v. Frohman*, 60 Ill. App. 303, holding bill for injunction

not alleging exclusive ownership of play, insufficient to enjoin production of it; *United States Mitis Co. v. Detroit Steel & Spring Co.* 122 Fed. 865, holding verification, upon information and belief, of bill not intended to be used as evidence on motion for temporary injunction, sufficient.

Ownership of copyright.

Cited in *Werckmeister v. Springer Lithographing Co.* 63 Fed. 810, holding well-known trade name sufficient designation of party by whom copyright is taken out.

Cited in note (51 L. R. A. 359) on common-law rights of authors and others in intellectual productions.

9 L. R. A. 438, *ROBERTS v. STUYVESANT SAFE DEPOSIT CO.* 123 N. Y. 57, 20 Am. St. Rep. 718, 25 N. E. 294.

Bailee's duty as to bailment.

Followed in *Glass v. Hauser*, 38 Misc. 780, 78 N. Y. Supp. 830, denying that failure of warehouseman to return bailment is excusable on mere ground of replevin.

Cited in *Spiegel v. Pacific Mail S. S. Co.* 26 Misc. 416, 56 N. Y. Supp. 171, holding it to be duty of carrier to resist replevin or notify consignee of action; *Mayer v. Brensinger*, 180 Ill. 114, 72 Am. St. Rep. 196, 54 N. E. 159, holding that safety-deposit proprietor must use ordinary care in protecting money in vaults; *Cussen v. Southern California Sav. Bank*, 133 Cal. 536, 85 Am. St. Rep. 221, 65 Pac. 1099, and *Lockwood v. Manhattan Storage & Warehouse Co.* 28 App. Div. 70, 50 N. Y. Supp. 974, holding warehouseman prima facie liable as bailee for loss of money from safe-deposit vault; *Glass v. Hauser*, 40 Misc. 662, 83 N. Y. Supp. 177, holding redelivery to bailor by bailee excused by seizure of goods under valid legal process; *Loomis v. Reimers*, 119 Iowa, 172, 93 N. W. 95, holding bailee failing to defend replevin action on advice of attorney, not liable for loss of property, although action was barred.

Distinguished in *Lee v. Maxwell*, 98 Mich. 504, 57 N. W. 581, denying junior creditors' liability as trespasser, for levying on wrongfully attached goods, after commencement of conversion suit by mortgagee against senior creditors; *Macaulay v. Palmer*, 125 N. Y. 744, 4 Silv. Ct. App. 342, 26 N. E. 912, denying liability of agent for proceeds of sale of cotton received by him but returned to vendee because of inability to deliver cotton.

Defense to action.

Distinguished in *Dyett v. Hyman*, 129 N. Y. 359, 26 Am. St. Rep. 533, 29 N. E. 261, holding unavailable, in action by assignee for conversion, defense that goods were subsequently applied to benefit of assignor.

Question for jury.

Cited in *Goldenson v. Lawrence*, 6 Misc. 232, 26 N. Y. Supp. 541, holding that question of ownership of goods converted should be submitted to jury.

9 L. R. A. 442, *ALABAMA G. S. R. CO. v. HILL*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 So. 90.

Review on appeal.

Approved in *Alabama G. S. R. Co. v. Hill*, 93 Ala. 518, 30 Am. St. Rep. 65, 9 So. 722, holding denial of application for new trial not reviewable; *Carr v.*

State, 104 Ala. 14, 16 So. 150, holding denial of continuance by trial court not reviewable on appeal.

Physical examination of plaintiff.

Approved in *South Bend v. Turner*, 156 Ind. 426, 54 L. R. A. 400, 83 Am. St. Rep. 200, 60 N. E. 271, holding defendant entitled to order for physical examination of plaintiff to determine extent of injury, where it may be made without pain or injury; *Ottawa v. Gilliland*, 63 Kan. 173, 88 Am. St. Rep. 232, 65 Pac. 252, holding that trial court has power, in action for personal injury, to require plaintiff to submit to examination by physicians selected by court; *Belt Electric Line Co. v. Allen*, 102 Ky. 554, 80 Am. St. Rep. 374, 44 S. W. 89, holding defendant entitled to demand physical examination of plaintiff, in action for permanent injuries; *Graves v. Battle Creek*, 95 Mich. 270, 19 L. R. A. 642, 35 Am. St. Rep. 561, 54 N. W. 757, holding that court has power to compel plaintiff to exhibit injured arm to physician in presence of jury; *McGovern v. Hope*, 63 N. J. L. 82, 42 Atl. 830, granting order for physical examination of plaintiff before trial, in action for injuries sustained on defective walk; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 120, 46 L. R. A. 154, 75 Am. St. Rep. 821, 57 Pac. 367, upholding order for examination of woman by medical experts appointed by court in action for personal injuries; *O'Brien v. La Crosse*, 99 Wis. 425, 40 L. R. A. 833, 75 N. W. 81, holding that right of defendant to have surgical examination made of plaintiff, rests, in the absence of statute, in the sound discretion of the trial court.

Cited in *Chicago, R. I. & T. R. Co. v. Langston*, 19 Tex. Civ. App. 578, 47 S. W. 1027 (dissenting opinion), majority holding defendant entitled to have plaintiff's injured leg, which had been exhibited to jury, examined by defendant's experts; *Atchison, T. & S. F. R. Co. v. Palmore* (Kan.) 64 L. R. A. 94, footnote p. 90, 75 Pac. 509, holding defendant entitled to expert examination of plaintiff's injured eyes where it would not produce serious discomfort or deleterious consequence.

Cited in note (14 L. R. A. 469) on power to compel plaintiff to submit to physical examination.

Distinguished in *Terre Haute & I. R. Co. v. Brunner*, 128 Ind. 554, 26 N. E. 178, holding refusal to direct surgical examination not reversible error, where application made after plaintiff rested and without affidavit showing its necessity; *Austin & N. W. R. Co. v. Cluck* (Tex.) 64 L. R. A. 496, 77 S. W. 403, holding court without power, in absence of statute, to direct plaintiff to submit to physical examination.

Disapproved in *Union P. R. Co. v. Botsford*, 141 U. S. 255, 35 L. ed. 739, 11 Sup. Ct. Rep. 1000, refusing to order plaintiff, in action for personal injuries, to submit to surgical examination in advance of trial.

Punitive damages.

Approved in *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 427, 8 So. 708, holding that act of conductor in starting train when he knows passenger is stepping upon cars may be such gross negligence as authorizes punitive damages; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 526, 30 Am. St. Rep. 65, 9 So. 722, holding evidence that old rails were used to repair track imputes recklessness or wantonness of company authorizing punitive damages.

Qualified in *Richmond & D. R. Co. v. Vance*, 93 Ala. 148, 30 Am. St. Rep. 41,

9 So. 574, holding existence of defective cross-ties of which railroad company was ignorant simply negligence not authorizing punitive damages.

Contributory negligence as defense to wanton negligence.

Approved in *McGhee v. Campbell*, 42 C. C. A. 101, 101 Fed. 943, holding contributory negligence not defense where evidence tends to show wanton negligence on part of defendant.

9 L. R. A. 445, *MORGAN v. KENDALL*, 124 Ind. 454, 24 N. E. 143.

Injuries provable under allegations of complaint.

Cited in *Heltonville Mfg. Co. v. Fields*, 138 Ind. 61, 36 N. E. 529, holding instruction to include mental disability as element of damage resulting from injury, proper although not specifically pleaded; *Kelley v. Kelley*, 8 Ind. App. 614, 34 N. E. 1009, holding shame, humiliation, loss of honor, reputation, and social position proper elements of damages in assault and battery action without being pleaded; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 60, 29 L. R. A. 291, 61 N. W. 543, holding under allegation that plaintiff was seriously hurt, injury to lung provable.

Damages recoverable for wilful tort.

Cited in note (11 L. R. A. 690) on rule of damages for negligent acts or omissions.

9 L. R. A. 449, *DUNTLEY v. BOSTON & M. R. CO.* 66 N. H. 263, 49 Am. St. Rep. 610, 20 Atl. 327.

Duties and liabilities of carrier of freight.

Cited in footnotes to *Illinois C. R. Co. v. Harris*, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported; *Chicago, B. & Q. R. Co. v. Williams*, 55 L. R. A. 289, which holds carrier liable for failure properly to provide for live stock knowingly taken without caretaker; *Betts v. Chicago, R. I. & P. R. Co.* 26 L. R. A. 248, which holds carrier liable for injuries to live stock by breaking of slats; *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 50 L. R. A. 729, which holds carrier negligently delaying delivery of goods, liable to penalty for delay to which shipper known to be subject.

Cited in note (12 L. R. A. 746) on duty of railway company to furnish proper cars.

Limitation of liability by contract.

Approved in *Durgin v. American Exp. Co.* 66 N. H. 279, 9 L. R. A. 455, 20 Atl. 328, and *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 613, 94 Am. St. Rep. 279, 64 N. E. 647, holding carrier's liability limited to amount stipulated in contract of shipment; *Alair v. Northern P. R. Co.* 53 Minn. 167, 19 L. R. A. 767, 39 Am. St. Rep. 588, 54 N. W. 1072, holding carrier's liability for loss from negligence limited to stipulated value of property; *Pacific Exp. Co. v. Foley*, 46 Kan. 468, 12 L. R. A. 802, 26 Am. St. Rep. 107, 26 Pac. 665, holding carrier's liability for loss through slight negligence limited to stipulated amount; *Baltimore & O. S. W. R. Co. v. Ragsdale*, 14 Ind. App. 426, 42 N. E. 1106 (dissenting opinion), majority holding that carrier cannot, by contract, limit liability for negligence.

Cited in *Ætna L. Ins. Co. v. Smith*, 31 C. C. A. 579, 60 U. S. App. 88, 88 Fed. 443, holding guaranty not implied by acceptance of receipt for premium with printed condition that policy revives when guaranty of good health furnished.

Cited in note (10 L. R. A. 420) on limitation of carrier's liability by contract.

Distinguished in *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for mistake in transmission and delivery, notwithstanding printed stipulation to contrary.

9 L. R. A. 453, *DURGIN v. AMERICAN EXP. CO.* 66 N. H. 277, 20 Atl. 328.

Limitation of carrier's liability.

Approved in *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 157, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, sustaining limitation of carrier's liability for damage not caused by negligence or lawful misfeasance, in consideration of special freight rate; *Pacific Exp. Co. v. Foley*, 46 Kan. 468, 12 L. R. A. 804, 26 Am. St. Rep. 107, 26 Pac. 665, sustaining limitation of liability to specified amount unless true value stated, when loss results only from slight negligence; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 613, 94 Am. St. Rep. 279, 64 N. E. 647, holding carrier's liability limited to stipulated amount.

Cited in *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 283, 29 Am. St. Rep. 436, 49 N. W. 183, and *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 375, 58 N. W. 968, holding contractual limitation of liability for carrier's negligence, invalid.

Cited in notes (14 L. R. A. 434) as to carrier's power to limit liability for negligence; (18 L. R. A. 527) as to right of common carrier to limit liability by contract in absence of negligence.

Distinguished in *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for failure correctly to transmit and deliver message, notwithstanding printed agreement to contrary.

9 L. R. A. 455, *REED v. MEAGHER*, 14 Colo. 335, 24 Pac. 681.

When partnership exists.

Approved in *Hodgson v. Fowler*, 24 Colo. 282, 50 Pac. 1034, holding persons jointly interested in a lease of mining land which they work under an agreement as to the interest of each, partners; *Abbott v. Smith*, 3 Colo. App. 270, 32 Pac. 843, holding existence of partnership not dependent upon compliance by each partner with his agreement, but upon contribution of property and labor and commencement of business; *Flower v. Barnekoff*, 20 Or. 138, 11 L. R. A. 151, 25 Pac. 370, holding that valid contract of partnership to speculate in real estate may be made by parol.

Cited in *Sabel v. Savannah Rail & Equipment Co.* 135 Ala. 383, 33 So. 663, holding partnership not created by purchase by one party under agreement to sell on joint account, where other party refused to pay his part of purchase price.

Cited in footnotes to *Childers v. Neely*, 49 L. R. A. 468, which holds mining partnership created where cotenants of oil lease or mine unite in working it; *Shrum v. Simpson*, 49 L. R. A. 792, which holds no partnership created by contract for working farm and dividing proceeds.

Dissolution by transfer of interest.

Approved in *Patrick v. Weston*, 22 Colo. 49, 43 Pac. 446, holding that member

of mining partnership may convey his interest to stranger without dissolving partnership.

Cited in *G. V. B. Min. Co. v. First Nat. Bank*, 35 C. C. A. 514, 95 Fed. 39, to point that transfer of interest in mining partnership will not work its dissolution.

Loss of interest.

Approved in *Continental Divide Min. Invest. Co. v. Bliley*, 23 Colo. 164, 46 Pac. 633, holding interest of mining partner under lease surrendered by his copartners, continued under new lease executed to one of them; *Continental Divide Min. Invest. Co. v. Bliley*, 23 Colo. 165, 46 Pac. 633, holding that failure of partner to pay his share of expenses of working lease does not forfeit his interest in mining partnership.

Cited in note (28 L. R. A. 100) on effect of conveyance by partner of partnership real estate.

Statute of frauds.

Cited in *Waterbury v. Fisher*, 5 Colo. App. 372, 38 Pac. 846, holding memorandum acknowledging receipt of money and its investment in land for party advancing it, sufficient to establish trust under statute of frauds; *Beulah Marble Co. v. Mattice*, 22 Colo. 557, 45 Pac. 432, holding that agreement between three persons to buy land, the title of which is to be taken in the name of one for the benefit of the others, is within the statute of frauds.

Cited in note (16 L. R. A. 750) on validity of parol partnership for dealing in lands.

Appellate review; reversal.

Approved in *Abbott v. Smith*, 3 Colo. App. 272, 32 Pac. 843, holding that judgment will be set aside where verdict is clearly against the evidence.

Cited in *Beulah Marble Co. v. Mattice*, 22 Colo. 558, 45 Pac. 432, holding that appellate court will review the evidence if the findings of the trial court are the result of prejudice or mistake.

9 L. R. A. 467, *PRICE v. LUSH*, 10 Mont. 61, 24 Pac. 749.

Mandatory or directory provisions in election law.

Cited in *State ex rel. Casper v. Piper*, 50 Neb. 41, 69 N. W. 383, holding statutory requirement that objection to nomination certificates be filed within three days, mandatory; *Re Cuddeback*, 3 App. Div. 107, 39 N. Y. Supp. 388, holding statutory requirement as to time before election nominating certificate must be filed, mandatory; *State ex rel. Bennett v. Barber*, 4 Wyo. 85, 32 Pac. 14, holding provision requiring filing of nomination certificates, mandatory.

Disapproved in *Stackpole v. Hallahan*, 16 Mont. 48, 28 L. R. A. 505, footnote, p. 502, 40 Pac. 80, holding provisions of ballot law not mandatory to extent of invalidating election; *State ex rel. Brooks v. Fransham*, 19 Mont. 289, 48 Pac. 1, holding that if no objection to nomination be made before election, provisions of statute should be treated as directory; *Bowers v. Smith*, 111 Mo. 58, 16 L. R. A. 759, 33 Am. St. Rep. 491, 20 S. W. 101, holding that erroneous addition of a name to official list of nominees does not invalidate election; *Baker v. Scott*, 4 Idaho, 602, 43 Pac. 76, holding objection that name of successful candidate was improperly placed in ballot, too late when made after election; *Blackmer v. Hildreth*, 181 Mass. 33, 63 N. E. 14, holding election of selectman not invalidated by irregularities in nomination papers.

Adoption of construction of foreign statute.

Cited in *Bowers v. Smith*, 111 Mo. 78, 16 L. R. A. 765, 33 Am. St. Rep. 491, 20 S. W. 101 (dissenting opinion), majority holding construction foreign statute has received not adopted with it.

Distinguished in *State ex rel. Bennett v. Barber*, 4 Wyo. 95, 32 Pac. 14, holding construction of foreign courts not adopted upon enactment of foreign statute.

Delegation of power to nominate.

Cited in *State ex rel. Pigot v. Benton*, 13 Mont. 330, 34 Pac. 301 (dissenting opinion), majority holding that political convention may delegate to committee power to make nominations for office.

Form of ballot.

Cited in note (10 L. R. A. 150, 151) on form of ballot.

What ballots cannot be counted.

Cited as modified in *Slaymaker v. Phillips*, 5 Wyo. 474, 47 L. R. A. 849, 40 Pac. 971 (dissenting opinion), majority holding that ballot not indorsed with official stamp and initials of judge of election, cannot be counted.

Cited in footnote to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

9 L. R. A. 471, *JOHNSON v. HESS*, 126 Ind. 298, 25 N. E. 445.

Record as notice.

Approved in *Hutchinson v. Gorham*, 37 Or. 353, 61 Pac. 431, holding certified transcript and docket thereof not notice of judgment not shown expressly or by inference to be docketed where obtained; *Boos v. Morgan*, 130 Ind. 312, 30 Am. St. Rep. 237, 30 N. E. 141, holding judgment creditor purchasing at sale, bound by his record of prior sale and satisfaction; *Osborn v. Hocker*, 160 Ind. 3, 66 N. E. 42, holding record showing, by mistake, smaller mortgage than that actually existing, binding as between purchaser and mortgagee.

Cited in note (14 L. R. A. 394) on index as part of records of title.

— Effect of identity or lack of identity of name.

Approved in *Fincher v. Hanegan*, 59 Ark. 155, 24 L. R. A. 545, 26 S. W. 821, holding mistake in mortgagor's middle initial not fatal to record as notice; *Davis v. Steeps*, 87 Wis. 475, 23 L. R. A. 820, 41 Am. St. Rep. 51, 58 N. W. 769, holding docket entry of judgment against Edward Davis not notice of encumbrance against E. A. Davis or Edward A. Davis; *Fisher v. Bush*, 133 Ind. 321, 32 N. E. 924, holding record showing that O'Brien & Graham were administrator's attorneys procuring order for sale of real estate, and that Robert Graham was purchaser thereat, gives notice of identity of persons and illegality of sale; *Bankers Loan & Invest. Co. v. Blair*, 99 Va. 611, 86 Am. St. Rep. 914, 39 S. E. 231, holding docketing and indexing judgment against Mrs. T. Frank not notice of lien on realty in name of May M. S.

Cited in notes (17 L. R. A. 825) on presumption of identity of person from identity of name; (24 L. R. A. 544) on form of Christian name required by recording acts.

Judgment liens and sales.

Cited in *McAfee v. Reynolds*, 130 Ind. 38, 13 L. R. A. 214, 30 Am. St. Rep. 194, 28 N. E. 423, holding judgment plaintiff deprived of lien by expiration of statu-

tory period therefor; *Old Nat. Bank v. Findley*, 131 Ind. 227, ineffective, judgment sale of land in which debtor has no equity.

9 L. R. A. 477, *McCLURE v. RABEN*, 125 Ind. 139, 25 N. E.

Conveyance of expectant interests.

Approved in *Habig v. Dodge*, 127 Ind. 39, 25 N. E. 182, holding that conveyance of expectant reversion in widow's deed to third person of expectant reversion in widow's title of heir's children to same where widow survives. *v. Chambers*, 139 Ind. 120, 38 N. E. 334, holding that encumbrance does not diminish necessity for adequate consideration to expectant reversionary interest; *McClure v. Raben*, 133 Ind. 555, 33 N. E. 275, holding on second appeal that quitclaim interest does not pass after acquired estate of inheritance; *Iowa*, 171, 96 N. W. 735, holding evidence of contingent or contingent interest in estate, insufficient proof of valid as *Houston*, 29 Tex. Civ. App. 632, 69 S. W. 183, holding conveyance of expectant estate for inadequate consideration properly set aside.

Cited in note (33 L. R. A. 272) on validity of sale of expectant interest.

Distinguished in *Brown v. Brown*, 139 Ind. 658, 39 N. E. 100, holding that conveyance of expectant interest of full age by advance of ancestor with expectant heirs of full age by advance of expectant interest, valid, where made without fraud.

Disapproved in *Hale v. Hollon*, 90 Tex. 434, 36 L. R. A. 819, 39 S. W. 287, Affirming 14 Tex. Civ. App. 108, 35 S. W. 100, holding that conveyance of expectancy of inheritance from insane person with where transaction is fair and upon adequate consideration.

9 L. R. A. 481, *BALLEW v. ROLER*, 124 Ind. 557, 24 N. E. 100, holding that judgment is conclusive as to all matters that might have been litigated.

Cited in *Maynard v. Waidlich*, 156 Ind. 575, 60 N. E. 348, holding judgment sufficient on demurrer binding, though erroneous, unless set aside; *Gilmore v. McClure*, 133 Ind. 576, 33 N. E. 351, holding judgment conclusive as to all matters that might have been litigated; *Maynard v. Waidlich*, 156 Ind. 571, 60 N. E. 348, holding judgment of foreclosure, even if erroneous, is conclusive as to execution of mortgage and right to foreclose and sell; *Berry*, 161 Ind. 318, 67 N. E. 915, holding right to assert title of parties to foreclosure, lost by failure to set it up.

Priority and enforcement of liens.

Cited in *Whetstone v. Baker*, 140 Ind. 215, 39 N. E. 868, holding that contract for purchase of land may enforce vendor's lien for purchase money.

Cited in note (12 L. R. A. 35) on priority of mechanics' liens.

9 L. R. A. 482, *Re KUBACH*, 85 Cal. 274, 20 Am. St. Rep. 200, holding that constitutional restrictions on business.

Approved in *Re Morgan*, 26 Colo. 449, 47 L. R. A. 66, 71 Pac. 1071, holding statutory limitation upon work in mine.

eight hours per day, void; *Seattle v. Smyth*, 22 Wash. 329, 79 Am. St. Rep. 939, 60 Pac. 1120, holding ordinance restricting hours of labor for contractors upon public works, invalid; *Cleveland v. Clements Bros.* (Constr. Co. 67 Ohio St. 222, 59 L. R. A. 782, 93 Am. St. Rep. 670, 65 N. E. 885, holding statute restricting hours of labor upon public work for state or political subdivisions, and providing for insertion of stipulation in contracts for such work, invalid; *Johnson v. Good-year Min. Co.* 127 Cal. 12, 47 L. R. A. 342, 78 Am. St. Rep. 17, 59 Pac. 304, holding preferential lien for wages on property of corporations, without even requiring description of property or notice, and imposing attorney's fees in case of action, class legislation; *State v. Buchanan*, 29 Wash. 607, 59 L. R. A. 344, 92 Am. St. Rep. 930, 70 Pac. 52, upholding constitutionality of act limiting hours of employment of females in mechanical and mercantile establishments.

Cited in footnote to *State v. Ray*, 60 L. R. A. 634, which holds unauthorized, ordinance for closing stores at 7:30 P. M. except Saturdays.

Cited in notes (13 L. R. A. 588) on unconstitutional and void municipal ordinances; (19 L. R. A. 142) on statutory limitation of hours of labor; (32 L. R. A. 854) on police power to protect health of employees.

9 L. R. A. 483, *ALPERS v. HUNT*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846.

Champertous contracts.

Cited in *Langdon v. Conlin* (Neb.) 60 L. R. A. 431, footnote, p. 429, 93 N. W. 389, holding void, contract to procure employment of attorney by third persons for share of fees received.

9 L. R. A. 487, *WALDRON v. WALDRON*, 85 Cal. 251, 24 Pac. 649, 858.

Cruelty as ground for divorce.

Cited in *Ring v. Ring* (Ga.) 62 L. R. A. 884, footnote, p. 878, 44 S. E. 861, holding habitual and intemperate use of morphine not cruel treatment authorizing divorce.

Cited in footnote to *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling-house, clothing, and food.

9 L. R. A. 493, *McLEAN v. JEPHSON*, 123 N. Y. 142, 25 N. E. 409.

Property subject to taxation.

Cited in *People ex rel. Lemmon v. Feitner*, 167 N. Y. 10, 82 Am. St. Rep. 698, 60 N. E. 265, Affirming 56 App. Div. 283, 67 N. Y. Supp. 893, holding money paid for seat in stock exchange not capital invested, subject to taxation; *Bowe v. McNab*, 11 App. Div. 391, 42 N. Y. Supp. 938, holding assessors without power to assess executors for property not under their control; *New York v. McLean*, 170 N. Y. 384, 63 N. E. 380, holding board of taxes without authority to enforce by judgment, payment of taxes on bank stock owned by nonresident; *Portland University v. Multnomah County*, 31 Or. 502, 50 Pac. 532, upholding right of college to contest assessment of property, although assessors deny exemption; *Mercur Gold Min. & Mill. Co. v. Spry*, 16 Utah, 234, 52 Pac. 382, holding tax on proceeds of mine for period when there were no net proceeds, void.

Validity of tax.

Cited in *People ex rel. Pike v. Barker*, 86 Hun, 285, 33 N. Y. Supp. 1132, Af-

firming 11 Misc. 264, 32 N. Y. Supp. 485, denying that designation of taxpayers "as executors" invalidate tax; *Re McLean*, 25 N. Y. S. R. 539, 6 N. Y. Supp. 230, denying that tax is subject to collateral attack in proceedings to enforce collection; *People ex rel. First Nat. Bank v. Button*, 43 N. Y. S. R. 80, 17 N. Y. Supp. 315, upholding reassessment of surplus among stockholders not against bank.

Recovery of illegal taxes paid.

Cited in *Ætna Ins. Co. v. New York*, 7 App. Div. 153 note, 14 Misc. 149, 35 N. Y. Supp. 857, upholding right of foreign corporation to recover taxes illegally collected on bank stock and paid by bank.

Distinguished in *United States Trust Co. v. New York City*, 77 Hun, 187, 28 N. Y. Supp. 344, denying right to recover tax erroneously assessed and paid without protest.

9 L. R. A. 497, *ALLEN v. LA FAYETTE*, 89 Ala. 641, 8 So. 30.

Municipal liability on contract.

Approved in *Thompson v. Elton*, 109 Wis. 595, 85 N. W. 425, holding town liable for money used by it for lawful municipal purposes but to which it had no legal right; *Witter v. Polk County*, 112 Iowa, 389, 83 N. W. 1041, holding that under express power given county to purchase real estate, it may create an indebtedness therefor.

Cited in *Bluthenthal v. Headland*, 132 Ala. 252, 90 Am. St. Rep. 904, 31 So. 87, holding that municipal corporation may be liable on implied assumpsit for goods purchased under *ultra vires* contract and used by it; *McGillivray v. Joint School Dist. No. 1*, 112 Wis. 359, 58 L. R. A. 103, footnote p. 100, 88 Am. St. Rep. 969, 88 N. W. 310, holding school district which contracted for material in excess of constitutional restriction on indebtedness, liable in part and up to constitutional limit.

9 L. R. A. 501, *SUPREME COUNCIL, O. C. F. v. FORSINGER*, 125 Ind. 52, 21 Am. St. Rep. 196, 25 N. E. 129.

Pleading.

Cited in *Grand Lodge A. O. U. W. v. Hall*, 31 Ind. App. 108, 67 N. E. 272, holding complaint of beneficiary, failing to show full performance of conditions imposed by certificate, defective.

Contract of member with benefit association.

Cited in *Gibson v. Megrew*, 154 Ind. 281, 48 L. R. A. 366, 56 N. E. 674, holding that member of relief association cannot be compelled by suit to pay mortuary assessment.

Cited in note (38 L. R. A. 34, 56) on whether benefit association is an insurance company.

Conclusiveness of decisions of agreed tribunals or arbitrators.

Cited in note (49 L. R. A. 373, 378, 382, 383) on conclusiveness of decisions of tribunals of associations or corporations.

— Of architect or engineer.

Cited in *Munk v. Kanzler*, 26 Ind. App. 110, 58 N. E. 543, holding failure to obtain architect's certificate not condition precedent to proceedings for me-

engineer's lien when contract does not, expressly or impliedly, make it such; *McCoy v. Able*, 131 Ind. 423, 30 N. E. 528, holding estimate of engineer as to amount of claim for constructing road not conclusive, though so provided in contract; *New Teleph. Co. v. Foley*, 28 Ind. App. 419, 63 N. E. 56, holding measurement by city engineer condition precedent to right of action for paving street under contract; *Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 528, 56 Am. St. Rep. 307, 43 N. E. 156, holding engineer's estimate of work performed not conclusive, but presumed correct until contrary shown; *Fulton County v. Gibson*, 158 Ind. 488, 63 N. E. 982, holding invalid, provision in contract providing for arbitration of disputes by one party thereto and his architect.

— **Of benevolent association.**

Cited in *Cotter v. Grand Lodge A. O. U. W.* 23 Mont. 91, 57 Pac. 650, holding by-law of benefit society requiring claims to be heard by society and appeal taken within it, conditions precedent to action; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 231, 49 L. R. A. 386, 60 Am. St. Rep. 745, 46 N. E. 577, holding that where there has been what is equivalent to an appeal provided for by by-law, resort to the court is not barred; *McMahon v. Supreme Council, O. C. F.* 54 Mo. App. 472, holding review by supreme council on its own motion, of decision of its officers, waiver of right to require an appeal by member; *Smith v. Preferred Masonic Mut. Acci. Asso.* 51 Fed. 522, holding that by-law requiring submission of claim to arbitration, if society require it, is not condition precedent to bringing action; *Supreme Lodge, O. S. F. v. Raymond*, 57 Kan. 651, 49 L. R. A. 378, 47 Pac. 533, holding that by-law that no claim shall be paid until requisite proof of its justness has been made, does not preclude resort to courts; *Prudent Patricians of Pompeii v. Marr*, 20 App. D. C. 375, holding beneficiary of certificate of benefit society not precluded from suing, by by-law of society; *Eighmy v. Brotherhood of Railway Trainmen*, 113 Iowa, 683, 83 N. W. 1051, holding decision of officers in brotherhood as to total disability of member is condition precedent to recovery on his certificate; *Voluntary Relief Department v. Spencer*, 17 Ind. App. 128, 46 N. E. 477, holding part of rule of department which makes decision of its committee final and conclusive without appeal, void; *People's Mut. Ben. Soc. v. Werner*, 6 Ind. App. 618, 34 N. E. 105, holding that society cannot abridge member's right to share in pool for payment of death losses, by arbitrary assertion that claim is invalid; *Sourwine v. Supreme Lodge, K. of P.* 12 Ind. App. 451, 54 Am. St. Rep. 532, 40 N. E. 646, holding that member of one class of benefit association cannot be arbitrarily refused admission to another class the right to which by-laws give him; *Modern Woodmen v. Taylor*, 67 Kan. 374, 71 Pac. 806, holding that remedy by appeal, provided member of fraternal insurance association, must be exhausted before resort can be had to courts.

9 L. R. A. 503, *CINCINNATI, I. ST. L. & C. R. CO. v. DAVIS*, 126 Ind. 99, 25 N. E. 878.

Care of injured employees.

Cited in *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 495, 60 Am. St. Rep. 172, 46 N. E. 1022, sustaining superintendent's authority to employ surgeon to attend injured employee; *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 442, 33 N. E. 135, holding that conductor may bind company for medical care of brakeman; *Bedford Belt R. Co. v. McDonald*, 12 Ind. App. 622, 40 N. E. 821,

raising, without deciding, question as to validity of contract between railroad company and surgeon to furnish services to injured employees.

Cited in note (20 L. R. A. 696) on authority of agent to employ medical services for servant.

Distinguished in *Chicago & E. R. Co. v. Behrens*, 9 Ind. App. 577, 37 N. E. 26, denying liability of company for board and articles furnished injured employee; *Spelman v. Gold Coin Min. & Mill. Co.* 26 Mont. 84, 55 L. R. A. 643, 91 Am. St. Rep. 402, 66 Pac. 597, denying authority of general manager to bind mining company for medical service furnished employees injured without fault of company.

9 L. R. A. 505, *LEWIS v. LEWIS*, 44 Minn. 124, 20 Am. St. Rep. 559, 46 N. W. 323.

Dissolution of marriage.

Cited in *Di Lorenzo v. Di Lorenzo*, 71 App. Div. 515, 75 N. Y. Supp. 878, denying husband's right to annul marriage contracted through false representations; *Ridgely v. Ridgely*, 79 Md. 305, 25 L. R. A. 805, 29 Atl. 597, holding court of equity without jurisdiction to annul marriage in absence of fraud.

Cited in note (40 L. R. A. 738) on marriage of person while insane.

9 L. R. A. 506, *ANHEUSER-BUSCH BREWING ASSO. v. MASON*, 44 Minn. 318, 20 Am. St. Rep. 580, 46 N. W. 558.

Illegal purpose as affecting contract.

Approved in *Illinois Trust & Sav. Bank v. Pacific R. Co.* 117 Cal. 344, 49 Pac. 197, holding bondholders not affected by *ultra vires* contract for which proceeds of bond issue were used.

Cited in footnotes to *Gray v. Western U. Teleg. Co.* 14 L. R. A. 95, which holds company liable for delay in delivering telegram relating to illegal transaction; *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday.

Cited in note (11 L. R. A. 589) as to partnership share of profits illegally acquired.

9 L. R. A. 508, *JACOBSON v. SULLIVAN*, 152 Mass. 480, 25 N. E. 973.

9 L. R. A. 509, *KENDALL v. GLEASON*, 152 Mass. 457, 25 N. E. 838.

Descent of property.

Cited in *Mullen v. Reed*, 64 Conn. 248, 24 L. R. A. 666, 42 Am. St. Rep. 174, 29 Atl. 478, defining heirs at law mentioned in benefit certificate as those taking under statute of distribution; *Lawrence v. Crane*, 158 Mass. 393, 33 N. E. 605, holding that will contemplating change of real estate into money before going to heirs refers to those taking under statute of distribution.

Distinguished in *Proctor v. Clark*, 154 Mass. 48, 12 L. R. A. 724, 27 N. E. 673, denying that sale of property by trustee prevents proceeds descending to heirs according to will.

9 L. R. A. 510, ATTY. GEN. *ex rel.* MANN v. REVERE COPPER CO. 152 Mass. 444, 25 N. E. 605.

Protection of public rights.

Cited in Atty. Gen. v. Williams, 174 Mass. 484, 47 L. R. A. 319, 55 N. E. 77, sustaining right of attorney general to maintain suit in equity for protection of public against violation of building law.

Water rights and rights of way.

Cited in Heald v. Kennard, 180 Mass. 522, 63 N. E. 4, denying abutting owner's right to prescriptive easement to great pond for irrigation purposes: Slater v. Gunn, 170 Mass. 514, 41 L. R. A. 273, 49 N. E. 1017, denying that use for one hundred years of road between street and great pond establishes prescriptive right of way.

Cited in footnotes to Concord Mfg. Co. v. Robertson, 18 L. R. A. 679, as to abutter's rights in public water and land under same; Watuppa Reservoir Co. v. Fall River, 13 L. R. A. 256, which holds right of private persons in great pond not affected by ordinance of 1647; Auburn v. Union Water Power Co. 33 L. R. A. 188, which holds taking 1/15 water supply of great pond for city not unreasonable as to owners of mill privileges.

Cited in notes (12 L. R. A. 634) on rights in great ponds as public highways; (50 L. R. A. 746) on state and Federal ownership of waters.

Statute of limitations as defense.

Cited in Schneider v. Hutchinson, 35 Or. 256, 76 Am. St. Rep. 474, 57 Pac. 324, holding that title to state lands may be acquired by adverse possession.

Cited in footnote to Osborne v. Lindstrom, 46 L. R. A. 715, which holds invalid, statute shortening period of limitation without leaving reasonable time to sue.

Cited in note (45 L. R. A. 609) on vested right of defense of statute of limitations.

Prescriptive right to maintain nuisance.

Cited in Holyoke v. Hadley Water-Power Co. 174 Mass. 426, 54 N. E. 889, denying right of one to acquire prescriptive privilege to discharge water into street, creating nuisance.

Cited in note (53 L. R. A. 892, 899, 902, 904) on prescriptive right to maintain public nuisance.

9 L. R. A. 514, RENIHAN v. WRIGHT, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. 822.

Parties to action for money lost in gaming.

Cited in Ervin v. State, 150 Ind. 342, 48 N. E. 249, holding wife not proper party plaintiff in action by state to recover money lost in gaming.

Disposition of corpse.

Cited in Enos v. Snyder, 131 Cal. 71, 53 L. R. A. 222, 82 Am. St. Rep. 330, 63 Pac. 170, holding widow entitled to custody of corpse as against personal representative and next of kin of deceased; Hackett v. Hackett. 18 R. I. 157, 19 L. R. A. 559, 49 Am. St. Rep. 762, 26 Atl. 42, upholding widow's right to remove husband's body from place selected by next of kin; Burney v. Children's Hospital, 169 Mass. 60, 38 L. R. A. 415, 61 Am. St. Rep. 273, 47 N. E. 401, holding

that father, as guardian, may maintain action against hospital for autopsy performed upon body of child without consent; *Pettigrew v. Pettigrew*, 207 Pa. 316, 64 L. R. A. 181, 99 Am. St. Rep. 795, 56 Atl. 878, upholding right of widow to designate burial place of husband.

Cited in note (14 L. R. A. 86) on right to control disposition of corpse.

Mental suffering as element of damages.

Cited in *Vanderberg v. Connolly*, 18 Utah, 126, 54 Pac. 1097, holding mental suffering element of damages in action for wrongful arrest; *Western U. Telg. Co. v. Newhouse*, 6 Ind. App. 434, 33 N. E. 800, and *Western U. Telg. Co. v. Cline*, 8 Ind. App. 365, 35 N. E. 564, upholding right to damages for mental suffering for nondelivery of message announcing death; *Western U. Telg. Co. v. Ferguson*, 157 Ind. 79, 54 L. R. A. 851, 60 N. E. 1080 (dissenting opinion) majority holding damages for mental suffering due to failure of telegraph company promptly to deliver message, not recoverable.

Cited in footnote to *Louisville & N. R. Co. v. Hull*, 57 L. R. A. 771, which authorizes consideration of mental anguish in assessing damages for breach of contract to transport corpse.

Accord and satisfaction.

Cited in *Barnum v. Green*, 13 Colo. App. 259, 57 Pac. 757, denying that payment of a smaller sum liquidates larger debt, in absence of accord and satisfaction; *Sheets v. Russell*, 12 Ind. App. 680, 40 N. E. 30, holding allegation that maker of note employed payee at extra compensation as part consideration for discharge of note, insufficient plea of accord and satisfaction.

9 L. R. A. 517, *COLEMAN v. WHITNEY*, 62 Vt. 123, 20 Atl. 322.

9 L. R. A. 521, *PHILLIPS v. MILWAUKEE & N. R. CO.* 77 Wis. 349, 46 N. W. 543.

Presumption of care.

Approved in *Union Stock Yards Co. v. Conoyer*, 41 Neb. 625, 59 N. W. 950, holding one killed at crossing presumed free from negligence, circumstances being consistent with presumption; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 656, 95 N. W. 161 (dissenting opinion) majority holding evidence that deceased used due care in crossing railroad track not supplied by presumption of exercise of instinct of self-preservation.

Cited in note (16 L. R. A. 261) on presumption as to exercise of due care of person found to have been killed by alleged negligence of another.

Duty to look and listen.

Cited in *Vance v. Ravenswood, S. & G. R. Co.* 53 W. Va. 346, 44 S. E. 461, holding injured person stopping and looking, not negligent in crossing railroad track at night after passage of engine, although familiar with practice of making flying switches.

Cited in footnotes to *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman absent not negligence *per se*; *Oleson v. Lake Shore & M. S. R. Co.* 32 L. R. A. 149, which holds it negligent to attempt to cross track immediately after passage of train whose smoke obstructs view; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train within 35 feet of track, negligence; *Western*

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& *A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds that failure to look within 30 feet of track will not prevent recovery; *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow in not looking and listening before crossing railroad track, question for jury.

Question for jury as to negligence at crossing.

Cited in *Winchell v. Abbot*, 77 Wis. 374, 46 N. W. 665, holding it question for jury whether woman, unfamiliar with city, should listen for trains before approaching tracks at night; *York v. Maine C. R. Co.* 84 Me. 125, 18 L. R. A. 62, 24 Atl. 790, holding it question for jury to determine whether traveler, seeing section of severed train pass crossing, should listen for rear section.

Negligence as to flying switches.

Cited in note (18 L. R. A. 67) on negligence of railroad company as to flying switches or detached cars moving by their own momentum.

9 L. R. A. 523, *STEVENS v. CARSON*, 27 Neb. 501, 20 Am. St. Rep. 681. 43 N. W. 361.

Property exempt from claims of creditors.

Cited in *Giles v. Miller*, 36 Neb. 351, 38 Am. St. Rep. 730, 54 N. W. 551, holding that vendee of lands, occupied as homestead at time of conveyance, acquires same clear from judgment docketed prior to purchase; *Noyes v. Belding*, 5 S. D. 622, 59 N. W. 1069, denying that action is maintainable against sheriff for releasing exempt property, although sold to defeat creditors; *Johnson v. Bartek*, 56 Neb. 424, 76 N. W. 878, denying that judgment sustaining attachment determines question of exemption as homestead.

9 L. R. A. 526, *HOBBS v. CLARK*, 53 Ark. 411, 14 S. W. 652.

Separate valuation of articles replevied.

Cited in *Byrne v. Lynn*, 18 Tex. Civ. App. 258, 44 S. W. 311, holding court without power to require jury to set separate values on articles replevied, proof of separate value being lacking.

9 L. R. A. 527, *GAMBLE v. QUEENS COUNTY WATER CO.* 123 N. Y. 91, 25 N. E. 201.

Shareholder's interest as affecting right to vote.

Cited in *Bjorngaard v. Goodhue County Bank*, 49 Minn. 487, 52 N. W. 48; *Cumberland Valley R. Co. v. Gettysburg & H. R. Co.* 177 Pa. 541, 35 Atl. 952; *Nye v. Storer*, 168 Mass. 55, 46 N. E. 402,—sustaining stockholder's right to vote upon transaction between corporation and himself; *Windmuller v. Standard Distilling & Distributing Co.* 114 Fed. 494, holding that interest adverse to others does not affect stockholder's right to vote; *Merz v. Interior Conduit & Insulation Co.* 87 Hun. 435, 34 N. Y. Supp. 215, holding that stockholder, also a creditor, may vote on proposition to increase or reduce capital stock; *Socorro Mountain Min. Co. v. Preston*, 17 Misc. 220, 40 N. Y. Supp. 1040, upholding right of stockholders personally interested as defendants to vote on resolution to discontinue action; *Blinn v. Riggs*, 110 Ill. App. 48, holding that stockholder may vote upon measure notwithstanding personal interest.

Rights of stockholders as to protection against corporate action.

Cited in *Watkins v. North America Land & Timber Co.* 107 La. 111, 31 So. 683. and *Jacobus v. American Mineral Water Mach. Co.* 38 Misc. 372, 77 N. Y.

Supp. 898, sustaining minority stockholder's right to equitable relief from oppressive action by majority; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 528, 62 U. S. App. 49, 91 Fed. 311, holding action of majority stockholders unfair to minority reviewable by courts; *Oelbermann v. New York & N. R. Co.* 14 Misc. 134, 36 N. Y. Supp. 1096, and *Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 323, 35 N. Y. Supp. 566, — holding that only flagrant violation by majority of rights of minority stockholders justifies interference of equity; *Du Puy v. Transportation & Terminal Co.* 82 Md. 426, 33 Atl. 889, holding that equity will protect stockholder from fraudulent acts of officers; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 334, 33 Am. St. Rep. 315, 30 N. E. 667, holding that majority stockholder cannot authorize sale of corporate property to himself against protest of minority; *Weckerly v. Fell*, 22 Pa. Co. Ct. 210, 8 Pa. Dist. R. 89, denying right of majority stockholders to authorize payment to themselves of baseless claims; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 508, 53 N. E. 520, holding action maintainable to set aside lease approved by majority stockholders in fraud of minority; *Content v. Metropolitan Street R. Co.* 37 Misc. 624, 76 N. Y. Supp. 151, denying right of minority stockholder to enjoin lease at adequate rental; *Flynn v. Brooklyn City R. Co.* 9 App. Div. 278, 41 N. Y. Supp. 566, upholding lease of railroad, approved by majority of stockholders, where fraud not clearly inferable; *McLeary v. Erie Teleg. & Teleph. Co.* 38 Misc. 7, 76 N. Y. Supp. 712, granting injunction to minority to restrain clearly detrimental action by majority stockholders; *Lewisohn Bros. v. Anaconda Copper Min. Co.* 23 Misc. 33, 50 N. Y. Supp. 263, granting injunction at suit of stockholder against sale of corporation property to lower of two bidders; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 426, 34 L. R. A. 82, 55 Am. St. Rep. 689, 44 N. E. 1043, Reversing 78 Hun, 219, 28 N. Y. Supp. 933, holding corporation controlling another cannot enforce defaulted obligations to injury of minority stockholders; *Phelan v. Edison Electric Illuminating Co.* 24 Misc. 112, 53 N. Y. Supp. 305, holding that minority stockholder cannot enjoin proposed purchase of majority stock by another corporation; *Jacobus v. Diamond Soda Water Mfg. Co.* 94 App. Div. 378, 88 N. Y. Supp. 302, holding bonds and mortgage issued by majority stockholders to enable president of another company to obtain control of corporation, fraud upon rights of minority; *Polhemus v. Polhemus*, 43 Misc. 144, 88 N. Y. Supp. 273, holding that stockholder must show fraud or waste to set aside sale by director to company.

When minority stockholder may maintain action.

Approved in *Buker v. Leighton Lea Asso.* 13 App. Div. 558, 46 N. Y. Supp. 35, holding that syndicate agreement, giving certain stockholders a bonus, will not be declared fraudulent at suit of shareholders, as against stockholders who have approved corporate settlement of the matter.

Cited in *Lewisohn Bros. v. Anaconda Copper Min. Co.* 26 Misc. 623, 56 N. Y. Supp. 807, holding that minority stockholder may maintain action to protect corporate interests where application to directors would be futile; *Hallenborg v. Greene*, 66 App. Div. 592, 73 N. Y. Supp. 403, holding that stockholder may maintain suit in company's behalf where directors act in hostility to corporation's interest; *Erny v. G. W. Schmidt Co.* 197 Pa. 484, 47 Atl. 877, denying right of stockholder to maintain action against directors for mismanagement, without attempt to obtain authority from corporation; *Oelbermann v. New York & N. R. Co.* 14 Misc. 138, 36 N. Y. Supp. 1096, holding complaint in action by minority to restrain majority stockholders must set forth unlawful acts disclosing alleged

fraud; *Kessler & Co. v. Ensley Co.* 129 Fed. 409, holding that minority stockholders may maintain action on behalf of corporation to set aside fraudulent transaction, upon refusal of directors to sue; *Niles v. New York C. & H. R. R. Co.* 176 N. Y. 126, 68 N. E. 142, holding that individual stockholder cannot bring action for damages from conspiracy to wreck corporation.

Valuation of property purchased by corporation.

Cited in *McClure v. Paducah Iron Co.* 90 Mo. App. 582; *Berwind-White Min. Co. v. Ewart*, 11 Misc. 496, 32 N. Y. Supp. 716, holding fair value of property to company, considering proposed use, correct basis of valuation.

Issue of stock for money or property.

Cited in *First Nat. Bank v. Cornell*, 8 App. Div. 431, 40 N. Y. Supp. 850, holding that corporation cannot take note in payment for stock; *White Corbin & Co. v. Jones*, 45 App. Div. 246, 61 N. Y. Supp. 21, and *Kelly v. Clark*, 21 Mont. 323, 42 L. R. A. 628, 69 Am. St. Rep. 668, 53 Pac. 959, holding owner of stock issued for over-valued property liable for difference between actual value of property and nominal value of stock; *Turner v. Bailey*, 12 Wash. 644, 42 Pac. 115, denying liability to creditors of holders of stock issued for property at bona fide valuation, which subsequently depreciates; *Donald v. American Smelting & Ref. Co.* 61 N. J. Eq. 462, 48 Atl. 786, holding issue of stock for property not enjoicable in absence of evidence of conscious over-valuation.

Cited in notes (42 L. R. A. 596, 615) on how far payment for stock in corporation by transfer of property will protect shareholders against corporate creditors; (38 L. R. A. 490) on bonus stock of corporations.

Issue of corporate bonds.

Cited in *Hudson River & W. County Midland R. Co. v. Hanfield*, 36 App. Div. 610, 55 N. Y. Supp. 877, upholding issue of stock at par and bonds at market value to pay for constructing railroad; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 846, holding that corporation may pledge bonds for debt less in amount than their par value; *The Vigilancia*, 19 C. C. A. 530, 38 U. S. App. 563, 73 Fed. 455, holding defense of usury not available to corporations issuing bonds below par.

Contracts between corporation and officer or stockholder.

Cited in *Strobel v. Brownell*, 16 Misc. 660, 40 N. Y. Supp. 702, sustaining contract between corporation and director; *Genesee Valley & W. R. Co. v. Retsof Min. Co.* 15 Misc. 195, 36 N. Y. Supp. 896, holding contract made in good faith between corporations having common directors, valid; *Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 321, 35 N. Y. Supp. 566, holding contract between corporations having common directors cannot be disaffirmed by minority stockholders of either; *Stanley v. Luse*, 36 Or. 33, 58 Pac. 75, holding purchase by managing director of property in which he owns interest, voidable; *Nathan v. Whitehill*, 67 Hun, 400, 22 N. Y. Supp. 63, holding that trustee may deal with corporations; *Robertson v. H. E. Bucklen & Co.* 107 Ill. App. 378, refusing to set aside deed of real estate from majority stockholder to corporations; *Farwell v. Babcock*, 27 Tex. Civ. App. 170, 65 S. W. 509, holding contracts made by corporation with minority of its directors not void.

Criticized in *Beers v. New York L. Ins. Co.* 66 Hun, 96, 20 N. Y. Supp. 788, holding contract of corporation with officer presiding at meeting and superintending vote authorizing it, invalid.

Duty of corporate trustee.

Cited in *Rutgers Female College v. Tallman*, 2 Misc. 563, 24 N. Y. Supp. 771, holding it no part of duty of corporation trustee to advance personal money.

Transfer of corporate property.

Approved in *Lewisohn Bros. v. Anaconda Copper Min. Co.* 26 Misc. 626, 56 N. Y. Supp. 807, holding that failure of directors or majority stockholders to accept highest bid for property sold does not justify inference of bad faith, as matter of law.

9 L. R. A. 534, *LUHRS v. LUHRS*, 123 N. Y. 367, 20 Am. St. Rep. 754, 25 N. E. 388.

Changing beneficiary.

Cited in *Masonic Benev. Asso. v. Bunch*, 109 Mo. 581, 19 S. W. 25, holding designation in will of change of beneficiary effectual, by-laws prescribing no different method; *Smith v. Harman*, 28 Misc. 686, 59 N. Y. Supp. 1044, denying that incomplete attempt to change beneficiary takes away interest of heirs of original beneficiary; *McGowan v. Supreme Court*, 1. O. F. 104 Wis. 181, 80 N. W. 603, holding that equity will uphold rights of substituted beneficiary, assured having performed all conditions possible; *Donnelly v. Burnham*, 86 App. Div. 230, 83 N. Y. Supp. 659, holding change in beneficiary made, where insured had fully complied with requirements of society therefor.

Cited in notes (15 L. R. A. 353) on changing designation in benefit certificate otherwise than in prescribed method; (49 L. R. A. 755) on power of insured to destroy rights of beneficiary.

Distinguished in *Fink v. Fink*, 171 N. Y. 624, 64 N. E. 506, Reversing 57 App. Div. 514, 68 N. Y. Supp. 80, denying that change in beneficiary was made where notice of purpose to change did not reach insurer till after death of insured; *Lahey v. Lahey*, 174 N. Y. 152, 61 L. R. A. 794, 95 Am. St. Rep. 554, 66 N. E. 670, denying that retention of certificate by beneficiary deprives substituted beneficiary of payment, insured complying with all conditions possible; *Thomas v. Thomas*, 131 N. Y. 210, 27 Am. St. Rep. 582, 30 N. E. 61, Affirming 60 Hun, 383, 15 N. Y. Supp. 15, denying wife's right to benefit under policy where name inserted without consent of company; *Coyne v. Bowe*, 23 App. Div. 264, 48 N. Y. Supp. 937, holding no change in beneficiary effected where insured failed to comply with conditions on certificate; *Independent Foresters v. Keliher*, 36 Or. 508, 78 Am. St. Rep. 785, 59 Pac. 324, holding failure to comply with regulations by neglecting to file written petition, makes attempted change of beneficiary ineffectual.

Vested right of beneficiary in certificate.

Cited in *Steinhausen v. Preferred Mut. Acci. Asso.* 59 Hun, 339, 13 N. Y. Supp. 36, holding that beneficiary has no vested interest in certificate; *Eagan v. Eagan*, 58 App. Div. 256, 68 N. Y. Supp. 777, holding delivery of insurance certificate to wife vests no rights in her, brother being named as beneficiary.

Time when contract of insurance is consummated.

Cited in footnote to *Hicks v. British America Assur. Co.* 48 L. R. A. 424, which holds rights of one whose property was destroyed after oral contract to insure it, but before policy was issued, subject to provisions of standard policy prescribed by law.

9 L. R. A. 537, *DICKSON v. FIELD*, 77 Wis. 439, 46 N. W. 668.

Proof of consideration for conveyance.

Approved in *Beckman v. Beckman*, 86 Wis. 661, 57 N. W. 1117, holding admissible, parol evidence of consideration for conveyance of homestead by parents to son, where mortgage back showed inadequate consideration.

Conveyances in consideration of support and burial.

Cited in *Morgan v. Loomis*, 78 Wis. 600, 48 N. W. 109, setting aside conveyance by crippled widow, in consideration of support and Christian burial on refusal of grantee's heirs to furnish grantor with necessities.

9 L. R. A. 540, *MORGAN v. HUGGINS*, 42 Fed. 869.

Action for accounting by administrator, in 48 Fed. 4.

9 L. R. A. 544, *ATKINSON v. MILLER*, 34 W. Va. 115, 11 S. E. 1007.

Effect of legally inoperative conveyance.

Cited in *Bogges v. Scott*, 48 W. Va. 321, 37 S. E. 661, holding that deed, without seal, passes equitable title; *Bensimer v. Fell*, 35 W. Va. 30, 29 Am. St. Rep. 774, 12 S. E. 1078, holding deed of trust, wanting formal party, valid, as equitable mortgage.

9 L. R. A. 547, *CLARE v. LOCKARD*, 122 N. Y. 263, 25 N. E. 391.

When action deemed commenced; within rule as to limitations.

Followed, without discussion, in *Farrington v. Muchmore*, 53 App. Div. 640. 66 N. Y. Supp. 1131.

Cited in *Riley v. Riley*, 64 Hun, 499, 19 N. Y. Supp. 522, raising, without deciding, question whether action barred by statute of limitations where defendant dies before service of summons, delivered to sheriff before action barred.

9 L. R. A. 548, *ENGELHORN v. REITLINGER*, 122 N. Y. 76, 25 N. E. 297.

Oral agreements relating to written contracts.

Cited in *Interstate S. B. Co. v. First Nat. Bank*, 87 Hun, 95, 33 N. Y. Supp. 966, holding that oral agreement cannot vary written contract as to vesting of title to personal property; *Stowell v. Greenwich Ins. Co.* 20 App. Div. 191, 46 N. Y. Supp. 802, upholding collateral, supplementary parol agreement not varying or contradicting written agreement; *Hall v. Beston*, 16 Misc. 529, 38 N. Y. Supp. 979; *Van Derhoef v. Hartmann*, 63 App. Div. 421, 71 N. Y. Supp. 552; *Hall v. Beston*, 26 App. Div. 110, note, 49 N. Y. Supp. 811 (special term opinion, affirmed in general term) — holding prior parol promise to make repairs merged in written lease; *Hanes v. Sackett*, 56 App. Div. 615, 67 N. Y. Supp. 843, holding separate parol agreement, collateral to deed and relating to consideration thereof, enforceable; *Case v. Phoenix Bridge Co.* 134 N. Y. 81, 31 N. E. 254, holding oral agreement previous to written contract, not a part thereof, not enforceable; *Waldorf v. Simpson*, 15 App. Div. 300, 44 N. Y. Supp. 921, holding vendee of stove bound by bill of sale, so that note not invalidated by unauthorized alteration by agent; *Kingsland v. Haines*, 62 App. Div. 149, 70 N. Y. Supp. 873, holding that new terms and covenants cannot be engrafted on written agreement under guise of varying the consideration.

Oral evidence as to writing.

Cited in *Thomas v. Scutt*, 127 N. Y. 140, 27 N. E. 961, holding contradictory parol evidence inadmissible to show assignment intended as security; *Emmett v. Penoyer*, 151 N. Y. 568, 45 N. E. 1041, Reversing 76 Hun, 555, 28 N. Y. Supp. 234, holding parol evidence proper to explain real consideration for sale under written agreement; *Woodard v. Foster*, 64 Hun, 148, 18 N. Y. Supp. 834, holding parol evidence inadmissible to show agreement that grantor of fee was to retain life use of premises; *Powers v. Knapp*, 71 Hun, 377, 25 N. Y. Supp. 19, holding written contract to purchase stock of corporation not variable by parol evidence; *Beagle v. Harby*, 73 Hun, 313, 26 N. Y. Supp. 375, holding rule as to inadmissibility of parol evidence not applicable to collateral undertakings; *Jackson v. Helmer*, 73 App. Div. 136, 77 N. Y. Supp. 835, holding oral evidence of negotiations preceding written contract of sale inadmissible; *House v. Walch*, 144 N. Y. 421, 39 N. E. 327; *Moore v. Glover*, 37 N. Y. S. R. 307, 13 N. Y. Supp. 565, holding parol evidence inadmissible to explain or vary unambiguous written contract relating to sale of real estate; *Bagley & S. Co. v. Saranac River Pulp & Paper Co.* 41 N. Y. S. R. 866, 16 N. Y. Supp. 657, holding parol evidence admissible to show capacity of machines named in written contract, such capacity being material; *Boehm v. Lies*, 46 N. Y. S. R. 28, 18 N. Y. Supp. 577, holding parol evidence inadmissible to fix definite time of performance where written contract is silent as to it; *Gerard v. Cowperthwait*, 2 Misc. 378, 21 N. Y. Supp. 1092, holding bond to secure payment of premiums not variable by proof of oral agreement to forbear suit as consideration therefor; *Morowsky v. Rohrig*, 4 Misc. 169, 23 N. Y. Supp. 880, holding that on plaintiff's allegation of written contract only, oral explanatory declarations inadmissible; *Cartledge v. Crespo*, 5 Misc. 352, 25 N. Y. Supp. 515, holding parol evidence admissible to show written contract not binding until performance of parol condition precedent; *Globe Soap Co. v. Liss*, 36 Misc. 200, 73 N. Y. Supp. 153, holding order for goods signed by vendee making complete contract not contradictable by parol evidence; *Gordon v. Parke & L. Machinery Co.* 10 Wash. 21, 38 Pac. 755, holding inadmissible, proof of oral contract not to discontinue business not mentioned in written contract of sale of stock; *Chicago Lumber Co. v. Comstock*, 18 C. C. A. 209, 34 U. S. App. 414, 71 Fed. 479, holding parol evidence as to time and manner of performance immaterial, where delay was not caused by defendant's fault; *McGarrigle v. McCosker*, 83 App. Div. 187, 82 N. Y. Supp. 494, holding evidence insufficient to establish independent parol contract to pay bonus in addition to compensation specified in subsequent written agreement; *Uihlein v. Matthews*, 172 N. Y. 159, 64 N. E. 792, holding parol evidence inadmissible to show that restriction as to use of premises was not intended to be removed by quitclaim deed without reservation as to it; *Finnigan v. Shaw*, 184, Mass. 115, 68 N. E. 35, holding parol evidence inadmissible to show absolute sale evidenced by written note, was conditional.

9 L. R. A. 551, *JACOB v. WOOLFOLK*, 90 Ky. 426, 14 S. W. 415.

Dedication of land for public use.

Cited in footnotes to *Campbell v. Kansas City*, 10 L. R. A. 593, which holds dedication for graveyard shown by marking it on plat; *Hogue v. Albina*, 10 L. R. A. 673, which holds acts showing clear intent to dedicate necessary.

9 L. R. A. 553, *ARMSTRONG v. BOYERTOWN NAT. BANK*, 90 Ky. 431, 14 S. W. 411.

Collections by banks.

Cited in *Henderson v. O'Connor*, 106 Cal. 391, 39 Pac. 786, holding agency of collecting bank not terminated by notice of collection of draft by its correspondent and credit to depositor on books; *Midland Nat. Bank v. Brightwell*, 148 Mo. 365, 71 Am. St. Rep. 608, 49 S. W. 994, and *National Bank of Commerce v. Johnson*, 6 N. D. 184, 69 N. W. 49, holding that bank receiving paper for collection holds it in capacity of agent; *American Exch. Nat. Bank v. Loretta Gold & Silver Min. Co.* 165 Ill. 110, 56 Am. St. Rep. 236, 46 N. E. 202, holding that purpose of special deposit to be forwarded to another bank, being defeated by latter's insolvency, such deposit must be held for depositor; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 57, 37 L. ed. 366, 13 Sup. Ct. Rep. 533, holding relation between banks as to uncollected paper that of principal and agent.

Cited in footnote to *Tyson v. Western Nat. Bank*, 23 L. R. A. 161, which holds that title does not pass by "indorsing for collection."

Cited in note (32 L. R. A. 717) on trust in proceeds of collection made by bank when insolvent.

9 L. R. A. 555, *GRIDLEY v. BROOKS-WATERFIELD CO.* 12 Ky. L. Rep. 391, 14 S. W. 407.

9 L. R. A. 556, *SIMRALL v. COVINGTON*, 90 Ky. 444, 29 Am. St. Rep. 398, 14 S. W. 369.

License tax.

Approved in *Stull v. De Mattos*, 23 Wash. 74, 51 L. R. A. 895, 62 Pac. 451, holding license tax of \$25 per day for selling stock of merchandise at auction, not authorized as regulation of business, but valid as exercise of power to license for purposes of regulation and revenue.

Cited in footnotes to *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; *Knisely v. Cotterel*, 50 L. R. A. 83, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real estate dealers, but not others, whose business less than \$1,000.

Cited in note (60 L. R. A. 350) on constitutional equality in the United States in relation to corporate taxation.

Foreign corporations.

Cited in *Zacher v. Fidelity Trust & Safety Vault Co.* 109 Ky. 454, 59 S. W. 493, holding creditor of foreign corporation not bound by appointment of foreign receiver.

9 L. R. A. 558, *MORGAN v. EAST*, 126 Ind. 42, 25 N. E. 867.

Executory contracts.

Cited in *Nickey v. Zonker*, 22 Ind. App. 213, 53 N. E. 478, holding purchaser and his vendee liable for conversion where possession taken against original owner on his refusal to comply with terms of executory sale contract; *Platter v*

Acker, 13 Ind. App. 420, 45 N. E. 832, holding that replevin will not lie for goods purchased under unexecuted sale agreement; *Mattix v. Leach*, 16 Ind. App. 119, 43 N. E. 909, holding sale of negotiable instrument executory, where not transferred, though partial payment of consideration made.

9 L. R. A. 560, *BEDFORD BANK v. ACOAM*, 125 Ind. 584, 21 Am. St. Rep. 258, 25 N. E. 713.

Bank's right to set off indebtedness against deposit.

Cited in *State v. Beach*, 147 Ind. 90, 36 L. R. A. 185, 46 N. E. 145, holding that bank may apply deposit to payment of matured debt of depositor; *Bollenbacher v. First Nat. Bank*, 8 Ind. App. 19, 35 N. E. 403, raising without passing on bank's right to apply deposit on indebtedness.

Cited in footnotes to *Gardner v. First Nat. Bank*, 10 L. R. A. 45, which holds authority given to bank to apply deposits to notes before maturity terminates with death of depositor; *First Nat. Bank v. Peltz*, 36 L. R. A. 832, which holds bank not bound to apply to payment of note, deposit account of first indorser for whose accommodation note made.

Title to deposit in bank.

Cited in *Union Nat. Bank v. Citizens Bank*, 153 Ind. 52, 54 N. E. 97, holding that no trust attaches to proceeds of collection mingled by collecting bank with its own funds.

Sufficiency of tender.

Cited in *Dillingham v. Parks*, 30 Ind. App. 70, 65 N. E. 300, holding offer of bank, having on deposit money to credit of transferee of mortgaged property, to pay mortgage note, upon certain condition, not a sufficient tender.

9 L. R. A. 561, *CRAWFORD v. WITHERBEE*, 77 Wis. 419, 46 N. W. 545.

Right to abandon contract.

Cited in note (30 L. R. A. 45) on right to rescind or abandon contract because of other party's default.

Covenants running with land.

Cited in *Doty v. Chattanooga Union R. Co.* 103 Tenn. 577, 48 L. R. A. 165, footnote, p. 160, 53 S. W. 944, holding that covenant to operate passenger trains in consideration of conveyance of land to railroad runs with land against successor of road.

Cited in footnotes to *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling, in determining whether covenant runs with land; *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes, as running with the land, agreement for party wall expressly declared to run with land.

9 L. R. A. 564, *SHEEHY v. BLAKE*, 77 Wis. 394, 46 N. W. 537.

Liability of religious corporation.

Cited in note (38 L. R. A. 689) on liability for salary of pastor.

9 L. R. A. 566, *MULLIN v. PEOPLE*, 15 Colo. 437, 22 Am. St. Rep. 414, 24 Pac. 880.

Contempt proceedings and change of venue.

Cited in *Le Hane v. State*, 48 Neb. 113, 66 N. W. 1017, holding summary conviction of attorney for contempt for use of libelous matter on motion for change of venue not authorized; *Re Murphy*, 73 Vt. 118, 50 Atl. 817, denying that mittimus must state facts constituting violation of injunction; *Bloom v. People*, 23 Colo. 418, 48 Pac. 519, holding review on appeal of conviction for contempt limited to question of jurisdiction; *Wyatt v. People*, 17 Colo. 256, 28 Pac. 961, denying that provision of Code, declaring judgment in contempt conclusive, precludes inquiry into jurisdiction.

Cited in footnote to *Thomas v. People*, 9 L. R. A. 569, which holds judge not empowered to punish for contempt for allegations in petition without verified statement.

Cited in note (11 L. R. A. 75) on criminal practice as to change of venue.

9 L. R. A. 569, *THOMAS v. PEOPLE*, 14 Colo. 254, 23 Pac. 326.

Affidavit in contempt proceedings.

Cited in *Mullin v. People*, 15 Colo. 440, 9 L. R. A. 568, 22 Am. St. Rep. 414, 24 Pac. 880, holding verified information sufficient affidavit on which to base contempt proceedings; *Le Hane v. State*, 48 Neb. 110, 66 N. W. 1017, denying right to convict attorney of contempt without information and trial for use of libelous matter on motion.

Jurisdiction of contempt proceedings.

Cited in *Herdman v. State*, 54 Neb. 629, 74 N. W. 1097, holding that affidavit in contempt proceedings must show jurisdiction; *State v. Sweetland*, 3 S. D. 506, 54 N. W. 415, holding affidavit must state facts showing jurisdiction, not mere presumptions; *Freeman v. Huron*, 8 S. D. 439, 66 N. W. 928, denying that allegations on information and belief in affidavit in contempt proceedings give jurisdiction; *Wyatt v. People*, 17 Colo. 256, 28 Pac. 961, denying that statute against review, on ground of error in trial, bars inquiry into jurisdiction; *Bloom v. People*, 23 Colo. 418, 48 Pac. 519, holding review on appeal of conviction for contempt limited to question as to jurisdiction of lower court.

Cited in note (9 L. R. A. 566) on contempt of court.

9 L. R. A. 571, *BARNES v. BOARDMAN*, 152 Mass. 391, 25 N. E. 623.

Fiduciary relations of tenants in common.

Cited in *Harris v. Lloyd*, 11 Mont. 402, 28 Am. St. Rep. 475, 28 Pac. 736, holding cotenant of mining property under no obligation to disclose to others larger offer for his interest.

Distinguished in *Houghton v. Butler*, 166 Mass. 549, 44 N. E. 624, denying existence of trust relation between naked trustee and equitable owners.

Right of one redeeming from mortgage.

Cited in *Kerse v. Miller*, 169 Mass. 47, 47 N. E. 504, holding life tenant of portion redeeming entire estate from mortgage entitled to possession until repayment of amount above proportionate share; *Wilder v. Wilder*, 75 Vt. 183, 53 Atl. 1072, holding life tenant paying off mortgage to protect estate entitled to subrogation against remainderman.

9 L. R. A. 573, *KNIGHT v. MAHONEY*, 152 Mass. 523, 25 N. E. 971.

Conditional devises.

Approved in *Fuller v. Wilbur*, 170 Mass. 507, 49 N. E. 916, holding that gift by will to wife of use and benefit of real estate so long as she remains grantor's widow, creates life estate determinable on her marrying again; *Mann v. Jackson*, 84 Me. 404, 16 L. R. A. 709, 30 Am. St. Rep. 358, 24 Atl. 886, holding grant of life estate unless grantee shall be married, not void as restraint on marriage where intention was to provide support until such event.

9 L. R. A. 576, *KOEHLER v. SANDERS*, 122 N. Y. 65, 25 N. E. 235.

Trademark and unfair competition.

Cited in *Columbia Mill Co. v. Alcorn*, 150 U. S. 465, 37 L. ed. 1147, 14 Sup. Ct. Rep. 151, holding word "Columbia" not subject to exclusive use as trademark; *York Card & Paper Co. v. York Wall Paper Co.* 15 Pa. Co. Ct. 555, 4 Pa. Dist. R. 128, 35 W. N. C. 575, holding that no such exclusive right to words "York," "paper," and "company" exists as warrants refusal to charter company with similar name; *Church & D. Co. v. Russ*, 99 Fed. 278, holding that use of trademark for compound of baking soda and saleratus, on product called baking powder, is infringement; *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 370, 55 N. Y. Supp. 298, holding party entitled to manufacture under his own name, in spite of prior authorized use thereof by company assigning its right on insolvency.

Cited in footnote to *Bolander v. Peterson*, 11 L. R. A. 350, which holds words "Svenska Snusmagasinet" cannot be exclusively claimed as trademark.

Cited in notes (10 L. R. A. 833) on trademark and trade name; (11 L. R. A. 524) on trademark; method of bronzing; (19 L. R. A. 56) on invalidity of deceptive trademark; (17 L. R. A. 130) on court's refusal to aid deception and fraud in trademark.

Distinguished in *Prince Mfg Co. v. Prince's Metallic Paint Co.* 39 N. Y. S. R. 495, 15 N. Y. Supp. 249, holding that mortgagor giving order on printer for delivery of "trademarks, wood cuts, and electrotypes" passes to mortgagee exclusive right to use same.

Infringement of trademark, label, or trade name.

Cited in *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 565, 18 U. S. App. 372, 58 Fed. 886, holding maker of "Bull's Cough Syrup" entitled to injunction against deceptive use of name, "Dr. B. L. Bull's Celebrated Cough Syrup;" *Fischer v. Blank*, 138 N. Y. 249, 33 N. E. 1040, holding merchant entitled to injunction against fraudulent imitator though no exclusive right to name, label, color, and shape of package; *Von Mumm v. Frash*, 56 Fed. 834, enjoining manufacturer from dressing product so as to enable retail dealers to deceive customers; *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 5 Misc. 83, 24 N. Y. Supp. 890, enjoining use of common name on product not embracing essential feature of system for which name stands; *De Youngs v. Jung*, 25 N. Y. Supp. 480, issuing injunction against use of name "The Youngs" where assumed in business, advertisement, etc., for evident purpose of fraudulent usurpation of plaintiff's trade; *Gebbie v. Stitt*, 82 Hun, 96, 31 N. Y. Supp. 102, enjoining use of name of place in fraud of plaintiff's product, though competing goods actually made there; *Investor Pub. Co. v. Dobinson*, 72 Fed. 609, overruling demurrer to bill alleging publication of journal of similar name and pur-

pose, causing confusion in business and diversion of trade; *Investor Pub. Co. v. Dobinson*, 82 Fed. 62 refusing, in absence of actual damage, to enjoin publication of similarly named journal where issued in distant state, with distinguishing characteristics; *W. J. Johnston Co. v. Electric Age Pub. Co.* 38 N. Y. S. R. 777, 14 N. Y. Supp. 803, refusing injunction *pendente lite*, on affidavit, where fraudulent resemblance of title pages not established; *Continental Ins. Co. v. Continental Fire Asso.* 96 Fed. 848, refusing to enjoin use of name, "Continental Ins. Co. of Ft. Worth, Texas," at suit of similarly named corporation of New York; *Von Mumm v. Frash*, 56 Fed. 834, enjoining use of labels closely imitating those employed by manufacturer of established brand of champagne; *Pettes v. American Watchman's Clock Co.* 89 App. Div. 347, 85 N. Y. Supp. 900, upholding injunction restraining corporation from doing business under corporate name wrongfully appropriated.

9 L. R. A. 579, *ROGERS v. BUFFALO*, 123 N. Y. 173, 25 N. E. 274.

Power of legislature over municipalities.

Cited in *State ex rel. Thompson v. McAllister*, 38 W. Va. 491, footnote p. 343, 24 L. R. A. 346, 18 S. E. 770, upholding validity of statute requiring members of common council to be freeholders; *People ex rel. Devery v. Coler*, 173 N. Y. 118, 65 N. E. 956, holding provision rendering any incumbent who may be removed from office of police commissioner ineligible for reappointment, unconstitutional; *People ex rel. Bishop v. Palen*, 74 Hun, 292, 26 N. Y. Supp. 225, holding statute requiring excise commissioner to take oath that he is not interested in liquor traffic, unconstitutional; *People ex rel. Price v. McGaw*, 38 Misc. 193, 77 N. Y. Supp. 241, holding charter provision forbidding pensioners to hold office, unconstitutional.

Cited in note (48 L. R. A. 485) on power of legislature to impose burdens on municipalities and to control their administration and property.

Constitutionality of civil-service laws.

Cited in *People ex rel. Akin v. Kipley*, 171 Ill. 59, 41 L. R. A. 780, footnote, p. 775, 49 N. E. 229, upholding statute imposing civil-service system upon municipal appointment; *Re Balcom*, 28 Misc. 3, 58 N. Y. 1097, upholding statute requiring probationary appointment of party passing highest civil-service examination; *People ex rel. Akin v. Loeffler*, 175 Ill. 599, 51 N. E. 785, holding examinations under Illinois civil-service law not "tests" within prohibition of Constitution.

Cited in footnotes to Opinion of the Justices, 34 L. R. A. 58, which sustains act preferring veterans to all persons except women in civil service; *Re Keymer*, 35 L. R. A. 447, which holds exemption of veterans from competitive examination unconstitutional.

Discrimination between political parties.

Cited in *Pearce v. Stephens*, 18 App. Div. 105, 79 N. Y. S. R. 425, 45 N. Y. Supp. 422, holding statute forbidding appointment of two police commissioners of Richmond county of same political opinion constitutional; *State ex rel. Churchill v. Bemis*, 45 Neb. 737, 64 N. W. 348, upholding charter provision for bipartisan fire and police board; *Rathbone v. Wirth*, 150 N. Y. 475, 34 L. R. A. 414, 45 N. E. 15 (distinguished in dissenting opinions), Affirming 6 App. Div. 317, 40 N. Y. Supp. 535, holding statute providing for bipartisan police board of four, two members only being selected by common council, void.

Appointments in disregard of civil-service law.

Cited in *People ex rel. McClelland v. Roberts*, 148 N. Y. 367, 31 L. R. A. 401, 42 N. E. 1082, declaring appointments not complying with requirements of Constitution in regard to civil service, illegal.

— Taxpayer's right of action.

Cited in *Peck v. Belknap*, 130 N. Y. 399, 29 N. E. 977, holding taxpayer entitled to injunction against employment by city official of party not having taken requisite civil-service examination; *Chittenden v. Wurster*, 152 N. Y. 367, 37 L. R. A. 816, 46 N. E. 857 (dissenting opinion), majority holding taxpayers' action to restrain payment of salaries not proper procedure to test validity of mayor's classification of civil-service positions.

Distinguished in *Greene v. Knox*, 175 N. Y. 436, 67 N. E. 910, holding that title of officers under appointments, valid in form, cannot be assailed in taxpayer's action to restrain payment of salaries.

Statutes limiting hours of labor.

Cited in *People v. Lochner*, 177 N. Y. 159, 69 N. E. 373, upholding constitutionality of statute limiting hours of labor in bakeries and confectionery establishments.

9 L. R. A. 584, *DAVIDSON v. COON*, 125 Ind. 497, 25 N. E. 601.

Construction of wills.

Cited in footnote to *Balch v. Pickering*, 14 L. R. A. 125, which holds literal construction of will resulting in intestacy will not prevail against evident intention of testator.

— Legacies.

Cited in *American Cannel Coal Co. v. Clemens*, 132 Ind. 166, 31 N. E. 786, holding money bequests chargeable upon residuary real estate; *Stuart v. Robinson*, 80 Miss. 297, 92 Am. St. Rep. 603, 31 So. 903, holding money legacy of testator without personal property, charge on realty; *Hutchins v. Hutchins*, 18 Misc. 635, 42 N. Y. Supp. 601, holding that direction to devisee of land to pay legacies charges them thereon; *Clark v. Marlow*, 149 Ind. 43, 48 N. E. 359, holding claim for support of devisee of use of real estate with power to sell and use proceeds for support, lien thereon; *Coulter v. Bradley*, 30 Ind. App. 423, 66 N. E. 184, holding complaint in action to enforce legacy, failing to show personalty or intention to charge realty, defective.

Cited in footnotes to *Re Lutz*, 50 L. R. A. 847, which holds legacies properly charged on land where testator had no personalty from which to pay them; *Case v. Hall*, 25 L. R. A. 766, which holds acceptance of devise with direction to pay legacies renders devisee personally liable.

Complaint in action to charge legacy on real estate.

Cited in *Longacre v. Stiver*, 135 Ind. 587, 35 N. E. 900, holding that complaint in action to charge legacies on real estate should show why not paid out of personalty.

Effect of quitclaim deed.

Cited in *Smith v. McClain*, 146 Ind. 83, 45 N. E. 41, holding that quitclaim deed passes grantor's entire estate; *Hancock v. Wiggins*, 28 Ind. App. 456, 63 N. E. 242, holding that quitclaim deed conveys grantor's existing interest.

Effect of deed in partition.

Cited in note (57 L. R. A. 334, 335, 338) on effect of deed in partition as distinguished from ordinary deeds.

9 L. R. A. 589, *FERGUSON v. GIES*, 82 Mich. 358, 21 Am. St. Rep. 576, 46 N. W. 718.

Civil rights.

Cited in *Fruchey v. Eagleson*, 15 Ind. App. 102, 43 N. E. 146, holding offer of accommodation on condition that meals be not taken in guests' dining room, unlawful discrimination; *McPherson v. McCarrick*, 22 Utah, 236, 61 Pac. 1004, holding that no action in favor of colored man against white juror exists by reason of written protest against sitting in same box.

Cited in footnote to *Cecil v. Green*, 32 L. R. A. 566, which holds soda-water fountain in drug store not a place of public accommodation within civil-rights act.

Distinguished in *Younger v. Judah*, 111 Mo. 310, 16 L. R. A. 561, footnote p. 558, 33 Am. St. Rep. 527, 19 S. W. 1109, holding theatre regulation limiting colored people to balcony violates no constitutional right.

Liability for violation of statute.

Cited in *Kinney v. Koopman* 116 Ala. 332, 37 L. R. A. 504, 67 Am. St. Rep. 119, 22 So. 593, holding party keeping gunpowder in violation of statute liable for injury to person intended to be protected by statute.

9 L. R. A. 593, *SUAU v. CAFFE*, 122 N. Y. 308, 25 N. E. 483.

Validity of married woman's contract.

Cited in *Blaechinska v. Missouri & Home for Little Wanderers*, 130 N. Y. 500, 15 L. R. A. 217, 29 N. E. 755, holding that married woman cannot contract with husband to do tailoring for him for wages; *Hulse v. Bacon*, 40 App. Div. 92, 57 N. Y. Supp. 537, Affirming 26 Misc. 457, 57 N. Y. Supp. 537, upholding deed from wife to husband in 1858 of land which had come to her from husband as a gift; *Wronkow v. Oakley*, 16 L. R. A. 211, 31 N. E. 521, Reversing 64 Hun, 223, 19 N. Y. Supp. 51, holding that married woman can appoint her own husband attorney to release her inchoate right of dower; *Hoaglin v. Henderson*, 119 Iowa, 725, 61 L. R. A. 758, 97 Am. St. Rep. 335, 94 N. W. 247, upholding right of wife to form business partnership with husband.

Distinguished and criticized in *Fuller & F. Co. v. McHenry*, 83 Wis. 581, 18 L. R. A. 514, 53 N. W. 896, holding that married woman cannot form partnership with husband under statute giving her right to contract.

Disapproved in *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 296, 16 L. R. A. 529, 35 Am. St. Rep. 105, 19 S. W. 747, holding that married woman cannot enter into mercantile partnership with her husband; *Haggett v. Hurley*, 91 Me. 556, 41 L. R. A. 366, 40 Atl. 561, holding married woman not liable as a partner with husband under statute which makes her contracts binding when "in her own name;" *Board of Trade v. Hayden*, 4 Wash. 272, 16 L. R. A. 534, 31 Am. St. Rep. 919, 30 Pac. 87, holding that married woman cannot form partnership with her husband in mercantile business under statute giving her right to contract as if unmarried.

9 L. R. A. 597, *STAMM v. BOSTWICK*, 122 N. Y. 48, 25 N. E. 233.

Inheritance by aliens.

Cited in *Callahan v. O'Brien*, 72 Hun, 221, 25 N. Y. Supp. 410, holding nonresident alien heirs not entitled to share in property inherited by deceased citizen; *Smith v. Reilly*, 31 Misc. 702, 66 N. Y. Supp. 40, holding that alien daughter takes fee where alien father, entitled to inherit on filing declaration of intention to become citizen, dies before will proved, and without filing intention; *Daly v. Beer*, 32 N. Y. S. R. 1065, 10 N. Y. Supp. 893, holding alien heirs entitled to fee in land acquired by deceased through devise; *Branagh v. Smith*, 46 Fed. 518, holding that inheritance statute applies only to titles acquired by resident aliens or naturalized citizens, through grant or devise; *Stewart v. Russell*, 91 App. Div. 314, 86 N. Y. Supp. 625, holding devise of real estate a "purchase" within meaning of statute relating to holding of property by aliens.

Cited in note (31 L. R. A. 101) on effect of state constitutions and statutes on question of inheritance by or from an alien.

9 L. R. A. 599, *HAYCRAFT v. BLAND*, 90 Ky. 400, 29 Am. St. Rep. 390, 14 S. W. 423.

Spendthrift trusts.

Cited in *Raynolds v. Hanna*, 55 Fed. 797, holding beneficiary's interest subject to payment of his debts where no express provision to contrary; *Bull v. Kentucky Nat. Bank*, 90 Ky. 457, 12 L. R. A. 39, footnote p. 37, 14 S. W. 425, holding only income accruing on trust fund prior to court's decision available to creditors, where principal made transferrable on decision.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary; *Requa v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest accepted by husband, not trust beyond reach of creditors.

Cited in notes (13 L. R. A. 213) on limitation in trust estates; (11 L. R. A. 565) on spendthrift trusts.

9 L. R. A. 601, *BOULWARE v. DAVIS*, 90 Ala. 207, 8 So. 84.

Sufficiency of allegations as to corporations.

Cited in *Nelms v. Edinburgh American Land Mortg. Co.* 92 Ala. 162, 9 So. 141, holding failure of corporations to allege right to loan money in bill to foreclose mortgage, not demurrable; *Arrington v. Savannah & W. R. Co.* 95 Ala. 437, 11 So. 7, holding it unnecessary in contractor's action against railroad for construction work, to allege authorization by proper resolution of directors; *Torrent Fire Engine Co. No. 5 v. Mobile*, 101 Ala. 564, 14 So. 557, holding bill to re-establish lost deed not demurrable for failure to allege plaintiff corporation had power to acquire land; *St. Louis, A. & T. R. Co. v. Fire Asso.* 55 Ark. 173, 18 S. W. 43, holding allegations of compliance with statutes unnecessary, it not appearing where foreign corporation's contract of insurance was made.

Presumption as to validity of corporate acts.

Cited in *Allen v. West Point Min. & Mfg. Co.* 132 Ala. 295, 31 So. 462, holding burden of showing invalidity of corporation's note upon corporation.

Comity as to foreign officers and corporations.

Cited in *Rogers v. Haines*, 96 Ala. 590, 11 So. 651, upholding dissolution of temporary injunction obtained by foreign receiver on denial by defendants that their claims against corporation were without merit; *Fitts v. National Life Asso.* 130 Ala. 416, 30 So. 374, holding action on contract not maintainable against foreign corporation after its legal dissolution; *Howarth v. Angle*, 39 App. Div. 160, 57 N. Y. Supp. 187, and *Small v. Smith*, 14 S. D. 624, 86 Am. St. Rep. 807, 86 N. W. 649, upholding right of foreign receiver to maintain action for recovery of realty; *Castleman v. Templeman*, 87 Md. 553, 41 L. R. A. 370. 67 Am. St. Rep. 363, 40 Atl. 275, upholding foreign receiver's action to collect unpaid subscription to capital stock; *Iowa & C. Land Co. v. Hoag*, 132 Cal. 629. 64 Pac. 1073, upholding foreclosure action by trustee appointed by foreign court; *Lewis v. American Naval Stores Co.* 119 Fed. 397, holding that receiver will be permitted to sue outside his own jurisdiction, there being no conflicting claims of creditors there.

Cited in notes (12 L. R. A. 366, 13 L. R. A. 585) on law of comity as to foreign corporations; (23 L. R. A. 55) on rights of receiver as to property outside of jurisdiction in which he is appointed; (24 L. R. A. 296) on recognition or exclusion of foreign corporations.

Statutes relating to business of foreign corporations.

Cited in *Maine Guarantee Co. v. Cox*, 146 Ind. 109, 42 N. E. 915, holding foreign corporation prohibited from doing particular kind of business in state, not precluded from general business.

Cited in footnote to *Fort v. State*, 22 L. R. A. 86, which upholds right of guarantee and Accident Lloyds, consisting of nonresidents, to transact business without license.

9 L. R. A. 604, ST. LOUIS, I. M. & S. R. CO. v. YONLY, 53 Ark. 503, 14 S. W. 800, 13 S. W. 333.

Liability for negligence of independent contractor.

Cited in *Cameron v. Oberlin*, 19 Ind. App. 147, 48 N. E. 386, holding landowner liable for damage naturally and probably ensuing from performance of contract to burn over land; *St. Louis, A. & T. R. Co. v. Knott*, 54 Ark. 427, 16 S. W. 9, denying railroad company's liability for trespass by servants of independent contractor; *Martin v. St. Louis, I. M. & S. R. Co.* 55 Ark. 522, 19 S. W. 314, holding railroad not liable for negligence of independent compress company in storing cotton.

Cited in footnotes to *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Uppington v. New York*, 53 L. R. A. 551, which denies city's liability for negligence of independent contractor constructing sewer; *Hoff v. Shockley*, 64 L. R. A. 538, which holds owner not liable to traveler in street for injuries due to negligence of independent contractor.

Cited in notes (13 L. R. A. 329) on imputing employee's negligence to em-

ployer; (9 L. R. A. 825) on railroad company's liability for emitting in sparks, cinders, etc.

Distinguished in *St. Louis, I. M. & S. R. Co. v. Hopkins*, 1 L. R. A. 191, 15 S. W. 610, holding railroad liable for not restoring fastenings of sign cut by independent contractor.

9 L. R. A. 606, *STATE v. BRADY*, 44 Kan. 435, 21 Am. St. R. **Criminal libel.**

Cited in *State v. Clyne*, 53 Kan. 19, 35 Pac. 789, holding publication of article imputing knowledge of intended larceny sufficient charge of criminal libel.

Cited in footnote to *Fenstermaker v. Tribune Pub. Co.* 35 authorizes action for defamation by any member of family libel.

9 L. R. A. 607, *TARKINGTON v. PURVIS*, 128 Ind. 182, 25 **Rescission of contract for fraud.**

Cited in *Taylor v. National Bank*, 6 S. D. 517, 62 N. W. to rescind purchase of stock induced by fraud.

Cited in footnote to *Springfield F. & M. Ins. Co. v. Hull*, 24 upholds right to maintain suit for balance due on policy with less sum accepted under threats of groundless prosecution.

Cited in notes (21 L. R. A. 206) on necessity of returning bringing replevin for property obtained by fraudulent purchase on rights and remedies of vendee.

Waiver of fraud.

Cited in *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. holding that mere lapse of time will not bar right to rescind action; *Ingram v. Abbott*, 14 Tex. Civ. App. 589, 38 S. W. 61 to sell notes with knowledge of part of fraud inducing purchase.

Rights of purchaser in consideration of antecedent debt.

Cited in *Orb v. Coapstick*, 136 Ind. 317, 36 N. E. 278, holding conveyance for antecedent debt not bona-fide purchase, as to prior equity; *Citizens' Nat. Bank v. Judy*, 146 Ind. 330, 43 mortgage for pre-existing debt subject to prior equities.

Cited in note (36 L. R. A. 161) on pre-existing debt as consideration for bona-fide purchase of property not negotiable.

Distinguished in *Adams v. Vanderbeck*, 148 Ind. 96, 62 A. N. E. 645, holding grantee of land in consideration of pre-existing purchaser.

Disapproved in *Pugh v. Highley*, 152 Ind. 258, 44 L. R. Rep. 327, 53 N. E. 171, holding land purchased by creditor not subject to prior unknown equities.

Review of sufficiency of evidence to sustain special findings.

Cited in *Baldwin v. Heil*, 155 Ind. 684, 58 N. E. 200, and *Grocer Co.* 65 Ark. 285, 45 S. W. 1060, holding motion for mode of reviewing sufficiency of evidence to sustain special findings.

Amendment of special findings.

Cited in *Barner v. Bayless*, 134 Ind. 605, 33 N. E. 907, cannot change special finding after filing.

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Cited as overruled in effect in *Apple v. Smith*, 26 Ind. App. 660, 60 N. E. 456, holding that amendment to special findings may be made before final judgment.

Laches.

Cited in footnote to *Old Times Distillery Co. v. Casey*, 42 L. R. A. 466, which holds right to enjoin use of trademark lost by ten years' delay.

9 L. R. A. 612, *VOISIN v. COMMERCIAL MUT. INS. CO.* 123 N. Y. 120, 25 N. E. 325.

Review of order granting or denying new trial.

Approved in *Williams v. Delaware, L. & W. R. Co.* 127 N. Y. 645, 3 Silv. Ct. App. 453, 27 N. E. 404; *Chapman v. Comstock*, 134 N. Y. 512, 31 N. E. 876; *Caponigri v. Altieri*, 164 N. Y. 479, 58 N. E. 667; *Bank of China v. Morse*, 163 N. Y. 471, 56 L. R. A. 144, 85 Am. St. Rep. 676, 61 N. E. 774,—holding order of appellate division granting new trial in action tried before jury upon conflicting evidence where order may have been upon facts, not reviewable in court of appeals unless record shows that order was affirmed as to facts or appeal was dismissed; *Matthews v. Herdtfelder*, 60 Hun, 522, 15 N. Y. Supp. 165, holding that entry of judgment after denial of motion for new trial does not preclude court from recalling decision and granting new trial at same term; *Whitman v. Johnson*, 10 Misc. 726, 31 N. Y. Supp. 805, holding that appeal may be taken from order denying new trial although judgment remains unappealed from and time limited therefor has expired; *Taylor v. Smith*, 24 App. Div. 527, 49 N. Y. Supp. 41, holding order denying new trial though made before judgment not an intermediate order, but outside of, and not connected with, the judgment.

Cited in *Whitman v. Johnson*, 12 Misc. 24, 33 N. Y. Supp. 60, to point that order denying new trial made at trial term is reviewable by general term of common pleas.

9 L. R. A. 616, *SMITH v. NATIONAL BEN. SOC.* 123 N. Y. 85, 25 N. E. 197.

Change of beneficiary.

Approved in *Grimbley v. Harrold*, 125 Cal. 29, 73 Am. St. Rep. 19, 57 Pac. 558, holding that insured cannot change designation where he has agreed not to do so in consideration of payment of assessments by beneficiary; *Maynard v. Vanderwerker*, 30 Abb. N. C. 137, 24 N. Y. Supp. 932, holding that payment of assessments by beneficiary under agreement confers vested interest precluding change of beneficiary; *Benard v. Grand Lodge, A. O. U. W.* 13 S. D. 137, 82 N. W. 404, holding designation of voluntary beneficiary invalid, as against prior beneficiaries, who, by agreement, had paid assessments; *Anderson v. Groesbeck*, 26 Colo. 10, 55 Pac. 1086, holding beneficiary may, by contract, acquire vested interest in certificate which insured cannot, even with consent of association, divest; *Webster v. Welch*, 57 App. Div. 561, 68 N. Y. Supp. 55, holding one made beneficiary in certificate in consideration of surrender of interest in another acquires vested interest precluding change of beneficiary; *Carpenter v. Knapp*, 101 Iowa, 729, 38 L. R. A. 133, 70 N. W. 764, holding beneficiary acquires no vested interest until death of insured where latter reserved right to change the beneficiary; *Lawler v. National Life Asso.* 83 Hun, 395, 31 N. Y. Supp. 875, holding that beneficiary has no vested interest in fund during life of insured where latter has power to revoke designation; *Sofge v. Supreme Lodge K. of H.* 98 Tenn. 452, 39 S. W. 853, holding beneficiary without vested

interest in certificate so long as right of cancelation and disposal remains in insured; *Armstrong v. Warren*, 83 Hun, 218, 31 N. Y. Supp. 665, holding that, under statute, assent of beneficiary whose designation is mere gift, not necessary to change of payee; *Southwell v. Gray*, 35 Misc. 744, 72 N. Y. Supp. 342, holding interest of beneficiary under certificate a mere expectancy which may be defeated by change of designation.

Cited in *McCormick v. Supreme Council C. B. L.* 6 App. Div. 177, 39 N. Y. Supp. 1010, to point that insured has right to change beneficiaries unless designated in pursuance of some contract or for value; *Simon v. O'Brien*, 87 Hun, 164, 35 N. Y. Supp. 815, to point that interest of beneficiary is no more a vested one than that of legatee before death of testator; *Bull v. Case*, 41 App. Div. 393, 58 N. Y. Supp. 774, to point that insured cannot change beneficiary in certificate issued to secure payment to creditor; *Kimball v. Lester*, 43 App. Div. 32, 59 N. Y. Supp. 540, holding assignment of certificate to insure payment of debt, valid although certificate not surrendered for cancelation and issue of new one, as required by laws of association.

Cited in note (49 L. R. A. 750, 755) on power of insured to destroy rights of beneficiary.

Distinguished in *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 223, 54 U. S. App. 290, 82 Fed. 519, and *Nix v. Donovan*, 46 N. Y. S. R. 22, 18 N. Y. Supp. 435, holding that voluntary payment of assessments does not, in absence of agreement, confer vested interest or prevent change of beneficiary; *Moan v. Normile*, 37 App. Div. 617, 56 N. Y. Supp. 339, holding that provision authorizing change of beneficiary, upon surrender of certificate, may be waived by association; *Lahey v. Lahey*, 174 N. Y. 153, 61 L. R. A. 794, 95 Am. St. Rep. 554, 66 N. E. 670, holding member of benefit association not prevented from changing beneficiary by refusal of original beneficiary to give up certificate.

Criticized in *Jory v. Supreme Council A. L. of H.* 105 Cal. 28, 26 L. R. A. 735, 45 Am. St. Rep. 17, 38 Pac. 524, holding that beneficiary may, by agreement, acquire equities which insured cannot defeat, but that his interest is not a vested one.

Proof of fraud or conspiracy.

Approved in *Sommer v. Oppenheim*, 19 Misc. 611, 44 N. Y. Supp. 396, holding transactions between one, alleged to have purchased goods from plaintiff by fraud, and other creditors, admissible to show general scheme of fraud; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 46 C. C. A. 679, 107 Fed. 845, holding acts and declarations of one of the conspirators while some of them were engaged in executing the conspiracy, competent evidence; *People v. McKane*, 143 N. Y. 470, 38 N. E. 950, holding acts and declarations of conspirators in furtherance of conspiracy, competent.

Cited in *Summers v. Metropolitan L. Ins. Co.* 90 Mo. App. 699, to point that insurance obtained by fraud may be avoided on proof of facts constituting fraud.

Admissibility of declarations.

Approved in *Supreme Conclave K. of D. v. O'Connell*, 107 Ga. 100, 32 S. E. 946, holding admissions or declarations of insured made before issuance of policy admissible against beneficiary without vested interest; *Terwilliger v. Industrial Ben. Asso.* 83 Hun, 323, 31 N. Y. Supp. 938, holding declarations of insured as to age, made prior to time beneficiary's interest vested, competent on behalf of benefit association.

Cited in *Fidelity Mut. L. Asso. v. Winn*, 96 Tenn. 227, 33 S. W. 1045, holding declarations of insured against his interest competent against beneficiary, where insured was real party in interest; *Connecticut Mut. L. Ins. Co. v. Hillmon*, 188 U. S. 218, 47 L. ed. 451, 23 Sup. Ct. Rep. 294, holding declarations of alleged conspirators as to plans admissible upon prima facie proof of conspiracy to defraud insurance company.

Cited in note (19 L. R. A. 751) on how near main transaction, declarations must be made, to constitute part of the *res gestæ*.

Distinguished in *Phillips v. Lindner*, 61 Hun, 489, 16 N. Y. Supp. 367, holding letter of maker of note to alleged indorser, written shortly before note fell due, confessing indorsement and forgery, not admissible in action by bona fide holder.

— **As to intent to commit suicide.**

Approved in *Merchants' Life Asso. v. Treat*, 98 Ill. App. 65, holding admissible, statements of insured made before issuance of policy tending to show intent to commit suicide.

Cited in *Ætna L. Ins. Co. v. Florida*, 30 L. R. A. 89, 16 C. C. A. 622, 32 U. S. App. 753, 69 Fed. 935, holding proof of contemplated suicide admissible, under statute, only when intent existed at time of application for policy.

Distinguished in *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 551, 68 N. W. 182, holding declarations as to intent to commit suicide made two years before death, inadmissible.

Effect of suicide.

Approved in *Campbell v. Supreme Conclave I. O. H.* 66 N. J. L. 280, 54 L. R. A. 579, 49 Atl. 550, holding that suicide will not defeat recovery unless contract so provides in express terms.

Cited in *Shipman v. Protected Home Circle*, 174 N. Y. 409, 63 L. R. A. 351, 67 N. E. 83, denying right of beneficiary to proceeds of certificate upon suicide of insured.

9 L. R. A. 617, *STEDMAN v. UNITED STATES MUT. ACCI. ASSO.* 123 N. Y. 304, 20 Am. St. Rep. 748, 25 N. E. 399.

Cause of death of insured.

Cited in *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 541, 70 Am. St. Rep. 212, 78 N. W. 252, holding that death is not accidental merely because of rupture of artery caused by reaching out to close window; *Dozier v. Fidelity & C. Co.* 13 L. R. A. 116, 46 Fed. 449, holding sunstroke a disease, within accident policy excepting "any disease or bodily infirmity;" *Thornton v. Travelers Ins. Co.* 116 Ga. 127, 94 Am. St. Rep. 99, 42 S. E. 287, upholding recovery for accident aggravating hernia, under policy exempting company in case of injury resulting from hernia.

Cited in notes (30 L. R. A. 209) on what constitutes an accident within meaning of accident insurance policy; (9 L. R. A. 685) on meaning of "accidental" in insurance policy.

— **Inhalation of gas.**

Cited in *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 600, 31 L. R. A. 688, 51 Am. St. Rep. 716, 43 N. E. 54, holding accident insurance company liable for death by accidental inhaling of gas; *Fidelity & C. Co. v. Waterman*, 161 Ill. 635, 32 L. R. A. 655, 44 N. E. 283, holding that accident policy covers

asphyxiation while asleep by illuminating gas although injuries resulting from "poison absorbed or inhaled" are excepted; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 93, 13 L. R. A. 663, 28 W. N. C. 460, 27 Am. St. Rep. 618, 22 Atl. 871, holding death by asphyxiation in bottom of well in which insured had gone to fix pump covered by policy excepting inhalation of gas; *Lowenstein v. Fidelity & C. Co.* 88 Fed. 476, holding death by asphyxiation caused by involuntary inhalation of illuminating gas covered by accident policy excepting injuries resulting from "anything accidentally or otherwise inhaled;" *Fidelity & C. Co. v. Lowenstein*, 46 L. R. A. 452, 38 C. C. A. 31, 97 Fed. 18, holding insurer liable for death due to accidental inhaling of gas while asleep because policy issued in same form after construction by court that exception meant voluntary and intelligent act.

— **Poison.**

Cited in *McGlother v. Provident Mut. Acci. Co.* 32 C. C. A. 323, 60 U. S. App. 705, 89 Fed. 691 (dissenting opinion), majority holding that accident policy, excepting "death resulting from poison," does not include death from poison taken under belief it was harmless.

Distinguished in *Meehan v. Traders & Travelers Acci. Co.* 34 Misc. 160, 68 N. Y. Supp. 821, holding that policy, excepting accident "by poison" in any form, does not cover accident by carbolic acid thrown upon insured.

— **Blood poisoning.**

Cited in *Martin v. Equitable Acci. Asso.* 61 Hun, 471, 16 N. Y. Supp. 279, holding death from blood poisoning, as result of accidental wound, within accident policy.

Distinguished in *Bailey v. Interstate Casualty Co.* 8 App. Div. 132, 40 N. Y. Supp. 513, holding question whether blood poisoning of physician, was the immediate result of accidental deep thrust of hyperdermic needle into himself, one for jury; *Martin v. Manufacturers' Acci. Indemnity Co.* 60 Hun, 542, 15 N. Y. Supp. 309, raising question as to right to recover for death from blood poisoning following injury to finger; *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 656, 29 C. C. A. 226, 56 U. S. App. 393, 85 Fed. 405, holding that abrasion of skin of toe by new shoe resulting in blood poisoning and death is accidental; *Delaney v. Modern Acci. Club*, 121 Iowa, 536, 63 L. R. A. 606, 97 N. W. 91, holding accidental, death from erysipelas and blood poisoning following cut on finger.

9 L. R. A. 621, *MOREY v. MORNING JOURNAL ASSO.* 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. 161.

What constitutes slander or libel.

Cited in *Winchell v. Argus Co.* 69 Hun, 360, 23 N. Y. Supp. 650, holding printed and published words exposing person to disgrace and obloquy, actionable *per se*; *Howell v. Press Pub. Co.* 48 App. Div. 321, 62 N. Y. Supp. 908, holding published article tending to disgrace woman and bring her into contempt and ridicule, libelous *per se*; *Hanchett v. Chiatovich*, 41 C. C. A. 651, 101 Fed. 745, Affirming 88 Fed. 876, holding error in leaving to jury question whether spoken words were defamatory, when presumed defamatory, harmless; *Van Ingen v. Mail & Exp. Pub. Co.* 14 Misc. 329, 35 N. Y. Supp. 838, holding publication that person was engaged in collecting large sum of money to influence election, libelous *per se*; *Hartman v. Morning Journal Asso.* 46 N. Y. S. R. 182, 19 N. Y. Supp. 398, holding publication imputing immoral and disgraceful complicity in swindle and cul-

pable misbehavior in business management, libelous *per se*; *Rider v. Rulison*, 74 Hun, 241, 26 N. Y. Supp. 234, holding words in letter charging man with being "perfectly unreliable," libelous both as to veracity and payment of debts; *Clark v. Anderson*, 33 N. Y. S. R. 867, 11 N. Y. Supp. 729, holding direction of verdict for defendant improper where plaintiff was charged with being blackleg and scoundrel and with false representation or swearing; *Martin v. Press Pub. Co.* 93 App. Div. 533, 87 N. Y. Supp. 859, holding article stating that one is poverty stricken and starving because overeducated, libelous *per se*; *Triggs v. Sun Printing & Pub. Asso.* 91 App. Div. 263, 86 N. Y. Supp. 486 (dissenting opinion), majority holding articles ridiculing opinions of teacher on certain subjects not libelous *per se*; *Morrison v. Smith*, 177 N. Y. 369, 69 N. E. 725, Reversing 83 App. Div. 210, 82 N. Y. Supp. 166, holding advertisement of "experience of a giddy typewriter girl" accompanied by complainant's picture, libelous *per se*.

Cited in footnotes to *Welch v. Tribune Pub. Co.* 11 L. R. A. 233, which holds charge that jurors have perjured themselves in rendering verdict, libelous; *Cervený v. Chicago Daily News Co.* 13 L. R. A. 864, which holds false charge that person is "an anarchist" libelous; *Hollenbeck v. Hall*, 39 L. R. A. 734, which holds publication that trader was dishonest in pleading statute of limitations, not libelous; *Cherry v. Des Moines Leader*, 54 L. R. A. 855, which holds not actionable, article ridiculing in exaggerated terms, extremely ridiculous entertainment.

Cited in notes (13 L. R. A. 98) on fair criticism of public men; (16 L. R. A. 625) on libel by filing lien.

— **Charging lewdness, etc.**

Cited in *Gates v. New York Recorder Co.* 155 N. Y. 232, 49 N. E. 769, holding statement that woman "is said to have been a concert-hall singer and dancer at Coney Island," libelous *per se*; *Gray v. Baker*, 47 N. Y. S. R. 375, 19 N. Y. Supp. 940, holding article charging married woman being detected in hotel room with another man, and being registered as husband and wife, libelous; *Woodruff v. Woodruff*, 36 Misc. 17, 72 N. Y. Supp. 39, holding it question for jury whether charge that married woman communicated loathsome disease to her husband, imputes unchastity; *Johnson v. Synett*, 89 Hun, 193, 35 N. Y. Sup. 79, holding article reporting colored minister's arrest and intimating that he was too much of a family man, libelous *per se*.

Evidence as to hurtful tendency of libelous publication.

Cited in *Tallmadge v. Press Pub. Co.* 39 N. Y. S. R. 30, 14 N. Y. Supp. 331, holding it proper, in action for libel, for plaintiff to give evidence of his social position; *Stafford v. Morning Journal Asso.* 68 Hun, 471, 22 N. Y. Supp. 1008, holding evidence of insulting letters and visits of men at plaintiff's house at night competent as showing way libelous advertisement was understood; *Parish v. Sun Printing & Pub. Asso.* 6 App. Div. 587, 39 N. Y. Supp. 540, holding that plaintiff had right to prove affirmatively, nature of his profession and surrounding circumstances, on question of damage.

Evidence to rebut malice or mitigate damages.

Cited in *Van Alstyne v. Rochester Printing Co.* 25 App. Div. 284, 49 N. Y. Supp. 523, holding question whether writer of libelous article had any malice against plaintiff properly excluded; *Robinson v. Evening Post Pub. Co.* 39 App. Div. 526, 57 N. Y. Supp. 303 (Reversing 25 Misc. 245, 55 N. Y. Supp. 62), holding proof that libelous publication was prepared by experienced reporter of

reputable news agency incompetent on question of vindictive damages, without also showing that it was believed to be true; *Palmer v. New York News Pub. Co.* 31 App. Div. 213, 52 N. Y. Supp. 539, holding fact that libelous article was published on authority of press association, not a defense; *Ward v. Deane*, 32 N. Y. S. R. 273, 10 N. Y. Supp. 421, holding evidence of plaintiff's reputation where she lived, not known to defendant, and not pleaded in mitigation, inadmissible; *Witcher v. Jones*, 43 N. Y. S. R. 152, 17 N. Y. Supp. 491, holding contemporaneous publication by other papers of same libel not admissible to disprove malice; *Edwards v. San Jose Printing & Pub. Soc.* 99 Cal. 439, 37 Am. St. Rep. 70, 34 Pac. 128, holding proof of previous particular acts of plaintiff, unknown to defendant inadmissible, on libelous charge of purpose to corrupt voters; *Courier-Journal Co. v. Sallee*, 104 Ky. 341, 47 S. W. 226, holding competency of evidence as to correspondent's sources of information, doubtful, in case of libelous publication *per se*, made without knowledge or inquiry; *Baldwin v. Boulware*, 79 Mo. App. 9, holding evidence that slanderous words were spoken under authority of persons whose names were given, inadmissible when not pleaded; *Hess v. Gansz*, 90 Mo. App. 445, holding general reputation of plaintiff in matters concerning libel admissible in mitigation of damages; *Palmer v. Mahin*, 57 C. C. A. 51, 120 Fed. 747, holding facts not known to publisher at time of libel not provable in mitigation of damages; *Palmer v. Matthews*, 29 App. Div. 157, 51 N. Y. Supp. 839 (dissenting opinion), majority holding cross-examination of plaintiff as to other suits for same libel, proper.

Mistake as excuse for libelous publication.

Cited in *Griebel v. Rochester Printing Co.* 60 Hun, 321, 14 N. Y. Supp. 848, holding publication charging obtaining of goods under false pretenses libelous *per se*, although made by mistake.

Damages for libel.

Cited in *Graybill v. De Young*, 140 Cal. 328, 73 Pac. 1067, holding exemplary damages recoverable for false defamatory publication made without regard to whether it was true or false.

Cited in footnote to *Morning Journal Asso. v. Rutherford*, 16 L. R. A. 803, which authorizes punitive damages against newspaper reprinting stories of elopement without inquiry.

9 L. R. A. 625, *LE BARRON v. BABCOCK*, 122 N. Y. 153, 19 Am. St. Rep. 488, 25 N. E. 253.

Cotenant's liability for conversion.

Cited in *Felts v. Collins*, 46 App. Div. 334, 61 N. Y. Supp. 482, holding tenant in common, forcibly taking one half of cattle, not liable for conversion.

Cited in note (12 L. R. A. 265) on liability of tenant in common to action of trover.

Rights of cotenants in common estate.

Cited in *Rich v. Rich*, 50 Hun, 201, 2 N. Y. Supp. 770, holding tenant in common occupying premises, receiving no income, not liable for use.

Distinguished in *Mott v. Underwood*, 148 N. Y. 469, 32 L. R. A. 272, 51 Am. St. Rep. 711, 42 N. E. 1048, Affirming 73 Hun, 511, 26 N. Y. Supp. 307, holding right of cotenant to take natural oysters not affected by planting of seed-oysters in oyster bed; *Cosgriff v. Dewey*, 21 App. Div. 131, 47 N. Y. Supp. 255, holding that tenant in common must account for rock quarried.

Title to emblements.

Cited in footnote to *Goodwin v. Smith*, 17 L. R. A. 284, which holds purchaser on foreclosure entitled to wheat sown by tenant after judgment.

9 L. R. A. 627, *COTTINGHAM v. FIREMAN'S FUND INS. CO.* 90 Ky. 439, 14 S. W. 417.

Change of title avoiding insurance.

Cited in footnote to *Blackwell v. Miami Valley Ins. Co.* 14 L. R. A. 431, which holds taking partner in business not sale avoiding policy.

Insurable interest.

Cited in note (11 L. R. A. 599) on what are insurable interests.

Change of interest.

Cited in note (11 L. R. A. 293) on condition in policy against transfer and alienation of interest.

9 L. R. A. 629, *LOUISVILLE v. LOUISVILLE BD. OF TRADE*, 90 Ky. 409, 14 S. W. 408.

Exemption from taxation.

Cited in *Thomas v. Sneed*, 99 Va. 617, 39 S. E. 586, holding municipality without inherent power to exempt from taxation; *Owensboro v. Com.* 105 Ky. 355, 44 L. R. A. 205, 49 S. W. 320 (dissenting opinion), majority holding public parks exempt, under statute exempting property used for public purposes; *Broadway Christian Church v. Com.* 112 Ky. 453, 66 S. W. 32, holding church parsonage not occupied by the minister, not exempt.

Cited in footnote to *Springfield v. Smith*, 37 L. R. A. 446, which denies implied exemption from license tax by contract giving street railway company right to operate road for term of years.

9 L. R. A. 631, *DE LA CUESTA v. INSURANCE CO. OF N. A.* 136 Pa. 62, 20 Atl. 505.

Followed without comment, in *Huffington v. Insurance Co. of N. A.* 136 Pa. 84, 9 L. R. A. 631, 20 Atl. 508.

Protest against payment.

Cited in *Hazelton v. McGroarty*, 6 Kulp, 536, 2 Pa. Dist. R. 290, holding protest necessary to show payment not voluntary; *Lippincott v. Supreme Council A. L. H.* 130 Fed. 484, holding voluntary, payment of amended rate of benefit insurance, under protest.

What constitutes duress.

Cited in *Pace v. Plymouth*, 7 Kulp, 241, holding payment of fine for violating invalid ordinance, involuntary; *Peters v. Kraft*, 9 Lanc. L. Rev. 36, holding threat of legal process not such duress as to make payment of claim involuntary.

Cited in footnotes to *Flack v. National Bank of Commerce*, 17 L. R. A. 583, which holds threat by bank to institute proceedings to collect unmatured note, not duress; *Galusha v. Sherman*, 47 L. R. A. 417, which holds threats making person incapable of exercising free will, duress.

Cited in note (16 L. R. A. 376) on duress by lien on real property.

Recovery back of money paid.

Cited in *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 169, holding money paid under agreement with city solicitor for business license, not recoverable; *Canfield Salt & Lumber Co. v. Manistee Twp.* 100 Mich. 470, 59 N. W. 164, holding money paid after improper seizure of property to satisfy tax lien, not recoverable; *Easton Power Co. v. Sterlingworth R. Supply Co.* 22 Pa. Super. Ct. 545, holding overpayment for power not recoverable, where voluntarily made, after tests; *Lauer Brewing Co. v. Chmielewski*, 28 Pa. Co. Ct. 632, holding attorney's commission, paid to sheriff as part of execution debt, not recoverable; *New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co.* 109 La. 26, 94 Am. St. Rep. 393, 33 So. 51, holding not recoverable, illegal wharfage fees paid by one having opportunity to test their legality.

Cited in footnotes to *Springfield F. & M. Ins. Co. v. Hull*, 25 L. R. A. 37, which upholds right to maintain suit for balance due on policy without tendering back less sum accepted under threats of groundless prosecution; *First Nat. Bank v. Sargent*, 59 L. R. A. 296, which sustains right to recover back money paid under duress.

Distinguished in *Hazelton v. McGroarty*, 6 Kulp, 540, 2 Pa. Dist. R. 293, holding excess of legal liquor-license fee, paid under protest, recoverable.

9 L. R. A. 637, *BURR v. LAMASTER*, 30 Neb. 688, 27 Am. St. Rep. 428, 46 N. W. 1015.

Party-wall agreements.

Cited in *Stehr v. Raben*, 33 Neb. 440, 50 N. W. 327, holding that party-wall agreement runs with and is charge upon land; *Garmire v. Willy*, 36 Neb. 344, 54 N. W. 562, holding that party-wall agreement binds subsequent purchaser; *Ensign v. Colts*, 75 Conn. 119, 52 Atl. 829, holding permanent divisional wall partly on land conveyed, an encumbrance.

9 L. R. A. 640, *GORDON v. CUMMINGS*, 152 Mass. 513, 23 Am. St. Rep. 846, 25 N. E. 978.

Liability for injury on dangerous premises.

Cited in *Foren v. Rodick*, 90 Me. 279, 38 Atl. 175, holding owner of office building liable for injury to party entering on business with tenant, due to misleading and defective cellar entrance; *Kann v. Meyer*, 88 Md. 550, 41 Atl. 1065, holding question of negligence for jury where defendant employing one to repair elevator in dark shaft, without warning him of danger through continued operation of adjoining elevator, one for jury.

Cited in footnotes to *Redigan v. Boston & M. R. Co.* 14 L. R. A. 276, which denies right of recovery to licensee falling through open trap door in station platform; *Benson v. Baltimore Traction Co.* 20 L. R. A. 714, which denies right of recovery to student falling into uncovered vat while class is inspecting power house under permission; *Sterger v. Van Sicken*, 16 L. R. A. 640, which holds property owner not required to have stairways safe as to person on premises in search of child; *Hart v. Cole*, 16 L. R. A. 557, which holds risk of unsafe outside steps in tenement building assumed by one attending wake; *Ryerson v. Bathgate*, 57 L. R. A. 308, which denies liability of owner for injury to one using premises for purpose not authorized by invitation; *Malloy v. New York Real*:

Estate Asso. 41 L. R. A. 487, which denies owner's liability for injury to one falling into elevator shaft, insufficient railing for which had been left out of place by third person; *Gibson v. Leonard*, 17 L. R. A. 588, which holds fire insurance patrolman entering burning building to save property, a mere licensee, towards whom owner owes no duty as to condition of elevator; *Manning v. Chesapeake & O. R. Co.* 16 L. R. A. 271, which holds one making friendly call on telegraph operator a mere voluntary licensee; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L. R. A. 181, which holds that order to trespasser not to leave premises by way he entered does not make him other than trespasser.

Cited in notes (23 L. R. A. 155) on landlord's liability as to condition of part of premises not controlled by tenant; (46 L. R. A. 85, 94) on liability of owner of premises of which he is not in possession.

Distinguished in *Beehler v. Daniels*, 19 R. I. 52, 31 Atl. 582, Affirming 18 R. I. 566, 27 L. R. A. 514, 49 Am. St. Rep. 790, 29 Atl. 6, denying liability for injuries received by fireman through fall into unguarded elevator well of hotel on fire; *Plummer v. Dill*, 156 Mass. 427, 32 Am. St. Rep. 463, 31 N. E. 128, denying liability to party entering building merely for his own convenience for purpose of inquiry; *Henson v. Beckwith*, 20 R. I. 167, 38 L. R. A. 718, 78 Am. St. Rep. 847, 37 Atl. 702, holding landlord not liable for injury to party at unprotected freight elevator shaft, while delivering goods to tenant; *Campbell v. Abbott*, 176 Mass. 246, 57 N. E. 462, holding that party entering strange building at night without making presence known, cannot recover for injury on stairs; *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 538, 32 L. R. A. 533, 50 Am. St. Rep. 124, 34 Atl. 491, holding railway liable for negligent injury to party crossing tracks to factory, whether by license or implied invitation.

Contributory negligence.

Cited in *Humphreys v. Portsmouth Trust & Guarantee Co.* 184 Mass. 424, 68 N. E. 836, holding that new workman used due care, although walking through wrong door into elevator well; *New York L. Ins. Co. v. Savage*, 7 C. C. A. 264, 19 U. S. App. 197, 58 Fed. 342, holding failure to see elevator opening in sidewalk on dark night while hastening for car, not negligence *per se*, on part of one who had no previous knowledge of it.

Cited in note (11 L. R. A. 130) on recovery for injury defeated by passenger's contributory negligence.

9 L. R. A. 645, *MOBILE SAV. BANK v. McDONNELL*, 89 Ala. 434, 18 Am. St. Rep. 137, 8 So. 137.

Consideration for transfer by insolvent.

Cited in *Heard v. Murray*, 93 Ala. 131, 9 So. 514, holding that discrepancy of \$3,000 between value of property and purchase price avoids transfer; *Fargason v. Hall*, 99 Ala. 214, 13 So. 302, sustaining transfer of goods where purchase price nearly equaled value of property; *Best v. Fuller & F. Co.* 185 Ill. 48, 56 N. E. 1077, Affirming 85 Ill. App. 509, holding conveyance absolute on face but intended as security, void as to creditors.

Burden of proving consideration for transfer by insolvent.

Cited in *Caldwell v. Pollak*, 91 Ala. 358, 8 So. 546, holding onus on grantee to show adequate consideration, as against creditor whose debt is reduced to judgment before conveyance; *Robinson v. Moseley*, 93 Ala. 73, 9 So. 372; *Miller*

v. Rowan, 108 Ala. 100, 19 So. 9; Chipman v. Glennon, 98 Ala. 265, 13 So. 822, — holding obligation upon vendee to show adequate and valuable consideration for transfer from insolvent grantor; Ezzell v. Brown, 121 Ala. 153, 25 So. 832, holding burden of showing consideration not on vendee until one assailing deed shows debt antedates conveyance; Sides v. Scharff Bros. 93 Ala. 108, 9 So. 228, holding more satisfactory proof of good faith demanded, where relations between parties intimate.

Cited in note (36 L. R. A. 363) on burden of proof to show consideration.

Estoppel by recitals in deed.

Distinguished in Vincent v. Walker, 93 Ala. 168, 9 So. 382, denying that married woman is estopped from showing want of consideration for deed of her statutory estate.

Preferences by insolvent.

Cited in First Nat. Bank v. Smith, 93 Ala. 99, 9 So. 548, upholding right of debtor to pay some creditors in full, neglecting others, when transaction bona fide.

Cited in note (36 L. R. A. 346) on parties preferred by insolvent.

Assumption of debt by grantee.

Cited in Harmon v. McRae, 91 Ala. 410, 8 So. 548, upholding conveyance from insolvent to surety who assumed to pay debt of principal; Loucheim v. First Nat. Bank, 98 Ala. 525, 13 So. 374, holding trust deed of insolvent to creditor, with power to sell and repay balance to debtor, valid.

Argumentative charges.

Cited in Eastis v. Montgomery, 93 Ala. 300, 9 So. 311, holding that charge unduly emphasizing particular facts, should not be given; Rice v. Schloss, 90 Ala. 420, 7 So. 802, condemning argumentative charges to jury.

Parol evidence as to consideration.

Cited in Buford v. Shannon, 95 Ala. 211, 10 So. 263, upholding admission of parol evidence to show actual consideration for conveyance.

9 L. R. A. 650, MACK v. DE BARDELEBEN COAL & I. CO. 90 Ala. 396, 8 So. 150.

Rights of minority stockholders.

Cited in Roman v. Woolfolk, 98 Ala. 238, 13 So. 212, denying minority stockholder's right to receivership without previous application to board of directors for redress; Decatur Mineral Land Co. v. Palm, 113 Ala. 539, 59 Am. St. Rep. 140, 21 So. 315, denying right to judicial interference with management of corporation before relief sought within body itself; George v. Central R. & Bkg. Co. 101 Ala. 624, 14 So. 752, and Steiner v. Parsons, 103 Ala. 221, 13 So. 771, holding that stockholder must exhaust remedies within corporation before application to court.

Cited in footnotes to Shaw v. Davis, 23 L. R. A. 294, which denies minority stockholder's right to enjoin legal contract; Grant v. Lookout Mountain Co. 27 L. R. A. 98, which sustains right of successful minority stockholders to expenses including attorneys' fees from corporation.

Cited in note (15 L. R. A. 684) on voting trusts of corporate stock.

9 L. R. A. 657, JACKSON v. CITY NAT. BANK, 125 Ind. 347, 25 N. E. 430.

Knowledge, by lender, of purpose for which money borrowed.

Cited in First Nat. Bank v. Dovetail Body & Gear Co. 143 Ind. 557, 52 Am. St.

Rep. 435, 40 N. E. 810, holding mortgage by insolvent corporation to discharge indebtedness valid, although president personally liable and mortgagee knew purpose for which money borrowed.

Contracts connected with illegal transactions.

Cited in footnotes to *Gray v. Western U. Teleg. Co.* 14 L. R. A. 95, which holds company liable for delay in delivering telegram relating to illegal transaction; *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, which holds breach of contract to transport cattle not excused because shipper intended to offer for sale on Sunday; *Martin v. Richardson*, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to proceeds from one fraudulently obtaining it after prize drawn; *Irvin v. Irvin*, 29 L. R. A. 292, which holds wife's recovery of consideration of contract to release dower rights not lost by invalidity of contemporaneous agreement for divorce.

— Gambling transactions.

Approved in *Singleton v. Bank of Monticello*, 113 Ga. 530, 38 S. E. 947, denying right to recover money loaned when lender participated in purchase of "margins."

Cited in *Plank v. Jackson*, 128 Ind. 425, 26 N. E. 568, denying right of lender to recover money loaned to deal in futures when he becomes *particeps criminis*.

Cited in footnotes to *Appleton v. Maxwell*, 55 L. R. A. 93, which denies right of action for money loaned to be used in gambling; *Olson v. Sawyer Goodman Co.* 53 L. R. A. 648, which holds void, agreement to debit and credit on accounts due employees, their winnings at card games with each other; *Drinkall v. Movius State Bank*, 57 L. R. A. 341, which holds title to cashier's check acquired by payee's indorsement to gambler in payment for chips to be used in gambling, defective; *Ullman v. St. Louis Fair Asso.* 56 L. R. A. 606, which denies right to abandon partly executed illegal bookmaking contract for specified period, and recover back *pro rata* amount of money paid; *Central Stock & Grain Exchange v. Bendinger*, 56 L. R. A. 875, which holds broker liable to refund to principal money illegally taken from agent as margins on gambling transaction; *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful options for sale of commodities which have been subject of gambling operations; *Baxter v. Deneen*, 64 L. R. A. 949, which refuses to enjoin broker from withdrawing money deposited in bank on stock gambling transaction.

9 L. R. A. 660, *JOHNSON v. ALEXANDER*, 125 Ind. 575, 25 N. E. 706.

Assignment of life insurance.

Cited in *State ex rel. Wright v. Tomlinson*, 16 Ind. App. 677, 59 Am. St. Rep. 335, 45 N. E. 1116, holding assignment of insurance to wife by insolvent husband, valid as against creditors; *Barbour v. Larue*, 106 Ky. 558, 51 S. W. 5, holding policies without pecuniary value at time of general assignment, not transferred to assignee under provision for "property" not specifically mentioned.

Cited in footnotes to *Spencer v. Myers*, 34 L. R. A. 175, which sustains right to assign policy on husband's life issued for wife's benefit; *Steinback v. Diepenbrock*, 44 L. R. A. 417, which authorizes assignment of policy to one having no insurable interest; *Chamberlain v. Butler*, 54 L. R. A. 338, which sustains right to assign policy on own life to one without insurable interest; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which authorizes assignment of policy payable to "legal representatives" of insured; *Hewlett v. Home for Incurables*,

17 L. R. A. 447, which holds assignee of interest in policy on third person's life entitled to recover though assignor died before insured; *Steele v. Gatlin*, 59 L. R. A. 129, which holds complete gift not made by verbal assignment of life policy accompanied with words indicating intent to give, and delivery of policy; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which sustains right to provide that assigned policy shall be void as to all above debt due assignee; *American Mut. L. Ins. Co. v. Bertram*, 64 L. R. A. 935, which holds recoverable, premiums paid by assignee on invalid policy, on assurance by office of company that it was valid; *Opitz v. Karel*, 62 L. R. A. 982, which holds that valid gift of proceeds of policy payable to personal representative of insured, may be made by delivery of policy.

9 L. R. A. 664, *WELSH v. STATE*, 126 Ind. 71, 25 N. E. 883.

What liquors deemed intoxicating.

Cited in *Douglas v. State*, 21 Ind. App. 304, 52 N. E. 238, holding verdict that liquor sold was beer, sufficient to support conviction under indictment for sale of "intoxicating liquors, to wit, beer."

State jurisdiction over boundary waters.

Cited in *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 310, 40 N. E. 527, holding that state has jurisdiction for enforcement of its civil and criminal laws on navigable river forming part of boundary; *Meyler v. Wedding*, 107 Ky. 700, 60 S. W. 20 (dissenting opinion), majority holding judgment rendered in Indiana upon service of process on Ohio river beyond low-water mark, void; *Roberts v. Fullerton*, 117 Wis. 239, 65 L. R. A. 971, 93 N. W. 1111 (dissenting opinion), majority holding out of state officer not authorized to destroy nets found in border lake within boundaries of state; *State v. Faudre (W. Va.)* 63 L. R. A. 881, 46 S. E. 269, upholding right of Ohio to fix Ohio ferry rates from Ohio to West Virginia.

Exercise of police power.

Cited in *Haggart v. Stehlin*, 137 Ind. 50, 22 L. R. A. 581, 35 N. E. 997, holding statutes regulating sale of intoxicating liquors by licensing of saloons, not unconstitutional; *State v. Gerhardt*, 145 Ind. 469, 33 L. R. A. 324, 44 N. E. 469, holding statute making it unlawful to issue license to sell intoxicating liquors, if remonstrance be signed by majority of voters in township or ward, valid; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 566, 12 L. R. A. 656, 3 Inters. Com. Rep. 617, 28 N. E. 76, holding statute regulating mode of procuring, transporting, and using natural gas, valid exercise of police power.

Equality of privileges.

Cited in *Woodford v. Hamilton*, 139 Ind. 485, 39 Atl. 47, upholding statute limiting issue of licenses to sell intoxicating liquors to "male inhabitants;" *Adams v. Cronin*, 29 Colo. 498, 69 Pac. 590, holding ordinance prohibiting saloon keepers from maintaining wine room for use of women, not unconstitutional; *Adams v. Cronin*, 29 Colo. 498, 65 L. R. A. 66, 69 Pac. 590, upholding constitutionality of act forbidding keepers from allowing women to enter saloons; *Boomershine v. Uline*, 159 Ind. 504, 65 N. E. 513, holding constitutional, law permitting majority of voters of township or ward, to prevent, by remonstrance, granting of liquor license.

Cited in notes (49 L. R. A. 111) on constitutionality of discrimination against

women in police regulations; (14 L. R. A. 582) on constitutional equality of privileges, immunities, and protection.

Requests for instructions.

Cited in *Leeper v. State*, 12 Ind. App. 639, 40 N. E. 1113, holding that defendant in criminal case, desiring further instructions, must prepare same, and request their submission.

Presumptions arising from record on appeal.

Cited in *Lofland v. Goben*, 16 Ind. App. 69, 44 N. E. 553, holding instructions refused, presumed not tendered in time, unless record shows contrary; *Campbell v. State*, 148 Ind. 529, 47 N. E. 221, holding continuance presumed to have been properly granted, in absence of record showing error; *Burrell v. State*, 129 Ind. 294, 28 N. E. 699, holding record showing continuance in criminal case by "consent of parties," raises presumption that defendant was in court at time; *State v. Daugherty*, 63 Kan. 479, 65 Pac. 695, holding record showing presence of defendant upon arraignment and at sentence, raises presumption that he was present during entire trial; *Bond v. State*, 63 Ark. 509, 58 Am. St. Rep. 129, 39 S. W. 554, holding defendant chargeable with bailable offense, absent when verdict rendered, presumed voluntarily absent on bail, or present in fact, when record silent.

9 L. R. A. 667, *HERRON v. HERRON*, 47 Ohio St. 544, 21 Am. St. Rep. 854, 25 N. E. 420.

9 L. R. A. 669, *YOUNG v. WESTERN U. TELEG. CO.* 107 N. C. 370, 22 Am. St. Rep. 883, 11 S. E. 1044.

Action for breach of public duty.

Cited in *Guardian Trust & D. Co. v. Greensboro Water Supply Co.* 115 Fed. 190, upholding right of one injured by fire because of failure of water supply to sue water company in tort, or for breach of contract.

Cited in note (10 L. R. A. 516) on liability for neglect to deliver telegram.

Who may maintain action.

Cited in *Hood v. Sudderth*, 111 N. C. 221, 16 S. E. 397, holding action for seduction maintainable by woman seduced; *Snider v. Newell*, 132 N. C. 619, 44 S. E. 354, holding action maintainable by parent for seduction of daughter, without showing actual loss of services.

Damages for nondelivery of telegram.

Cited in *Hansley v. Jamesville & W. R. Co.* 117 N. C. 573, 32 L. R. A. 553, 53 Am. St. Rep. 600, 23 S. E. 443, upholding sendee's right to exemplary damages for nondelivery of telegram announcing severe illness of near relative; *Rosser v. Western U. Teleg. Co.* 130 N. C. 254, 41 S. E. 378, holding it not error to omit word "great" in connection with word "care" in charging jury to distinguish between suffering from nondelivery of message and inability to attend funeral; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 362, 43 L. R. A. 218, 70 Am. St. Rep. 205, 78 N. W. 63, holding damages for nondelivery of message may include loss of reward for inability to arrest fugitive; *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 467, 35 L. R. A. 550, holding receiver may sue on case as for tort for actual damages resulting from negligent alteration of message; *Walser v. Western U. Teleg. Co.* 114 N. C. 446, 19 S. E. 366, upholding right to nominal damages for nondelivery of message.

Mental suffering, as element of damages.

Followed in *Thompson v. Western U. Teleg. Co.* 107 N. C. 455, 12 S. E. 427, upholding right to damages for mental suffering for nondelivery of telegram, though no physical pain result; *Havener v. Western U. Teleg. Co.* 117 N. C. 543, 23 S. E. 457, upholding right to recover for mental suffering where importance of immediate delivery appears on face.

Cited in *Sherill v. Western U. Teleg. Co.* 117 N. C. 358, 23 S. E. 277, sustaining decisions on former appeals in 109 N. C. 533, 14 S. E. 94, 116 N. C. 658, 21 S. E. 429, upholding right to damages for mental pain caused by nondelivery of telegram; *Cashion v. Western U. Teleg. Co.* 123 N. C. 270; *Lyne v. Western U. Teleg. Co.* 123 N. C. 133, 31 S. E. 350; *Meadows v. Western U. Teleg. Co.* 132 N. C. 43, 43 S. E. 512; *Graham v. Western U. Teleg. Co.* 109 La. 1075, 34 So. 91, — sustaining right to damages awarded for mental pain caused by nondelivery of message announcing illness of near relative; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 756, 28 L. R. A. 73, 57 Am. St. Rep. 294, 62 N. W. 1, upholding recovery by addressee for mental anguish, sender failing to deliver message announcing death of mother; *Kennon v. Western U. Teleg. Co.* 126 N. C. 234, 35 S. E. 468, denying damages for mental suffering for nondelivery of telegram: "Meet me tomorrow, 12 o'clock;" *Morton v. Western U. Teleg. Co.* 130 N. C. 302, 41 S. E. 484, holding injury to person includes acts causing mental suffering; *Young v. Gormley*, 120 Iowa, 380, 94 N. W. 922, holding damages for mental suffering and humiliation recoverable in action for illegal arrest.

Cited in footnote to *Getty v. Peters*, 10 L. R. A. 464, which holds damages for mental anguish alone from delay in delivering telegram not recoverable.

Cited in note (13 L. R. A. 860) on recovery for mental anguish alone.

Distinguished in *Chappell v. Ellis*, 123 N. C. 262, 68 Am. St. Rep. 822, 31 S. E. 709, denying that right to damages for mental suffering is applicable to action for wrongful seizure; *Sparkman v. Western U. Teleg. Co.* 130 N. C. 449, 41 S. E. 881, denying right of recovery for nondelivery of message intended to relieve sender of mental anxiety; *Hunter v. Western U. Teleg. Co.* 135 N. C. 472, 47 S. E. 745 (dissenting opinion), majority holding damages for mental suffering recoverable for failure to deliver message announcing death of second cousin.

Disapproved in effect in *Connell v. Western U. Teleg. Co.* 116 Mo. 50, 20 L. R. A. 178, footnote, p. 172, 38 Am. St. Rep. 575, 22 S. W. 345, denying liability to damages for nondelivery of message although company knew mental pain would result; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 79, 54 L. R. A. 851, 60 N. E. 1080, and *Newman v. Western U. Teleg. Co.* 54 Mo. App. 440, denying sender's right to damages for mental suffering alone resulting from nondelivery of telegram; *Butner v. Western U. Teleg. Co.* 2 Okla. 238, 4 Inters. Com. Rep. 771, 37 Pac. 1087, denying right to damages for mental pain alone for negligence in delivery of message announcing death of relative; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 442, 21 L. R. A. 814, footnote, p. 810, 14 So. 148; *Chapman v. Western U. Teleg. Co.* 88 Ga. 765, 17 L. R. A. 431, footnote, p. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Kester v. Western U. Teleg. Co.* 55 Fed. 604; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, footnote, p. 706, 6 C. C. A. 450, 13 U. S. App. 317, 57 Fed. 477; *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 466, 43 S. W. 965, denying right to damages for mental suffering for failure to deliver telegram announcing illness or death; *Gahan v. Western U. Teleg. Co.* 59 Fed. 433, and *Connelly v. Western U. Teleg. Co.* 100 Va. 57, 56 L. R. A. 667, 93 Am.

St. Rep. 919, 40 S. E. 618, denying right to damages for mental pain for non-delivery of message, either at common law or under statute imposing penalties.

9 L. R. A. 674, *HUNT v. RUMSEY*, 83 Mich. 136, 47 N. W. 105.

Defenses against indorsee with notice.

Cited in *Conrad v. Manning*, 125 Mich. 79, 83 N. W. 1038, holding want of consideration of note defense against indorsee with notice.

Option contracts.

Cited in footnote to *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations.

9 L. R. A. 676, *HORN v. INDIANAPOLIS NAT. BANK*, 125 Ind. 381, 21 Am. St. Rep. 231, 25 N. E. 558.

Proof of publication of notice of sale.

Cited in *Curry v. State*, 131 Ind. 440, 31 N. E. 86, holding proof of publication sufficient, affidavit of printer showing first publication on 11th and third on 25th of month.

Fixtures.

Cited in *McFarlane v. Foley*, 27 Ind. App. 487, 87 Am. St. Rep. 264, 60 N. E. 357, upholding mechanic's lien on chandeliers, attached to ceilings with intention of annexing same to realty.

Cited in note (19 L. R. A. 445) on effect of agreement to prevent fixtures from becoming part of realty.

Redemption by encumbrancer.

Cited in *Robertson v. Van Cleave*, 129 Ind. 224, 15 L. R. A. 71, 26 N. E. 399, holding that owner of sheriff's certificate on execution sale has right to redeem as lienor, from subsequent foreclosure; *Scobey v. Kinningham*, 131 Ind. 554, 31 N. E. 355, holding that mortgagee, redeeming land from foreclosure of prior mortgage, may enforce lien; *Anderson v. Anderson*, 129 Ind. 574, 28 Am. St. Rep. 211, 29 N. E. 35, denying right of mortgagee buying land at foreclosure sale to enforce payment of balance of debt after redemption by junior encumbrancer; *Merritt v. Gibson*, 129 Ind. 179, 15 L. R. A. 285, 27 N. E. 136 (dissenting opinion), majority holding that receiver may be appointed after foreclosure to act till right to redeem expires, land being inadequate to pay debt.

Cited in footnote to *Fields v. Danehower*, 43 L. R. A. 519, which holds lien of mortgage not restored on redemption from foreclosure, though part of mortgage debt unpaid.

Illegal foreclosure sale.

Cited in *Houston v. National Mut. Bldg. & L. Asso.* 80 Miss. 45, 92 Am. St. Rep. 565, 31 So. 540, upholding right of quitclaim grantee of mortgagor, after voidable foreclosure sale, to avoid conveyance of property to mortgagee.

9 L. R. A. 683, *ULLMAN v. DUNCAN*, 78 Wis. 213, 47 N. W. 266.

Rights of creditors at large as to encumbered property.

Cited in *Union Nat. Bank v. Oium*, 3 N. D. 208, 44 Am. St. Rep. 533, 54 N. W. 1034, denying that one holding pre-existing debt and attaching mortgaged chat-

tels, has lien superior to mortgagee; *Nix v. Wiswell*, 84 Wis. 340, 54 N. W. 620, denying that statute requires reffiling of chattel mortgage to preserve force as against one purchasing within two years; *Weber v. Weber*, 90 Wis. 475, 63 N. W. 757, denying right of creditor at large to attack validity of judgments, for fraud; *Gregory v. Rosenkrans*, 78 Wis. 455, 47 N. W. 832, denying right of mortgagee and purchaser on foreclosure to assail lessee's interest for fraud; *Re Antigo Screen Door Co.* 59 C. C. A. 254, 123 Fed. 255, holding unfilled chattel mortgage validated as to general creditors by mortgage taking possession before filing of bankruptcy petition.

9 L. R. A. 685, *SHEANON v. PACIFIC MUT. L. INS. CO.* 77 Wis. 618, 20 Am. St. Rep. 151, 46 N. W. 799.

Report of second appeal in 83 Wis. 511, 53 N. W. 878.

Accident and life insurance.

Cited in footnote to *Eury v. Standard Life & Acci. Ins. Co.* 10 L. R. A. 534, which holds notice necessary before forfeiting policy for nonpayment of order given for premium.

Cited in note (13 L. R. A. 264) on accident insurance.

— Extent of injury.

Cited in *Lord v. American Mut. Acci. Asso.* 89 Wis. 23, 26 L. R. A. 743, footnote, p. 742, 46 Am. St. Rep. 815, 61 N. W. 293, which holds it question for jury whether without amputation above wrist, entire loss of hand caused by injury; *Sneck v. Travellers' Ins. Co.* 81 Hun, 334, 30 N. Y. Supp. 881 (dissenting opinion), majority holding loss of fingers and portion of thumb and palm not "severance of entire hand," within policy.

Distinguished in *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 122 Mich. 550, 48 L. R. A. 87, footnote p. 86, 80 Am. St. Rep. 598, 81 N. W. 326, denying right to whole amount of insurance for amputation of "limb (whole hand or foot)," on amputation of part of foot.

— What covered by policy.

Cited in *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 354, 17 L. R. A. 755, 30 N. E. 1013, holding insurer liable under accident policy for fall causing fatal attack of peritonitis to which insured was predisposed.

Cited in footnotes to *Stedman v. United States Mut. Acci. Asso.* 9 L. R. A. 617, which holds death from malignant pustule caused by contact with putrid animal matter, not accidental; *Humphreys v. National Ben. Asso.* 11 L. R. A. 564, which holds loss of sight of only eye covered by provision for loss of sight of both eyes; *Mogé v. Société De Bienfaisance St. Jean Baptiste*, 35 L. R. A. 736, which holds total blindness resulting from accident, covered by policy; *Dailey v. Preferred Masonic Mut. Acci. Asso.* 26 L. R. A. 171, which holds risk of getting on and off moving train by passenger conductor covered by accident policy; *Duran v. Standard Life & Acci. Ins. Co.* 13 L. R. A. 637, which holds injury by slipping, while hunting on Sunday, not covered by insurance policy; *Dozier v. Fidelity & C. Co.* 13 L. R. A. 114, which holds sun stroke not bodily injury sustained through external, violent and accidental means; *Travelers Ins. Co. v. McCarthy*, 11 L. R. A. 297, which holds accident insurance company not liable for intentional injury by third person.

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Cited in notes (13 L. R. A. 265) on intentional injuries within meaning of policy; (17 L. R. A. 754) on proximate cause of death within meaning of life insurance policy.

— **Voluntary exposure to risk.**

Cited in footnotes to *Follis v. United States Mut. Acci. Asso.* 23 L. R. A. 78, which holds attempt to cross bridge on ties voluntary exposure to danger; *Shevlin v. American Mut. Acci. Asso.* 36 L. R. A. 52, which holds jumping in dark from moving freight train unnecessary exposure to danger; *Wells v. New England Mut. L. Ins. Co.* 53 L. R. A. 327, which denies right to recover on policy for death of one voluntarily submitting to abortion to get rid of illegitimate child.

Cited in note (13 L. R. A. 266) on voluntary exposure to unnecessary risks.

— **More hazardous occupation.**

Cited in footnote to *Willey Casualty Co. v. Sheppard*, 47 L. R. A. 650, which holds barber not engaged in more hazardous occupation while hunting rabbits as incident to daily life.

Cited in note (10 L. R. A. 383) on conditions in policy as to increase of risk by change of occupation.

9 L. R. A. 688, *CARSTEN v. NORTHERN P. R. CO.* 44 Minn. 454, 20 Am. St. Rep. 589, 47 N. W. 49.

Wrongful treatment or ejection of passenger.

Cited in *Sloane v. Southern California R. Co.* 111 Cal. 677, 32 L. R. A. 195, 44 Pac. 320, holding action in tort for wrongful ejection from car maintainable, although no personal violence was used or displayed; *Pittsburgh, C. C. & St. L. R. Co. v. Berryman*, 11 Ind. App. 653, 36 N. E. 728, holding carrier bound to accept ticket issued by agent where authority has been revoked without notice to passenger; *Walker v. Price*, 9 Kan. App. 729, 59 Pac. 1102, holding carrier liable for expulsion of passenger having unlimited ticket; *Gleason v. Willamette Valley*, 71 Fed. 713, holding owner of vessel liable for refusal to furnish passenger first-class accommodations on return excursion ticket entitling him thereto.

Cited in footnotes to *Wardwell v. Chicago, M. & St. P. R. Co.* 13 L. R. A. 596, which authorizes ejection for refusal to make up deficiency of one from whom less than full fare was mistakenly received; *Gulf, C. & S. F. R. Co. v. Henry*, 16 L. R. A. 318, which holds that ticket, good for continuous passage, does not entitle holder to stop at intermediate points.

Distinguished in *Mahoney v. Detroit Street R. Co.* 93 Mich. 614, 18 L. R. A. 336, 32 Am. St. Rep. 528, 53 N. W. 793, holding that passenger on street car cannot recover for ejection, not having furnished conductor with evidence of payment of fare.

Assignability of tickets.

Cited in *Nichols v. Southern P. Co.* 23 Or. 130, 18 L. R. A. 59, 37 Am. St. Rep. 664, 31 Pac. 296, holding reduced rate partly used coupon ticket transferable, unless prohibited on face thereof; *Hoffman v. Northern P. R. Co.* 45 Minn. 53, 47 N. W. 312, holding return part of round-trip ticket transferable, in absence of contrary conditions.

Cited in note (18 L. R. A. 55) on assignability of railroad ticket.

Measure of damages.

Cited in *O'Neill v. Johnson*, 53 Minn. 442, 39 Am. St. Rep. 615, 55 N. W. 601,

holding injury to business not proximate result of garnishment in action maliciously prosecuted.

— **For wrongful expulsion.**

Cited in *Lucas v. Michigan C. R. Co.* 98 Mich. 4, 39 Am. St. Rep. 517, 56 N. W. 1039, holding injury to feelings proper element of damages recoverable for wrongful ejectment; *Serwe v. Northern P. R. Co.* 48 Minn. 81, 50 N. W. 1021, holding indignity and injury to health by exposure, proximately resulting from wrongful expulsion from railroad train proper elements of compensatory damages; *Willson v. Northern P. R. Co.* 5 Wash. 625, 32 Pac. 468, holding feeling of humiliation and disgrace suffered from wrongful expulsion from car, proper element of damages; *Hoffman v. Northern P. R. Co.* 45 Minn. 53, 47 N. W. 312, holding exemplary damages not recoverable for wrongful expulsion of passenger in absence of malice; *Zion v. Southern P. Co.* 67 Fed. 503, holding verdict of \$1,700 for wrongful expulsion, without violence, excessive.

9 L. R. A. 689, *MANCHESTER & L. R. CO. v. CONCORD R. CO.* 66 N. H. 100, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

Estoppel to plead invalidity of agreement under which property acquired.

Cited in *Abbott v. Wolfeborough Sav. Bank*, 68 N. H. 292, 38 Atl. 1050, holding bank receiving deposit, *ultra vires*, liable therefor; *Blue Mountain Forest Asso. v. Borrowe*, 71 N. H. 77, 51 Atl. 670, holding that in action for assessment, that delinquent stockholder cannot allege invalidity of agreement under which stock was acquired; *Lyon, P. Co. v. First Nat. Bank*, 29 C. C. A. 48, 55 U. S. App. 747, 85 Fed. 122, holding corporation receiving payment of debt out of note, cannot deny validity of accommodation indorsement; *International Trust Co. v. Davis & F. Mfg. Co.* 70 N. H. 119, 46 Atl. 1054, holding plea of *ultra vires* not available to corporation receiving proceeds of mortgage; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 89, 82 Fed. 135, and *Beach v. Wakefield*, 107 Iowa, 586, 76 N. W. 688, holding that corporation cannot avoid indebtedness, exceeding statutory limit, by pleading *ultra vires*; *Hunt v. Hauser Malting Co.* 90 Minn. 286, 96 N. W. 85, holding corporation receiving dividends on purchased bank stock estopped from pleading *ultra vires* to avoid liability as stockholder.

Cited in footnote to *Bath Gaslight Co. v. Claffy*, 36 L. R. A. 604, which denies right of lessee of corporation to escape payment of rent on ground that law *ultra vires*.

Cited in note (20 L. R. A. 772) on estoppel of corporation to set up plea of *ultra vires*.

Right of railroads to contract in relation to business.

Cited in *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 84, 4 Inters. Com. Rep. 451, 7 C. C. A. 78, 19 U. S. App. 36, 58 Fed. 72, upholding validity of association of railroads for mutual protection by establishing reasonable rates; *Hedding v. Gallagher*, 72 N. H. 386, 64 L. R. A. 817, 57 Atl. 225, Overruling 69 N. H. 662, 76 Am. St. Rep. 204, 45 Atl. 96, upholding right of railroad company to grant exclusive privilege to one person of entering premises to solicit carriage of baggage.

Cited in notes (45 L. R. A. 272, 273, 275) on restrictions on consolidation of parallel or competing railroads; (52 L. R. A. 377, 381, 388) on right of corporations to consolidate.

Recovery of property transferred under *ultra vires* contract.

Cited in *Municipal Secur. Co. v. Baker County*, 39 Or. 399, 65 Pac. 369, holding property for which *ultra vires* county warrants issued, recoverable; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 164 Mass. 224, 49 Am. St. Rep. 454, 41 N. E. 268, holding funds expended on railroad by another under *ultra vires* traffic agreement, recoverable; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 151, 43 L. ed. 114, 18 Sup. Ct. Rep. 808, Modifying 65 Fed. 164, holding lessee liable for value of property transferred under lease *ultra vires* lessor's charter.

Rights under invalid contract.

Cited in *Edgerly v. Hale*, 71 N. H. 147, 51 Atl. 679, holding sums paid to sheriff in excess of legal fees, recoverable; *Turner v. Merchants Bank*, 126 Ala. 411, 28 So. 469, holding action not maintainable to cancel usurious mortgage, without tender of loan with legal interest; *Scott v. Scott*, 68 N. H. 9, 38 Atl. 567, holding illegal purpose of transfer of stock no defense to action on promise to retransfer to transferror's administratrix; *Portsmouth Brewing Co. v. Mudge*, 68 N. H. 462, 44 Atl. 600, holding action maintainable on agreement to make restitution of funds acquired in illegal business; *Gilbert v. American Surety Co.* 61 L. R. A. 258, 57 C. C. A. 623, 121 Fed. 503, denying right to reclaim property sold to illegal combination after vendor has been in possession for three years as agent for vendee, on ground that contract for sale was in restraint of trade.

Cited in *Stockwell v. Stockwell*, 72 N. H. 70, 54 Atl. 701, holding that reconveyance may be decreed to one alleging conveyance for self-protection pending divorce suit; *Stewart v. Pierce*, 116 Iowa, 749, 89 N. W. 234, holding valid portion of separable contract enforceable.

Cited in note (17 L. R. A. 115) on relief to less guilty party to illegal contract.

Disapproved in *Storz v. Finklestein*, 46 Neb. 580, 30 L. R. A. 645, 65 N. W. 195, denying right of recovery for beer furnished for illegal traffic.

9 L. R. A. 696, *HEROLD v. HEROLD*, 47 N. J. Eq. 210, 20 Atl. 375.**Divorce on ground of desertion.**

Cited in *Van Wart v. Van Wart*, 57 N. J. Eq. 600, 41 Atl. 965, holding wife's desertion not obstinate, her husband standing by and not asking her to stay; *Sarfaty v. Sarfaty*, 59 N. J. Eq. 202, 45 Atl. 261, holding decree of wilful desertion by wife not justified, where husband apparently approved of the separation; *Hall v. Hall*, 60 N. J. Eq. 470, 46 Atl. 866, holding husband not bound to make efforts at reconciliation after desertion by wife, where such efforts would be plainly unavailing; *Ogilvie v. Ogilvie*, 37 Or. 182, 61 Pac. 627, holding that in case of wilful desertion, injured party need not make first advances toward reconciliation.

Cited in footnotes to *Williams v. Williams*, 14 L. R. A. 220, which holds wife's refusal to live with husband on condition that she shall not visit her mother not desertion preventing divorce for his desertion; *Hardie v. Hardie*, 25 L. R. A. 697, which holds divorce for desertion not authorized, by wife, on receiving blow from husband, leaving house without intent to remain away permanently; *Danforth v. Danforth*, 31 L. R. A. 608, which authorizes divorce for wife's desertion though husband visited her for a few days during statutory period; *Tirrell v. Tirrell*, 47 L. R. A. 750, which holds that mere payment of allowance to abandoned wife under order of court does not prevent divorce for desertion.

Uncorroborated testimony of complainant.

Cited in *Hires v. Hires*, 61 N. J. Eq. 495, 48 Atl. 598, holding that divorce will not be decreed where any necessary element in proofs depends upon uncorroborated testimony of complainant; *Garcin v. Garcin*, 62 N. J. Eq. 205, 50 Atl. 71, refusing divorce for cruelty on uncorroborated testimony of wife.

9 L. R. A. 700, *FRIEDLANDER v. HEWITT*, 30 Neb. 783, 47 N. W. 83.

Right of tenant to remove fixtures.

Cited in *Fuller v. Brownell*, 48 Neb. 150, 67 N. W. 6; *Free v. Stuart*, 39 Neb. 226, 57 N. W. 991; *Morey v. Hoyt*, 62 Conn. 549, 19 L. R. A. 615, 26 Atl. 127; *Stevens v. Burnham*, 62 Neb. 673, 87 N. W. 546,—holding that without special agreement, right to remove severable fixtures under lease, perishes on expiration of tenancy; *Mueller v. Chicago, M. & St. P. R. Co.* 111 Wis. 303, 87 N. W. 239, holding lean-to, put up by servant on master's premises not removable by servant after discharge.

Cited in footnotes to *Demby v. Parse*, 12 L. R. A. 87, which holds buildings erected by third person on land in life tenant's possession not removable against remainderman's objection; *Wright v. Du Bignon*, 57 L. R. A. 669, which denies right of tenant to remove fixtures annexed by him to freehold; *Baker v. McClurg*, 59 L. R. A. 131, which holds oven, engine, boilers and shafting put in building by tenant for use in bakery business, removable.

Cited in notes (10 L. R. A. 724) on what are fixtures; (64 L. R. A. 662) on tenant's duty to leave the premises in good condition, as to fixtures.

Right of third person to remove fixtures.

Cited in *Free v. Stuart*, 39 Neb. 226, 57 N. W. 991, holding that chattel mortgagee of removable building on leased premises cannot remove same after tenant loses right of removal; *Morey v. Hoyt*, 62 Conn. 549, 19 L. R. A. 615, 26 Atl. 127, holding that creditor's right to tenant's fixtures, removable under lease, is gone after tenant is out of possession; *Little Valeria Gold Min. & Mill. Co. v. Lambert*, 15 Colo. App. 448, 62 Pac. 964, holding that attaching creditor has no greater right in fixtures than debtor tenant.

9 L. R. A. 703, *INTERNATIONAL & G. N. R. CO. v. KEENAN*, 78 Tex. 294, 22 Am. St. Rep. 52, 14 S. W. 668.

Duty to inspect foreign cars.

Followed in *St. Louis, A. & T. R. Co. v. Putnam*, 1 Tex. Civ. App. 143, 20 S. W. 1002, holding railway company liable for injury to brakeman resulting from furnishing, without proper inspection, defective foreign car received from connecting line.

Cited in *Galveston, H. & S. A. R. Co. v. Nass*, 94 Tex. 258, 59 S. W. 870, holding railroad liable for failure to inspect foreign car; *Bennett v. Northern P. R. Co.* 2 N. D. 115, 13 L. R. A. 467, 49 N. W. 408, holding it railroad's duty to inspect foreign cars; *Missouri, K. & T. R. Co. v. Chambers*, 17 Tex. Civ. App. 492, 43 S. W. 1090, holding it question for jury whether ordinary care, required inside inspection of foreign car.

Cited in footnote to *Budge v. Morgan's L. & T. R. & S. S. Co.* 58 L. R. A. 333, which holds master failing to inspect foreign cars liable for consequences of defects discoverable by ordinary inspection.

Cited in note (41 L. R. A. 103) on rule as to inspection of foreign cars.

Delegation as excuse for nonperformance of duty.

Cited in *Texas & P. R. Co. v. Juneman*, 18 C. C. A. 397, 30 U. S. App. 541, 71 Fed. 943, holding railroad liable for injuries caused by crippled steer which employee fails to remove; *Burns v. Merchants & P. Oil Co.* 26 Tex. Civ. App. 226, 63 S. W. 1061, holding that duty of master to warn servant repairing cable, of danger from approaching engine, cannot be delegated.

Who are fellow servants.

Cited in *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 344, 16 L. R. A. 343, 37 Am. St. Rep. 348, 52 N. W. 942, holding car inspector not brakeman's fellow servant.

Cited in footnote to *Buck v. New Jersey Zinc Co.* 60 L. R. A. 453, which holds blacksmith in factory working link for chain to keep box of dump car in position, a fellow servant of one using car.

Cited in notes (18 L. R. A. 795) on who are fellow servants; (54 L. R. A. 103) on vice principalship as determined with reference to character of act causing injury.

9 L. R. A. 704, *EMMELUTH v. HOME BEN. ASSO.* 122 N. Y. 130, 25 N. E. 234.

Right of one to sue on contract with several.

Cited in *Brown v. Farnham*, 55 Minn. 36, 56 N. W. 352, holding that any creditor, party to composition agreement, may bring several action for breach; *Spencer v. Wabash R. Co.* 36 App. Div. 449, 55 N. Y. Supp. 948, holding that each member of theatrical company may maintain suit for breach of contract to carry baggage.

9 L. R. A. 706, *BOWERY NAT. BANK v. WILSON*, 122 N. Y. 478, 19 Am. St. Rep. 507, 25 N. E. 855.

Validity of assignment.

Cited in footnote to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable, right of purchaser at unlawful tax sale to have money refunded.

Cited in note (21 L. R. A. 798) on constitutionality of statutes restricting contracts and business.

— Unearned salary of public officer.

Cited in *Re Worthington*, 141 N. Y. 12, 23 L. R. A. 98, footnote p. 97, 35 N. E. 929, Affirming 51 N. Y. S. R. 557, 22 N. Y. Supp. 19, holding assignment of commissions by executor before accounting, void; *State use of Perkins v. Barnes*, 10 S. D. 311, 73 N. W. 80, holding assignment of future salary of fees of district attorney, void; *National Bank v. Fink*, 86 Tex. 304, 40 Am. St. Rep. 883, 24 S. W. 256, holding lien upon assessor's future fees, to secure discounted note, void.

Cited in footnotes to *State v. Williamson*, 21 L. R. A. 827, which holds assignment of unearned salary by mail carrier, void; *Edwards v. Randle*, 36 L. R. A. 174, which holds sale by postmaster of postoffice furniture and agreement to resign office, void; *White v. Cook*, 57 L. R. A. 417, which holds void, sale by sheriff to deputy of all work of office in one district and compensation for same; *Cansler v. Penland*, 48 L. R. A. 441, which holds void, contract by which sheriff turns over tax list to another to collect taxes on specified commission.

Distinguished in *Bowery Bank v. Gerety*, 153 N. Y. 412, 47 N. E. 793, Affirming 91 Hun, 540, 36 N. Y. Supp. 254, holding bank's remedy against accommodation indorsers not affected by taking void assignment of future fees of maker as public officer, as collateral; *Blake v. Bolte*, 10 Misc. 335, 31 N. Y. Supp. 124, holding that salary of judge may be reached by creditors after it is earned and paid.

9 L. R. A. 708, *JEMISON v. CITIZENS SAV. BANK*, 122 N. Y. 135, 19 Am. St. Rep. 482, 25 N. E. 264.

Notice of power or authority.

Approved in *Nuting v. Kings County Elev. R. Co.* 91 Hun, 257, 36 N. Y. Supp. 142, holding one dealing with agent of corporation bound to know extent of his authority; *Parmelee v. Associated Physicians & Surgeons*, 9 Misc. 460, 61 N. Y. S. R. 119, 30 N. Y. Supp. 250, holding one dealing with officer of corporation without inherent executive authority chargeable with notice of officer's apparent want of authority; *Brisay v. Star Co.* 13 Misc. 355, 35 N. Y. Supp. 99, holding one dealing with corporation bound to take notice of its powers and that ratification cannot make *ultra vires* act good; *Warner v. Scoharie & S. Mut. F. Ins. Asso.* 39 N. Y. S. R. 651, 15 N. Y. Supp. 632, holding member of mutual fire insurance association bound by its charter and that he must seek indemnity for loss in accordance with its rules and by-laws.

Cited in *Kelley v. Chenango Valley Sav. Bank*, 21 Misc. 243, 79 N. Y. S. R. 653, 45 N. Y. Supp. 651, holding depositor justified in relying on statement of treasurer authorized to receive and credit deposits in savings bank as to his authority to deliver pass book showing deposits in national bank doing business in same room.

Ultra vires contracts.

Approved in *Filon v. Miller Brewing Co.* 38 N. Y. S. R. 603, 15 N. Y. Supp. 57, holding guaranty of lease of saloon by brewing company *ultra vires*, although lessee agreed to buy his beer of the company; *Aaronson v. David Mayer Brewing Co.* 29 Misc. 292, 60 N. Y. Supp. 523, holding brewery company not liable on guaranty of its vice president of customer's lease of saloon where company had no knowledge of guaranty; *Kipp v. East River Electric Light Co.* 46 N. Y. S. R. 398, 19 N. Y. Supp. 387, holding contract of electric light company to pay funeral expenses of employee *ultra vires*, in absence of legal liability; *Brisay v. Star Co.* 13 Misc. 352, 35 N. Y. Supp. 99, holding offer of newspaper corporation to pay certain sum to heirs of person accidentally killed who may have upon his body copy of paper of current date, *ultra vires*; *Snow, C. & Co. v. Hall*, 19 Misc. 658, 44 N. Y. Supp. 427, holding that collection agency may recover from client for legal services incidental to its business that it caused to be rendered; *Kennan v. Rundle*, 81 Wis. 225, 51 N. W. 426, holding mutual insurance company without power, under statute, to take bond from policy holders to establish a guaranty fund; *McVity v. E. D. Albro Co.* 90 App. Div. 124, 86 N. Y. Supp. 144 (dissenting opinion), majority holding stockholder of foreign corporation entitled to have *ultra vires* contract rescinded; *Usher v. New York C. & H. R. R. Co.* 76 App. Div. 429, 78 N. Y. Supp. 508 (dissenting opinion), majority holding enforceable *ultra vires* contract for employment of injured servant for life against master having benefit thereof.

Estoppel to deny liability.

Cited in *Hutchison v. Rock Hill Real Estate & Loan Co.* 65 S. C. 61, 43 S. E.

295, holding corporation bound by action of secretary certifying that resolution, authorizing execution of bond and assignment of assets, had been passed.

Cited in notes (12 L. R. A. 168) on estoppel of corporation to deny liability on its contracts; (20 L. R. A. 768) on estoppel of corporation to set up plea of *ultra vires*.

Failure to disclose principal.

Cited in *Argersinger v. Macnaughton*, 114 N. Y. 539, 11 Am. St. Rep. 687, 21 N. E. 1022, holding failure of agent, contracting in his own name, to disclose name of principal renders agent personally liable.

Relation between bank and depositor.

Cited in *People ex rel. Newburgh Sav. Bank v. Peck*, 22 Misc. 483, 50 N. Y. Supp. 820, to point that relation between depositors and savings bank is that of debtor and creditor.

9 L. R. A. 711, *BOHAN v. PORT JERVIS GASLIGHT CO.* 122 N. Y. 18, 25 N. E. 246.

What are nuisances, and liability for same.*

Approved in *Moon v. National Wall Plaster Co.* 31 Misc. 633, 66 N. Y. Supp. 33, holding owner of factory liable for injury due to discharge of dust from defective machine, although he used due diligence to obviate trouble; *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 812, 12 L. R. A. 56, 12 S. E. 1085, holding noise of furniture factory materially impairing physical comfort, a nuisance; *Pach v. Geoffroy*, 67 Hun, 404, 22 N. Y. Supp. 275, granting injunction restraining tenant from operating dynamo and machinery in such manner as to constitute a private nuisance to the damage of another tenant; *Campbell v. United States Foundry Co.* 73 Hun, 578, 26 N. Y. Supp. 165, holding foundry company liable for loss by fire due to its failure to maintain spark arrester on top of chimney; *Morris v. Barrisford*, 9 Misc. 15, 29 N. Y. Supp. 17, holding one who maintains insecure awning over highway, liable for injury thereby inflicted on pedestrian; *Davis v. Niagara Falls Tower Co.* 25 App. Div. 328, 49 N. Y. Supp. 554, holding maintenance of tower upon which ice forms and drops on adjoining building to its damage, unlawful; *Albee v. Chappaqua Shoe Mfg. Co.* 62 Hun, 224, 16 N. Y. Supp. 687, holding company liable for injury due to frightening horse in highway by steam factory whistle; *Booth v. Rome, W. & O. R. Co.* 44 N. Y. S. R. 11, 17 N. Y. Supp. 336, holding railroad liable for injury to house caused by repeated concussions in blasting; *Sullivan v. Dunham*, 161 N. Y. 298, 47 L. R. A. 719, 76 Am. St. Rep. 274, 55 N. E. 923, holding one exploding blast on his own land without negligence, whereby piece of wood falls on traveler in highway, liable for injury inflicted; *Bates v. Holbrook*, 171 N. Y. 474, 64 N. E. 181, holding structures erected by subcontractors for carrying on work, nuisance when needlessly erected near hotel to proprietor's damage; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 7, 55 N. Y. Supp. 192, holding that franchise to manufacture gas which does not specify place or process of manufacture, does not relieve from liability for conducting its business so as to constitute nuisance.

Cited in *Reilly v. Erie R. Co.* 72 App. Div. 481, 76 N. Y. Supp. 620 (dissenting opinion), majority holding maintenance of dynamite magazine less than 1,000 feet from dwelling house private nuisance rendering owner liable to in-

jury due to explosion; *American Ice Co. v. Catskill Cement Co.* 43 Misc. 230, 88 N. Y. Supp. 455, holding owner of ice in river entitled to enjoin soot nuisance during harvesting season.

Cited in footnotes to *Wylie v. Elwood*, 9 L. R. A. 726, which holds coal sheds on railroad lands, a nuisance; *People v. Detroit White Lead Works*, 9 L. R. A. 722, which holds conduct of business with which smoke, soot, and noxious odors and gases inseparably connected, a nuisance; *Robb v. Carnegie Bros. & Co.* 14 L. R. A. 329, which holds operator of coke oven on own land liable for injuries to adjoining owners; *Fogarty v. Junction City Pressed Brick Co.* 18 L. R. A. 756, which holds generation of gas destroying growing crops on adjacent land, a nuisance; *Frost v. Berkeley Phosphate Co.* 26 L. R. A. 693, which holds owner of factory liable for damage by fumes; *Swift v. Broyles*, 58 L. R. A. 390, which sustains right to compensation for discomfort from noxious gases, etc., from chemical works on adjoining premises; *Susquehanna Fertilizer Co. v. Malone*, 9 L. R. A. 737, which holds business of manufacturing sulphuric acid and fertilizer, a nuisance; *Hauck v. Tide Water Pipe-Line Co.* 20 L. R. A. 642, which holds pipe-line proprietor absolutely liable for escape of oil; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L. R. A. 544, which denies to telephone company, injunction against operation of electric railway; *Rowland v. Miller*, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants;" *Haggart v. Stehlin*, 22 L. R. A. 577, which holds saloon in residence district previously free from such business, a nuisance; *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds noise from boiler works causing physical discomfort to occupants of dwelling, enjoinder.

Cited in notes (12 L. R. A. 54) on annoyance by noise as nuisance; (12 L. R. A. 577) on damages for pollution of water of stream.

Extent of damage.

Approved in *Roscoe Lumber Co. v. Standard Silica Cement Co.* 62 App. Div. 422, 70 N. Y. Supp. 1130, holding that owner need not be driven from dwelling by nuisance, but that it is enough if his enjoyment of light and property be rendered uncomfortable; *Emigrant Mission Committee v. Brooklyn Elev. R. Co.* 20 App. Div. 599, 47 N. Y. Supp. 344, holding injury from ashes and cinders dumped from engines in yards established without statutory authority, element of past damage only, but not fee damage.

Distinguished in *Farrell v. New York Steam Co.* 23 Misc. 726, 53 N. Y. Supp. 55, denying injunction to restrain operation of steam plant from which comes occasional disturbance, heat, odors, or cinders not due to negligence or amounting to nuisance.

Statutory authority.

Approved in *Morton v. New York*, 140 N. Y. 212, 22 L. R. A. 243, 35 N. E. 490, holding that legislative authority to shelter actual nuisance must be express or clearly implied; *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 273, 53 N. E. 44, holding that railroad cannot maintain bridge obstructing highway in absence of statutory authority expressed or clearly implied; *Garvey v. Long Island R. Co.* 159 N. Y. 331, 70 Am. St. Rep. 550, 54 N. E. 57, holding that statutory authority to operate steam surface railroad does not authorize maintenance of turn-table in immediate vicinity of inhabited dwellings; *Spring v. Delaware, L. & W. R. Co.* 88 Hun, 388, 34 N. Y. Supp.

810, holding railroad without right to maintain structure for coaling engines opposite dwelling house in absence of statutory authority expressed or clearly implied; *Fries v. New York & H. R. Co.* 169 N. Y. 277, 62 N. E. 358, holding railroad changing manner of operation from depressed cut to elevated viaduct in pursuance of statutory mandate not liable for remote or consequential damages to abutting owner; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 319, 25 L. R. A. 169, 24 S. W. 591, holding that statute making railroad liable for fires set by its locomotives does not impair obligation of contract in its charter authorizing use of steam power; *Kobbe v. New Brighton*, 20 Misc. 478, 45 N. Y. Supp. 777, holding legislature without power to authorize village to maintain crematory to the injury of private property; *Kobbe v. New Brighton*, 23 App. Div. 245, 48 N. Y. Supp. 990, holding village without right to maintain crematory constituting nuisance, in absence of statutory authority expressed or clearly implied; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 6, 58 L. R. A. 502, 64 N. E. 745, holding that public character of electric illuminating company's business does not entitle it to maintain nuisance; *Butler v. White Plains*, 59 App. Div. 36, 69 N. Y. Supp. 193, holding that statutory authority to justify pollution of stream with sewage must be express or unquestionably implied; *Hill v. New York*, 139 N. Y. 502, 34 N. E. 1090, holding city liable for consequential injuries due to dumping garbage from pier unless acting under statutory authority, expressly given or clearly implied.

Cited in *Welde v. New York & H. R. Co.* 168 N. Y. 602, 61 N. E. 554, raising but not deciding question whether abutting owner has right of action for maintenance of viaduct structure in presence of statutory authority; *Sadlier v. New York*, 40 Misc. 81, 81 N. Y. Supp. 308, holding owner entitled to compensation for injury to property by bridge authorized by legislature without provision for compensation for injuries.

Due process of law.

Cited in *Forster v. Scott*, 136 N. Y. 584, 18 L. R. A. 547, 32 N. E. 976, holding that statute denying compensation for building erected after filing map of proposed street deprives owner of property without just compensation; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 328, 25 L. R. A. 172, 24 S. W. 591, holding that statute making railroad liable for fires set by locomotives does not take its property without due process of law or contrary to law.

9 L. R. A. 722, *PEOPLE v. DETROIT WHITE LEAD WORKS*, 82 Mich. 471, 46 N. W. 735.

What constitutes nuisance.

Cited in *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 812, 12 L. R. A. 56, 12 S. E. 1085, holding noise of factory materially impairing comfort of neighborhood, public nuisance.

Cited in footnote to *Wylie v. Elwood*, 9 L. R. A. 726, which holds coal sheds on railroad lands a nuisance; *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds noise from boiler works, causing physical discomfort to occupants of dwelling, enjoined.

Necessity as excuse for nuisance.

Cited in *Austin v. Augusta Terminal R. Co.* 108 Ga. 712, 47 L. R. A. 772, 34 S. E. 852, by Lumpkin and Lewis, JJ., dissenting, who hold company liable for diminution in value of property through noise, smoke, and vibration incident to operation of railroad.

Previous establishment as excuse for nuisance.

Cited in *State ex rel. Board of Health v. Lederer*, 52 N. J. Eq. 677, 29 Atl. 444, holding that establishment of offensive business in uninhabited locality will not excuse continuance after occupation.

Cited in note (53 L. R. A. 894) on prescriptive right to maintain public nuisance.

— When business must be stopped.

Cited in *Northwood v. Barber Asphalt Paving Co.* 126 Mich. 288, 54 L. R. A. 456, footnote p. 454, 85 N. W. 724, holding that where no means devisable to prevent nuisance, business must be discontinued.

Distinguished in *Ballentine v. Webb*, 84 Mich. 47, 13 L. R. A. 324, 47 N. W. 485, holding slaughterhouse not abatable at instance of newcomers into neighborhood where not injurious to health.

Liability of officers for acts of corporation.

Cited in note (28 L. R. A. 427) on personal liability of officers of corporation for its torts or negligence.

Validity of ordinances coincident with general law.

Cited in *State v. Fourcade*, 45 La. Ann. 726, 40 Am. St. Rep. 249, 13 So. 187, holding ordinance not invalidated by existence of state statute relating to same subject; *Hood v. Von Glahn*, 88 Ga. 408, 14 S. E. 564, holding that existence of general law does not prevent delegation by legislature of power to enact municipal ordinance on same subject.

Cited in footnotes to *Ogden v. Madison*, 55 L. R. A. 506, which sustains city's power to impose penalty for keeping house of ill fame through misdemeanor under state statute; *Judy v. Lashley*, 57 L. R. A. 414, which denies power to make punishable by city ordinance, carrying of deadly weapons made punishable by state law.

Municipal power over nuisances.

Cited in notes (36 L. R. A. 603, 611) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 324) on municipal power over nuisances affecting safety, health, and personal comfort; (41 L. R. A. 326) on injunctions by municipal corporations against nuisances affecting public morals, peace, good order, and health and safety; (39 L. R. A. 552) on municipal control over smoke as public nuisance; (38 L. R. A. 646) on municipal power over nuisances relating to trade or business.

Nuisances; remedy.

Cited in *Grand Rapids v. Weiden*, 97 Mich. 85, 56 N. W. 233, holding bill to abate nuisance proper form of procedure.

9 L. R. A. 726, *WYLIE v. ELWOOD*, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 570.

What constitutes a nuisance.

Cited in *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 812, 12 L. R. A. 56, 12 S. E. 1085, holding factory a nuisance, if it materially impairs ordinary comfort of ordinary normal persons; *Bielman v. Chicago*, St. P. & K. C. R. Co. 50 Mo. App. 154, holding stockyards a nuisance where proximity to dwelling necessarily produces discomfort and destroys reasonable enjoyment of same.

Cited in footnote to *People v. Detroit White Lead Works*, 9 L. R. A. 722, which holds business with which smoke, soot, and noxious odors and gases inseparably connected, a nuisance.

Distinguished in *Flood v. Consumers Co.* 105 Ill. App. 566, refusing to enjoin construction of building where bill does not show, beyond doubt, structure to be a nuisance.

Remedy for special injury by nuisance.

Cited in *Crane Co. v. Stammers*, 83 Ill. App. 332, holding individual action for loss of eye available to party injured by public smoke and cinder nuisance; *Curran v. McGrath*, 67 Ill. App. 567, sustaining action by owner for depreciation in value of property though surrounding property similarly affected by noise, vibration, etc.; *Kuhn v. Illinois C. R. Co.* 111 Ill. App. 328, holding action maintainable for damages for injury to merchandise from smoke, soot, etc., escaping from roundhouse.

Cited in footnotes to *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which holds enjoynable, noise of boiler factory causing physical discomfort and annoyance to occupants of dwelling; *Farmers' Co-Op. Mfg. Co. v. Albemarle & R. R. Co.* 29 L. R. A. 700, which authorizes private action for public nuisance by one having common misfortune with class of persons, but not with entire public; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* 33 L. R. A. 542, which denies steamboat owner's right of action for obstructing navigation of river; *Griffith v. Holman*, 54 L. R. A. 178, which denies private individual's right to abate public nuisance consisting of fence across navigable stream; *Hill v. McBurney Oil & Fertilizer Co.* 52 L. R. A. 398, which authorizes injunction against blowing of loud factory whistle at unreasonable hours in populous community; *Jenkins v. Pennsylvania R. Co.* 57 L. R. A. 309, which sustains right to more than nominal damages for emission of smoke from locomotives denser than required.

Distinguished in *Illinois C. R. Co. v. Anderson*, 73 Ill. App. 626, holding grant of right of way to railroad with all necessary appurtenances, bars action by subsequent purchaser for damages caused by soot and noise.

Evidence of special injury by nuisance.

Cited in *Litchfield v. Whitenack*, 78 Ill. App. 367, holding evidence of effect of sewer odors upon family and visitors, admissible to show extent and character of injuries and power of nuisance to produce them; *Belvidere Gaslight & Fuel Co. v. Jackson*, 81 Ill. App. 429, holding condition of neighboring wells admissible to show extent, character, and production of injury by operation of gas plant; *Crane Co. v. Stammers*, 83 Ill. App. 333, holding evidence of injury to others by smoke and cinders competent to prove that nuisance might inflict injury complained of; *N. K. Fairbank Co. v. Bahre*, 112 Ill. App. 291, holding testimony of others than plaintiff admissible to prove that odors complained of were incapable of producing discomfort and sickness.

9 L. R. A. 731, *HOPKINS v. ENSIGN*, 122 N. Y. 144, 25 N. E. 306.

Agreements to refrain from bidding.

Cited in *De Baun v. Brand*, 61 N. J. L. 628, 41 Atl. 958, Reviewing 60 N. J. L. 287, 37 Atl. 726, upholding agreement not to bid at sale of testator's property in consideration of promise to pay legacy; *Barnes v. Morrison*, 97 Va. 380, 34 S. E. 93, holding agreement to make joint bid at judicial sale, without intention to sup-

press competition, valid; *Gulick v. Webb*, 41 Neb. 712, 43 Am. St. Rep. 720, 60 N. W. 13, upholding agreement by judgment lienors to make joint bid.

Cited in note (20 L. R. A. 545, 552) on effect of preventing or checking bids on validity of sales at auction.

9 L. R. A. 735, *ALEXANDER v. WILCOX*, 30 Neb. 793, 47 N. W. 81.

Adverse possession.

Cited in *Black v. Leonard*, 33 Neb. 747, 51 N. W. 126, and *Alexander v. Meadville*, 33 Neb. 221, 49 N. W. 1123, holding that adverse possession of lands as owner for ten years defeats prior tax-deed lien; *Meyer v. Lincoln*, 33 Neb. 570, 18 L. R. A. 150, 29 Am. St. Rep. 500, 50 N. W. 763, holding that full adverse possession of portion of city street for ten years vests title.

Cited in note (9 L. R. A. 773) on adverse possession under color of title.

Statute of limitations.

Cited in *Darr v. Wisner*, 63 Neb. 308, 88 N. W. 518, and *Alexander v. Thacker*, 43 Neb. 497, 61 N. W. 738, holding action to foreclose tax lien barred five years after time to redeem ends; *Warren v. Demary*, 33 Neb. 329, 50 N. W. 15, holding action to foreclose brought nearly ten years after issue of tax deed, barred.

Corrected in *Fuller v. Colfax County*, 33 Neb. 725, 50 N. W. 1044, holding tax deed issued more than three years after expiration of time to redeem, invalid.

Sales for taxes.

Cited in note (9 L. R. A. 769) on service by publication.

9 L. R. A. 737, *SUSQUEHANNA FERTILIZER CO. v. MALONE*, 73 Md. 268, 25 Am. St. Rep. 595, 20 Atl. 900.

Nuisance.

Cited in *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 227, 28 Atl. 702, enjoining operation of fertilizer plant in populous neighborhood, where nausea, sickness, and depreciation of property resulted; *Pittsburgh, C. C. & St. L. R. Co. v. Crothersville*, 159 Ind. 335, 64 N. E. 914, holding proof of similar nuisances existing in neighborhood no excuse for continuance of one complained of.

Cited in footnotes to *Swift v. Broyles*, 58 L. R. A. 390, which sustains right to compensation for discomfort from noxious gases, etc., from chemical works on adjoining premises; *Rowland v. Miller*, 22 L. R. A. 182, which holds offensive undertaking business, violation of restrictive covenant even though not a nuisance.

— Necessity for material injury.

Cited in *Euler v. Sullivan*, 75 Md. 618, 32 Am. St. Rep. 420, 23 Atl. 845, overruling instruction that smoke, steam, and cinders rendering premises "less" comfortable and useful, constitutes nuisance; *Sayre v. Newark*, 58 N. J. Eq. 147, 42 Atl. 1068, enjoining construction of large sewer discharge within 60 feet of complainant's wharfage premises as anticipatory material injury.

— Use of care.

Cited in *Frost v. Berkeley Phosphate Co.* 42 S. C. 410, 26 L. R. A. 696, 46 Am. St. Rep. 736, 20 S. E. 280, holding that injury by phosphate-factory gases supports action in spite of care used in process; *People v. Burtleson*, 14 Utah, 264, 47 Pac. 87, holding that care in conduct of lawful business does not relieve party injuring others thereby from liability for nuisance; *Euler v. Sullivan*, 75 Md. 620,

32 Am. St. Rep. 420, 23 Atl. 845, holding instruction to find for defendant if factory conducted in reasonable manner in manufacturing district, erroneous; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 572, 63 Am. St. Rep. 533, 39 Atl. 270, holding injury to property and comfort by gases support action, though emitted in lawful business carefully conducted in factory district.

— **Prior location.**

Cited in *Baltimore v. Fairfield Improv. Co.* 87 Md. 364, 40 L. R. A. 496, 67 Am. St. Rep. 344, 39 Atl. 1081, holding prior location of pesthouse in secluded locality no bar to action by parties subsequently locating near by, as to whom it is nuisance, where right to maintain such nuisance not prescriptive; *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 10, 58 L. R. A. 504, footnote p. 500, 64 N. E. 745, holding that tenant under lease executed during continuance of nuisance may maintain action to abate same; *Lurssen v. Lloyd*, 76 Md. 367, 25 Atl. 294, holding evidence of sale of premises to mortgagee on foreclosure irrelevant in action by mortgagor in possession for injuries caused by nuisance.

9 L. R. A. 740, *CLARK v. LINDSEY*, 47 Ohio St. 437, 25 N. E. 422.

Effect of tax sale on dower right.

Cited in *Clason v. Ward*, 1 Ohio N. P. 219, holding right of doweress not forfeited until one year after sale for taxes.

Distinguished in *Tullis v. Pierano*, 9 Ohio C. C. 651, holding that subsequent purchase by heirs of landowner from purchaser at tax sale does not reinvest widow's dower.

Rights of tenant in common paying taxes.

Cited in *Hake v. Lee*, 106 La. 485, 31 So. 54, holding cotenant purchasing at tax sale only acquires claim against coowners for reimbursement.

Cited in note (9 L. R. A. 769) on redemption from tax sale.

9 L. R. A. 744, *WESTERN U. TELEG. CO. v. SHORT*, 53 Ark. 434, 14 S. W. 649.

Liability for negligence in transmission of messages.

Cited in *Mitchell v. Western U. Teleg. Co.* 12 Tex. Civ. App. 281, 33 S. W. 1016, and *Reed v. Western U. Teleg. Co.* 135 Mo. 673, 34 L. R. A. 497, 58 Am. St. Rep. 609, 37 S. W. 904, holding that telegraph company cannot, by contract, exempt itself from liability for servant's negligence; *Fleischner v. Pacific Postal Teleg. Cable Co.* 55 Fed. 742, holding telegraph company liable for operator's failure to inform sender of important message, of break in line notwithstanding stipulation against liability for unrepeatd message; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 696, 56 L. R. A. 493, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority holding that contract valid where made exempting telegraph company from liability for mistakes in unrepeatd message will be sustained in other state.

Cited in footnotes to *Coit v. Western U. Teleg. Co.* 53 L. R. A. 678, which holds one requesting information bound by correspondent's agreement with telegraph company limiting liability; *Brown v. Postal Teleg. Cable Co.* 17 L. R. A. 648, which holds limitation of amount of liability for mistake in transmitting telegram, void as to mistake caused by negligence; *Birkett v. Western U. Teleg. Co.* 33 L. R. A. 404, which holds valid, condition against liability beyond amount paid for sending unrepeatd message.

Cited in notes (13 L. R. A. 510) on effect of stipulations in contract to transmit telegrams; (11 L. R. A. 102) on stipulation for sixty days' notice in contracts for delivering telegrams.

Recovery of damages incidentally resulting from breach of contract.

Cited in *Western U. Teleg. Co. v. Henley* 23 Ind. App. 25, 54 N. E. 775, denying liability of telegraph company failing to deliver message, for mental distress suffered by sender through not being met at railroad station; *Murrell v. Pacific Exp. Co.* 54 Ark. 25, 26 Am. St. Rep. 17, 14 S. W. 1098, holding express company, without notice, not liable for difference between special sale and market price of goods delayed in shipment; *Moffitt-West Drug Co. v. Byrd*, 34 C. C. A. 354, 92 Fed. 293, holding incidental expenses of purchaser in connection with contract of sale not recoverable.

Cited in note (53 L. R. A. 38, 42, 94, 96) on loss of profits as an element of damages for breach of contract.

Liability for mistake in unrepeatable message.

Cited in *Western U. Teleg. Co. v. Lyman*, 3 Tex. Civ. App. 464, 22 S. W. 656, holding that failure to repeat message does not excuse negligent misdirection.

Powers of telegraph companies.

Cited in footnote to *State, Duke, Prosecutor, v. Central N. J. Teleph. Co.* 11 L. R. A. 664, which holds company organized under act to regulate telegraph companies may condemn route for telephone lines.

Limitation of right to contract.

Cited in *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 417, 23 L. R. A. 269, 41 Am. St. Rep. 109, 25 S. W. 75, holding act prohibiting withholding of discharged employee's wages, unconstitutional as to persons, but valid as to corporations.

9 L. R. A. 748, *BURBANK v. BURBANK*, 152 Mass. 254, 25 N. E. 427.

9 L. R. A. 750, *LOUISVILLE, N. A. & C. R. CO. v. NITSCHKE*, 126 Ind. 229, 22 Am. St. Rep. 582, 26 N. E. 51.

Complaint in actions for permitting fire to spread.

Explained in *Miller v. Miller*, 17 Ind. App. 612, 47 N. E. 338, holding that complaint alleging fire set "purposely, wrongfully, and negligently" proceeds upon theory of negligence.

Cited in *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 72, 30 N. E. 812, holding complaint alleging negligent escape of fire from defendant's premises sufficient; *Louisville, N. A. & C. R. Co. v. Palmer*, 13 Ind. App. 162, 39 N. E. 881, holding allegation that fire was negligently permitted to escape to plaintiff's premises essential; *Lake Erie & W. R. Co. v. Lowder*, 7 Ind. App. 544, 34 N. E. 447, holding that complaint charging negligence in permitting fire to spread from train wreck to plaintiff's property states cause of action; *Wabash R. Co. v. Schultz*, 30 Ind. App. 499, 64 N. E. 481, holding paragraph of complaint charging negligence in permitting fire to escape from right of way, sufficient.

Distinguished in *Lake Erie & W. R. Co. v. Miller*, 9 Ind. App. 194, 36 N. E. 428, holding that allegation of negligence in relation to spark-arresters does not state cause of action for negligently permitting fire to escape from premises.

Liability for starting fire on one's own premises.

Cited in *Brummit v. Furness*, 1 Ind. App. 410, 50 Am. St. Rep. 215, 27 N. E. 656, holding setting fire to peat bed extending into neighbor's land, in dry time, negligence; *Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 18, 38 N. E. 534, holding railroad liable for negligently permitting fire to escape from right of way; *Tien v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 307, 44 N. E. 45, raising, without deciding, question whether setting fire to burn over right of way positive wrong, permitting recovery independent of negligence; *Chicago & E. R. Co. v. Smith*, 6 Ind. App. 266, 33 N. E. 241, holding that presence of combustible material on adjoining land imposes duty on railroad company to exercise greater care against setting fires.

Cited in notes (21 L. R. A. 258, 260) on liability for setting fires which spread to property of others; (11 L. R. A. 506, 507) on right of railroad company to burn combustibles on its right of way.

Proximate cause.

Cited in *Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 34, 30 N. E. 696, holding fire set on railroad land, burning over intervening lands, subdued several times but again breaking out, proximate cause of resulting injury; *Pittsburgh, C. C. & St. L. R. Co. v. Iddings*, 28 Ind. App. 512, 62 N. E. 112, holding negligence in permitting fire to spread from right of way to adjoining lands proximate cause of destruction of roadway; *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 229, 56 N. E. 451, and *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 405, 53 N. E. 1033, holding fire, negligently started in adjoining premises, passing to plaintiff's property without intervention of independent human agency, proximate cause of resulting injury; *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 220, 28 N. E. 328, holding fire escaping to adjoining pasture proximate cause of injury to stock wandering into it; *Union P. R. Co. v. McCollum*, 2 Kan. App. 327, 43 Pac. 97, and *Lake Erie & W. R. Co. v. Keiser*, 25 Ind. App. 425, 58 N. E. 505, holding ordinary wind, causing fire to break forth afresh, not intervening cause; *Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 637, 38 N. E. 342, holding fire carried by wind across intervening premises, proximate cause of resulting injury; *Reid v. Evansville & T. H. R. Co.* 10 Ind. App. 390, 53 Am. St. Rep. 391, 35 N. E. 703, holding railroad's delay in forwarding car not proximate cause of destruction by fire from adjacent building; *Davis v. Williams*, 4 Ind. App. 491, 31 N. E. 204, holding owner of dead dog placed in highway without his knowledge not liable to person whose horse was frightened thereby; *Knouff v. Logansport*, 26 Ind. App. 206, 84 Am. St. Rep. 292, 59 N. E. 347, holding failure to maintain railing at abutment proximate cause of injury to one falling over while dodging bicycle; *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 395, 26 N. E. 64, holding hand car wrongfully placed on highway proximate cause of injuries received through horse's taking fright at it; *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 316, 65 N. E. 591, holding unsafe embankment proximate cause of death of quarry employee leaping from runaway car, and rolling under wheels; *Chicago & E. R. Co. v. Lesh*, 158 Ind. 424, 63 N. E. 794, holding ordinary wind not a new and independent intervening agency in spread of fire.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform heavy doors blown on track by severe gale not proximate cause of derailment of engine.

Cited in note (17 L. R. A. 38) on effect of concurring negligence of third person on liability of one sued for negligently causing injury.

9 L. R. A. 754, CLEVELAND, C. C. & I. R. CO. v. CLOSSER, 126 Ind. 348, 3 Inters. Com. Rep. 387, 22 Am. St. Rep. 593, 26 N. E. 159.

Discrimination in charges by corporations.

Cited in Indiana Natural Illuminating Gas Co. v. State, 158 Ind. 523, 57 L. R. A. 763, 63 N. E. 220, holding that option to charge meter or "flat" rates for gas to consumers does not authorize charging meter rate to one person only; Lovejoy v. Michels, 88 Mich. 28, 13 L. R. A. 775, 49 N. W. 901 (concurring opinion), holding combination to control prices, unlawful; Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 4 Inters. Com. Rep. 581, 9 C. C. A. 664, 27 U. S. App. 1, 61 Fed. 997, holding pooling-railway agreement void.

Cited in footnotes to Cook v. Chicago, R. I. & P. R. Co. 9 L. R. A. 764, which holds allowance of rebate to some customers unjust discrimination; Fitzgerald v. Grand Trunk R. Co. 13 L. R. A. 70, which holds agreement for rebate to one shipper illegal; Bagg v. Wilmington, C. & A. R. Co. 14 L. R. A. 596, which holds act compelling shipment of freight within specified time not interference with commerce; Western U. Teleg. Co. v. Call Pub. Co. 27 L. R. A. 622, which authorizes difference in telegraph rates to morning and evening paper.

Cited in notes (12 L. R. A. 436) on rates of freight, long and short hauls and interstate commerce regulations; (18 L. R. A. 105) on right of carrier at common law to discriminate between passengers and shippers.

Knowledge of corporate agents, as notice.

Cited in Indiana, I. & I. R. Co. v. Snyder, 140 Ind. 660, 39 N. E. 912, holding knowledge of carpenter making car handles, of defective handle, notice to master.

Special findings and evidence supporting judgment.

Cited in Kedey v. Petty, 153 Ind. 185, 54 N. E. 798, and Becknell v. Hosier, 10 Ind. App. 8, 37 N. E. 580, holding special verdict to be considered, not in detachments, but as a whole; Ellinger v. Rawlings, 12 Ind. App. 340, 40 N. E. 146, sustaining judgment for goods sold and delivered where part of them, not like sample, were not promptly returned; Merritt v. Temple, 155 Ind. 498, 58 N. E. 699, holding that if special finding, taken as a whole, supports judgment, it must stand.

Authority of railroad commissioners.

Cited in footnote to State *ex rel.* Tompkins v. Chicago, M. & St. P. R. Co. 47 L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

Power of legislature to regulate freights and fares.

Cited in Indianapolis v. Navin, 151 Ind. 144, 41 L. R. A. 340, 47 N. E. 525, upholding constitutionality of 3-cent fare act.

Cited in notes (11 L. R. A. 247) on power of Congress to regulate commerce; (11 L. R. A. 452) on state regulation of fares and freights; (13 L. R. A. 107) on power of state law to regulate interstate commerce.

9 L. R. A. 764, COOK v. CHICAGO, R. I. & P. R. CO. 81 Iowa, 551, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080.

Discriminating rates by carrier.

Followed in Blair v. Sioux City & P. R. Co. 109 Iowa, 380, 80 N. W. 673, L. R. A. Au.—Vol. II.—17.

holding that railroads, entering agreement for joint rates, create new line, subject to law preventing discrimination.

Cited in *Kidder v. Fitchburg R. Co.* 165 Mass. 400, 43 N. E. 115, upholding right of express company to same privileges and facilities as those furnished others by railroad company; *Kelly v. Chicago, M. & St. P. R. Co.* 93 Iowa, 449, 61 N. W. 957, denying that unjust discrimination is shown by company furnishing free transportation, when rates charged others are reasonable; *Western U. Teleg. Co. v. Call Pub. Co.* 44 Neb. 346, 27 L. R. A. 628, 48 Am. St. Rep. 729, 62 N. W. 506 (dissenting opinion), majority denying telegraph company's liability to repay excess of usual rate, transmission being made under different circumstances.

Common law as to discrimination.

Cited in *Murray v. Chicago & N. W. R. Co.* 62 Fed. 44, and *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 872, holding that common law gives shipper right of action for fraudulent discrimination, independent of interstate law.

Cited in note (18 L. R. A. 105) on right of carrier at common law to discriminate between passengers or shippers.

Distinguished in *Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 143, 28 L. R. A. 566, 63 N. W. 589, denying that common law is part of national jurisdiction authorizing state to recover freight overcharges on interstate shipment; *Beadle v. Kansas City, Ft. S. & M. R. Co.* 51 Kan. 252, 32 Pac. 910, holding provisions of statute allowing treble damages for overcharge by carrier, substituted for common-law action.

Operation of statute of limitations.

Followed in *Cole v. Charles City Nat. Bank*, 114 Iowa, 635, 87 N. W. 671, denying that statute of limitations begins to run till discovery of mistake in bank account.

Cited in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 871, holding that statute does not begin to run against shipper's action for fraudulent discrimination until fraud discovered.

Cited in note (25 L. R. A. 567) on how far statute of limitations will be regarded as having abrogated maxim that one cannot profit by his own wrong.

Disapproved in effect in *McBride v. Burlington, C. R. & N. R. Co.* 97 Iowa, 95, 59 Am. St. Rep. 395, 66 N. W. 73, denying that operation of statute is interrupted by company's concealment of facts concerning accident.

9 L. R. A. 767, *BROWN v. POOL*, 81 Iowa, 455, 46 N. W. 1069.

Erroneously cited in *Lowry v. Chicago, B. & Q. R. Co.* 46 Fed. 85, on subject of discriminating rates by carriers.

Notice to redeem from tax sale.

Cited in *Shelley v. Smith*, 97 Iowa, 264, 66 N. W. 172, holding one improving and tilling land in same quarter section entitled to notice to redeem; *Seymour v. Harrison*, 85 Iowa, 136, 52 N. W. 114, holding notice to redeem unnecessary when property sold in name of person taxed.

Repayment by contribution among cotenants.

Cited in note (9 L. R. A. 740) on right to reimbursement by contribution among cotenants.

9 L. R. A. 770, *SENECA MIN. CO. v. SECRETARY OF STATE*, 82 Mich. 573, 47 N. W. 25.

When amendments become operative.

Followed in *Re Joslyn*, 117 Mich. 443, 75 N. W. 930, holding that amendment to Constitution raising salary of judges becomes operative at time of ratification.

Cited in *State v. Kyle*, 166 Mo. 297, 56 L. R. A. 118, footnote, p. 115, 65 S. W. 763, holding amendment to Constitution making information and indictment concurrent remedies operative from time of canvass of votes.

Constitutional conventions and amendments.

Cited in footnotes to *State ex rel. Torryson v. Grey*, 19 L. R. A. 134, which holds publication of proposed constitutional amendments sixteen to eighteen months before election, allowable; *State ex rel. Wineman v. Dahl*, 34 L. R. A. 97, which holds submission to popular vote of proposal for constitutional convention properly made by legislature; *Worman v. Hagan*, 21 L. R. A. 716, which holds governor's proclamation of adoption of constitutional amendment conclusive; *Com. ex rel. Elkin v. Griest*, 50 L. R. A. 568, which holds governor's approval of proposed constitutional amendment, unnecessary; *Edwards v. Lesueur*, 31 L. R. A. 815, which holds proposed constitutional amendment for changing location of seat of state government not invalidated by new conditions imposed.

9 L. R. A. 772, *CRAMER v. CLOW*, 81 Iowa, 255, 47 N. W. 59.

Adverse possession.

Followed in *Boling v. Clark*, 83 Iowa, 483, 50 N. W. 57, holding ten years of notorious adverse possession based upon contract by husband, sufficient, against wife's interest.

Cited in *Independent District v. Fagen*, 94 Iowa, 678, 63 N. W. 456, holding ten years' adverse possession by school district sufficient to support action to quiet title.

Cited in footnotes to *Sontag v. Bigelow*, 16 L. R. A. 326, which holds master's deed in partition proceedings sufficient color of title upon which to found claim of adverse possession; *Alexander v. Wilcox*, 9 L. R. A. 735, which holds title acquired as against lien of tax deed by ten years' adverse possession.

Cited in notes (9 L. R. A. 769) on constructive notice; service by publication; (13 L. R. A. 207) on defenses in action of ejectment.

9 L. R. A. 777, *SWEESEY v. SPARLING*, 81 Iowa, 433, 25 Am. St. Rep. 506, 46 N. W. 1068.

Homestead rights.

Cited in footnote to *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in note (11 L. R. A. 705) on judgment lien subject to homestead right.

9 L. R. A. 780, *TRAGESSER v. GRAY*, 73 Md. 250, 20 Am. St. Rep. 587, 20 Atl. 905.

Police power.

Cited in *State v. Heinemann*, 80 Wis. 258, 27 Am. St. Rep. 34, 49 N. W. 818,

holding statute imposing penalty upon keeping retail pharmacy without having registered pharmacist in employ, valid.

Cited in note (14 L. R. A. 582, 584) on constitutional equality of privileges, immunities, and protection.

Distinguished in *Templar v. State Examiners*, 131 Mich. 258, 90 N. W. 1058, holding unconstitutional act prohibiting issuance of barbers' licenses to aliens.

Regulation of sale of intoxicating liquors.

Cited in *State ex rel. George v. Aiken*, 42 S. C. 235, 26 L. R. A. 353, 20 S. E. 221, holding statute regulating time and place of sale, and permitting sale only by state officers, valid; *State ex rel. Noble v. Cheyenne*, 7 Wyo. 437, 40 L. R. A. 716, 52 Pac. 975, holding ordinance vesting discretionary power in municipal council to issue licenses, valid; *Farmville v. Walker*, 101 Va. 327, 61 L. R. A. 127, 99 Am. St. Rep. 870, 43 S. E. 558, holding constitutional, act permitting town to establish dispensary for exclusive sale of liquors.

Cited in footnotes to *Com. v. Fowler*, 33 L. R. A. 839, which sustains restraint of sales of liquor by druggists for medicinal purposes except on physician's prescription; *State v. Gerhardt*, 33 L. R. A. 313, which upholds requirement for locking doors of room where liquor sold during prohibited hours; *Bennett v. Pulaaski*, 47 L. R. A. 278, which sustains ordinance for closing saloons between ten and four at night and on Sundays, but not requirement for removing curtains on front doors and windows.

Cited in notes (46 L. R. A. 417) on liability of carrier for transporting intoxicating liquors; (10 L. R. A. 616) on interstate commerce; importations of intoxicating liquors; sale by importer.

Distinguished in *Ex parte Theisen*, 30 Fla. 537, 32 Am. St. Rep. 36, 11 So. 901, holding ordinance prohibiting use of state liquor license within certain distance of church or school, except with consent of common council, void.

9 L. R. A. 786, *MAGENAU v. FREMONT*, 30 Neb. 843, 27 Am. St. Rep. 436, 47 N. W. 280.

Validity of acts of de facto officer.

Cited in *Waite v. Santa Cruz*, 184 U. S. 323, 46 L. ed. 566, 22 Sup. Ct. Rep. 327, Reversing 89 Fed. 628, holding act of *de facto* officer in signing city bonds valid as to public and third persons.

Cited in footnote to *Oliver v. Jersey City*, 48 L. R. A. 412, which holds unauthorized acceptance of second office does not prevent one from being *de facto* officer on continuing performance of duties of first office.

Transaction of business in municipal bodies.

Cited in *Moore v. Perry*, 119 Iowa, 427, 93 N. W. 510, holding business presentable at special meeting of council, properly considered at adjourned session thereof.

Cited in footnotes to *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-thirds majority of all members elected to council to pass ordinance over veto though some seats vacant; *Board of Education v. Best*, 27 L. R. A. 77, which holds mandatory, provision for requiring ayes and nays on motion to employ teacher.

— Powers of executive officers.

Cited in footnotes to *Cate v. Martin*, 48 L. R. A. 613, which denies mayor's power to veto action by aldermen in passing on election for member of board;

Brown v. Foster, 31 L. R. A. 116, which authorizes mayor to vote only to break tie; *State ex rel. Young v. Yates*, 37 L. R. A. 205, which holds mayor's right to casting vote in case of tie not restricted by provision requiring majority vote of all members of council; *State ex rel. Morris v. McFarland*, 39 L. R. A. 282, which holds auditor's right to give casting vote on tie vote by township trustees not limited to vote by ballot; *Wooster v. Mullins*, 25 L. R. A. 694, which authorizes casting vote by mayor where three newspapers receive each the votes of four aldermen.

Tax on occupations.

Followed in *York v. Chicago, B. & Q. R. Co.* 56 Neb. 580, 76 N. W. 1065, denying that statute imposing occupation tax upon common carrier is violation of Constitution; *Steidl v. State*, 63 Neb. 697, 88 N. W. 853, holding money paid for occupation license, license money, not tax; *Templeton v. Tekamah*, 32 Neb. 544, 49 N. W. 373, denying that law authorizing cities to collect occupation tax is unconstitutional.

Cited in *German-American F. Ins. Co. v. Minden*, 51 Neb. 874, 71 N. W. 995, sustaining right of city to impose occupation tax upon insurance company, applying proceeds to support fire department; *Western U. Teleg. Co. v. Fremont*, 39 Neb. 698, 26 L. R. A. 700, 5 Inters. Com. Rep. 51, 58 N. W. 415, upholding city's right to collect occupation tax from telegraph company; *State ex rel. School District v. Aiken*, 61 Neb. 493, 85 N. W. 395, and *German-American F. Ins. Co. v. Minden*, 51 Neb. 877, 71 N. W. 995, denying city's authority to make payment of occupation tax condition precedent to conducting business; *State ex rel. School District v. Boyd*, 63 Neb. 836, 58 L. R. A. 111, 89 N. W. 417 (dissenting opinion), majority holding ordinance adopted to raise revenue by imposing occupation assessment, tax ordinance.

Cited in footnotes to *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers, but not others, whose business is less than \$1,000; *Child v. Bemus*, 12 L. R. A. 57, which holds discretionary power granted mayor to revoke licenses not unreasonable; *Perry v. Salt Lake City*, 11 L. R. A. 446, which holds that city council has wide discretion as to granting of licenses; *Hoefling v. San Antonio*, 16 L. R. A. 608, which holds that city cannot levy occupation tax on persons not similarly taxed by state; *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; *Knisely v. Cotterel*, 50 L. R. A. 86, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade.

Cited in note (60 L. R. A. 341) on constitutional equality in the United States in relation to corporate taxation.

Overruled in *Rosenbloom v. State*, 64 Neb. 347, 57 L. R. A. 924, 89 N. W. 1053, holding statute authorizing imprisonment for nonpayment of license tax, valid.

Constitutional protection of political and property rights.

Cited in *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 489, 41 L. R. A. 627, 76 N. W. 175, sustaining power of courts to declare statute invalid which deprives voters of cities from choosing their own officers.

Cited in note (11 L. R. A. 286) on constitutional protection of property rights.

Enforceability of valid parts of statute or ordinance.

Cited in *State ex rel. Farmers Mut. Ins. Co. v. Moore*, 48 Neb. 877, 67 N. W. 876,

holding constitutional portions of statute will be sustained if separable from invalid part; *State ex rel. Wheeler v. Stuhrt*, 52 Neb. 217, 71 N. W. 941, upholding valid provisions of statute, illegal in part; *Re Langston*, 55 Neb. 313, 75 N. W. 828, upholding valid parts of ordinance prohibiting keeping billiard rooms without license.

9 L. R. A. 792, *WILSON v. BROOKSHIRE*, 126 Ind. 497, 25 N. E. 131.

Rule as to profiting out of trust relation.

Cited in *Taylor v. Calvert*, 138 Ind. 76, 37 N. E. 531, holding that guardian cannot obtain title adverse to ward's, even without intending fraud; *Frazier v. Jeakins*, 64 Kan. 618, 57 L. R. A. 577, footnote p. 575, 68 Pac. 24, holding guardian's sale to her husband void.

Cited in footnotes to *Clark v. American Coal Co.* 17 L. R. A. 557, which holds ratifiable, contract by which agent gets stock in corporation from which he purchases for principal; *Strong v. Brennan*, 47 L. R. A. 792, which denies right of attorney to recover for services to association employing him when also engaged and paid by adverse party; *Harrison v. Mulvane*, 54 L. R. A. 405, which holds one charged with selling corporate stock to pay encumbrances one of which he owns, not forbidden, as trustee, to buy prior liens to protect own interests.

Cited in notes (12 L. R. A. 396) on agent, acting in double capacity; (13 L. R. A. 492) on purchase by trustee of objects of trust; (13 L. R. A. 493) on effect of purchase by trustee; (13 L. R. A. 494) on setting aside sale of trust property to trustee.

Statute of limitations.

Cited in *Parks v. Satterthwaite*, 132 Ind. 415, 32 N. E. 82, holding that in continuing trust, where demand is necessary, statute does not begin to run until such demand has been made; *Jefferson School Twp. v. Worthington*, 5 Ind. App. 589, 32 N. E. 807, holding six years' statute of limitations applicable to action to recover tax moneys converted by school township; *Morgan v. King*, 27 Colo. 559, 63 Pac. 416, holding five-year statute applicable in cases of fraud where trust relation exists, three-year statute, otherwise.

New trial as matter of right.

Cited in *Rariden v. Rariden*, 129 Ind. 290, 28 N. E. 701, holding assignee, seeking to establish right to foreclose mortgage, not entitled to new trial as matter of right; *Pool v. Davis*, 135 Ind. 329, 34 N. E. 1130, holding that no question of title being involved in issues adjudged against a party, new trial as matter of right is not given by statute; *Roeder v. Keller*, 135 Ind. 697, 35 N. E. 1014, holding new trial not given as matter of right in action for subrogation; *Seisler v. Smith*, 150 Ind. 93, 46 N. E. 993; *Corbin v. Thompson*, 141 Ind. 314, 40 N. E. 532; *Bennett v. Closson*, 138 Ind. 551, 38 N. E. 46,—holding that where in one of two joined substantive causes of action, losing party is not entitled to new trial, new trial will not be granted; *Jones v. Peters*, 28 Ind. App. 387, 62 N. E. 1019, holding new trial as of right properly denied, in action to quiet title and declare deed a mortgage; *Richwine v. Presbyterian Church*, 135 Ind. 86, 34 N. E. 737, holding new trial as of right not demandable where action is substantially one for injunction and damages; *Schlichter v. Taylor*, 31 Ind. App. 169, 67 N. E. 556, denying new trial in partition, defendant claiming title and possession under oral contract.

Title to real estate.

Cited in *Branson v. Studabaker*, 133 Ind. 164, 33 N. E. 98, holding title in fee acquirable by possession or limitation.

9 L. R. A. 798, *HENDRY v. SQUIER*, 126 Ind. 19, 25 N. E. 830

Breach of agreement to repair.

Cited in *Hanson v. Cruse*, 155 Ind. 178, 57 N. E. 904, denying damages to tenant for injuries resulting from obvious defects which landlord agreed to repair; *Hamilton v. Feary*, 8 Ind. App. 621, 52 Am. St. Rep. 485, 35 N. E. 48, denying landlord's liability for breach of covenant to repair well, causing injury to tenant.

9 L. R. A. 801, *HANAW v. BAILEY*, 83 Mich. 24, 46 N. W. 1039.

Acts of party not affecting appeal.

Cited in *Whittaker v. Deadwood*, 12 S. D. 610, 82 N. W. 202, holding payment of tax in suit, under protest, to save sale of property not ground for dismissing appeal.

Effect of absence of re-entry clause in lease.

Distinguished in *Ganson v. Baldwin*, 93 Mich. 221, 53 N. W. 171, upholding action to recover land upon defendant's breach of agreement to support grantor, although re-entry clause is absent; *Re Pennewell*, 55 C. C. A. 574, 119 Fed. 142, holding lease not forfeitable for violation of stipulation against subletting, in absence of provision therefor.

9 L. R. A. 803, *KING v. WELBORN*, 83 Mich. 195, 47 N. W. 106.

Rights in homestead.

Approved in *Lamont v. Le Fevre*, 96 Mich. 173, 55 N. W. 687, sustaining homestead exemption in land purchased for homestead upon which building is erected and occupied by owner for residence and hotel; *De Ford v. Painter*, 3 Okla. 99, 30 L. R. A. 728, 41 Pac. 96, holding building in business part of city exempt as homestead where owner resides on part of second floor, and remainder of building rented for offices and stores; *Lawrence v. Morse*, 122 Mich. 271, 80 N. W. 1087, holding tenant in common entitled to benefit of homestead; *Smith v. Guckenhimer*, 42 Fla. 47, 27 So. 900 (dissenting opinion), majority holding that entire block not wholly used as homestead cannot be set aside as exempt.

Cited in footnote to *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in note (11 L. R. A. 705) on judgment liens subject to homestead right.

9 L. R. A. 807, *WRIGHT v. MULVANEY*, 78 Wis. 89, 23 Am. St. Rep. 393, 46 N. W. 1045.

Water rights.

Cited in notes (12 L. R. A. 637) on qualified property in water front; (12 L. R. A. 673) on paramount rights of navigation and commerce; (64 L. R. A. 982, 983) on liabilities for injuries caused by attempted exercise of rights of navigation.

Rights as to fishing.

Approved in *Kuehn v. Milwaukee*, 83 Wis. 588, 18 L. R. A. 556, 53 N. W. 912,

holding injury to public fishery in navigable stream not ground for private suit by individual fisherman.

Cited in footnotes to *State v. Harrub*, 15 L. R. A. 761, which holds statute prohibiting shipment of oysters in shells from state not interference with commerce; *Com. v. Brown*, 28 L. R. A. 110, which sustains weekly tax on sales of oysters; *Bradshaw v. Lankford*, 11 L. R. A. 583, which holds that question of dredging for oysters in public waters in specified county, cannot be submitted to certain election districts thereon.

Cited in note (60 L. R. A. 487, 525) on right to fish.

Objection first taken on appeal.

Approved in *Continental Nat. Bank v. McGeoch*, 92 Wis. 309, 66 N. W. 606, refusing to consider transactions alleged to invalidate settlement with creditors where not specifically presented and determined by trial court.

Measure of damages.

Approved in *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 217, 52 L. R. A. 215, 53 Am. St. Rep. 909, 66 N. W. 119, holding fair profit lost, measure for breach of contract to furnish goods; *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 312, 53 N. W. 501, holding that utmost damages for sales in violation of defendant's contract are profits, if defendant made sales; *Pewaukee Mill. Co. v. Howitt*, 86 Wis. 277, 56 N. W. 784, holding loss of rental value, measure of lessee's damages where water wheel of less power than stipulated was put in.

Cited in note (52 L. R. A. 46) on damages for tort as affected by loss of profits.

Distinguished in *Hiehborn v. Bradley*, 117 Iowa, 139, 90 N. W. 592, holding loss of profits provable upon illegal revocation of agency to introduce brand of cigars into specified territory.

9 L. R. A. 810, *HORN v. MILLER*, 136 Pa. 640, 20 Atl. 706.

Report of second appeal in 142 Pa. 557, 21 Atl. 994.

Covenant running with land.

Approved in *Webb v. Bennett's Branch Improv. Co.* 161 Pa. 628, 29 Atl. 260, holding administrator without right to compensation for flooding of lands subsequent to testator's death, in violation of agreement with latter; *Patterson v. Fair*, 8 Northampton Co. Rep. 113, holding grant of right to conduct water, covenant running with the land.

Cited in footnote to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall expressly declared to run with land.

Distinguished in *Hill v. Pardee*, 143 Pa. 104, 28 W. N. C. 451, 22 Atl. 815, holding lessee of coal mine not liable for failure to furnish support under predecessor's covenant not declared on.

Right to divert water of stream.

Cited in footnote to *Gould v. Eaton*, 38 L. R. A. 181, which denies riparian owner's power to transfer right to divert water from stream to use on nonriparian land.

9 L. R. A. 814, *VEON v. CREATON*, 138 Pa. 48, 20 Atl. 865.

Civil damage act.

Cited in *Littell v. Young*, 41 W. N. C. 103, 5 Pa. Super. Ct. 214, holding that

person injured when intoxicated has right of recovery from saloonkeeper, under act giving damages to any person aggrieved; *Bradford v. Boley*, 36 W. N. C. 239, holding wife to be a "person aggrieved," having action for damages for husband's imprisonment for manslaughter, committed while intoxicated; *Cunningham v. Porchet*, 23 Tex. Civ. App. 83, 56 S. W. 574, holding one whose boarders left because of saloon and dancehall, "aggrieved" thereby.

Cited in footnote to *Gage v. Harvey*, 43 L. R. A. 143, which holds loss of money taken from intoxicated person's pocket not included in damages from sale of liquor to him.

Distinguished in *Eddy v. Courtright*, 91 Mich. 269, 51 N. W. 887, holding mother receiving support from son killed by intoxication, within statute giving action for injury to means of support.

Licensing sale of liquors.

Cited in footnote to *Perry v. Salt Lake City*, 11 L. R. A. 446, which holds city council has wide discretion as to granting of licenses.

What liquors are intoxicating.

Cited in note (10 L. R. A. 520) on cider as a fermented liquor.

9 L. R. A. 817, *ROSUM v. HODGES*, 1 S. D. 308, 47 N. W. 140.

Demand before suit.

Cited in *Guernsey v. Tuthill*, 12 S. D. 595, 82 N. W. 190, and *Consolidated Land & Irrig. Co. v. Hawley*, 7 S. D. 231, 63 N. W. 904, holding demand unnecessary in action for wrongful seizure of property by officer; *Willard v. Monarch Elevator Co.* 10 N. D. 406, 87 N. W. 996, holding demand unnecessary before action for conversion of wheat; *Schwamb Lumber Co. v. Schaar*, 94 Ill. App. 546, holding demand unnecessary to sustain replevin, defendant's possession being wrongful.

9 L. R. A. 820, *MURPHY v. MURPHY*, 1 S. D. 316, 47 N. W. 142.

Impeaching verdict by affidavits of jurors.

Followed in *Ulrich v. Dakota Loan & T. Co.* 2 S. D. 294, 49 N. W. 1054, holding affidavits of jurors not admissible to show misconduct in reaching verdict.

Cited in *State v. Andre*, 14 S. D. 217, 84 N. W. 783, holding affidavit of juror alleging use of intoxicating liquors during trial no ground for new trial.

Cited in notes (11 L. R. A. 706) on jurors impeaching their own verdict; (31 L. R. A. 489) on right of jurors to act on their own knowledge of the facts in or relevant to the issue.

Distinguished in *Edward Thompson Co. v. Gunderson*, 10 S. D. 43, 71 N. W. 764, holding juror's affidavits admissible to sustain verdict.

Presumption as to agreement to pay for services of relative.

Cited in footnote to *Ulrich v. Ulrich*, 18 L. R. A. 37, which holds that no presumption exists against parents' agreement to pay for services where evidence tends to show agreement.

9 L. R. A. 824, *WHITE v. CHICAGO, M. & ST. P. R. CO.* 1 S. D. 326, 47 N. W. 146.

Measure of damages for injury to property.

Cited in *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 532, 19 L. R. A. 655,

54 N. W. 596, holding that where trees are wrongfully destroyed, owner may recover either for value of trees or injury to real estate.

Cited in note (19 L. R. A. 659) on measure of damages for injury to or destruction of trees.

Proof of cause of fire.

Cited in *Finkelston v. Chicago, M. & St. P. R. Co.* 94 Wis. 283, 68 N. W. 1005, holding damages for injury by fire not recoverable where cause of fire is merely speculative.

Presumption of negligence from fact of fire.

Cited in *Cronk v. Chicago, M. & St. P. R. Co.* 3 S. D. 100, 52 N. W. 420, holding presumption of negligence as to fire from engine sparks, rebuttable; *Allend v. Spokane Falls & N. R. Co.* 21 Wash. 333, 58 Pac. 244, holding presumptive evidence that engine sparks caused explosion sufficient to take case to jury.

Cited in note (15 L. R. A. 40) on presumption of negligence from occurrence of railway fires.

Liability of railroads for fire from defective engine appliances.

Cited in note (11 L. R. A. 508) on railroad company's liability for fire communicated by defective engine appliances.

9 L. R. A. 829, *DEL ESCOBAL'S SUCCESSION*, 42 L. Ann. 1086, 8 So. 268.

9 L. R. A. 830, *STINSON v. LEE*, 68 Miss. 113, 24 Am. St. Rep. 257, 8 So. 272. **Commercial paper.**

Cited in footnote to *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.

9 L. R. A. 831, *MAYO v. INDIA MUT. INS. CO.* 152 Mass. 172, 23 Am. St. Rep. 814, 25 N. E. 80.

Liability for constructive total loss.

Cited in *Devitt v. Providence Washington Ins. Co.* 173 N. Y. 22, 65 N. E. 777, Affirming 61 App. Div. 400, 70 N. Y. Supp. 654, holding insurer liable for constructive total loss.

Disapproved in *Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co.* 179 U. S. 14, 45 L. ed. 58, 21 Sup. Ct. Rep. 1, Affirming 106 Fed. 117, denying right of recovery for constructive total loss under memorandum warranting free from particular average; *Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co.* 27 C. C. A. 134, 50 U. S. App. 231, 82 Fed. 297, holding constructive total loss not covered by policy with warranty against partial loss.

9 L. R. A. 833, *MILLER v. SOUTH CAROLINA R. CO.* 33 S. C. 359, 11 S. E. 1093.

Authority of agent as to delivery of goods.

Cited in footnote to *Rudell v. Ogdensburg Transit Co.* 44 L. R. A. 415, which sustains agent's general authority to contract for delivery of goods at specified time.

Review of findings of fact.

Cited in *Rhodes v. Russell*, 38 S. C. 424, 17 S. E. 222, holding question of fact

left to referee not reviewable on appeal; *Wilson v. Cantrell*, 40 S. C. 128, 18 S. E. 517, holding findings of fact by master beyond review on appeal.

9 L. R. A. 838, *HOBBS v. ATLANTIC & N. C. R. CO.* 107 N. C. 1, 12 S. E. 124.

Fellow servants.

Cited in *Hancock v. Norfolk & W. R. Co.* 124 N. C. 226, 32 S. E. 679, upholding act making railroad companies liable for injuries to servants through negligence of fellow servants.

— Who are fellow servants.

Approved in *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 547, 26 S. E. 922, holding motorman and track foreman, fellow servants; *Pleasants v. Raleigh & A. Air Line R. Co.* 121 N. C. 495, 61 Am. St. Rep. 674, 28 S. E. 267, holding conductor of side-tracked train, fellow servant of engineer of passing train.

Cited in note (50 L. R. A. 431) on what servants are deemed to be in same common employment apart from statutes where no questions as to vice principalship arise.

Incompetence of vice principal.

Cited in *Harris v. Balfour Quarry Co.* 131 N. C. 556, 42 S. E. 973, holding knowledge of master essential to charge him with liability for injury due to incompetence of vice principal.

9 L. R. A. 840, *STATE v. BAGWELL*, 107 N. C. 859, 12 S. E. 254.

9 L. R. A. 841, *CLARK v. HIRSCHL*, 81 Iowa, 200, 47 N. W. 78.

Rights of insured and beneficiary under insurance contract.

Approved in *Schmidt v. Iowa K. of P. Ins. Asso.* 82 Iowa, 306, 11 L. R. A. 206, 47 N. W. 1032, holding indorsement upon benefit certificate, by third person in absence of insured in accordance with oral instructions from latter, sufficient to change beneficiary; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 579, 19 S. W. 25, holding beneficiary of certificate without vested interest therein; *Schmidt v. Northern Life Asso.* 112 Iowa, 47, 51 L. R. A. 144, 84 Am. St. Rep. 323, 83 N. W. 800, holding benefit certificate payable to administrator of insured murdered by beneficiary; *Delaney v. Delaney*, 175 Ill. 201, 51 N. E. 961, holding new benefit certificate issued to new beneficiary, valid although former one not surrendered as stipulated; *Fink v. Delaware L. & W. Mut. Aid Soc.* 57 App. Div. 512, 68 N. Y. Supp. 80, holding request for change of beneficiary with required fee, effective; *Cade v. Head Camp P. J. W. W.* 27 Wash. 230, 67 Pac. 603, holding wife, named as beneficiary in certificate, without special equity as such.

Cited in *Schardt v. Schardt*, 100 Tenn. 279, 45 S. W. 340, raising, without deciding, question as to force of word "attest" in rule for changing beneficiary; *Waldum v. Homstad*, 119 Wis. 319, 96 N. W. 806, holding change of beneficiary not defeated by failure of officer of society to forward certificate.

Cited in footnote to *Lahey v. Lahey*, 61 L. R. A. 791, which denies right of original beneficiary to fund notwithstanding failure to effect change on his refusal to surrender old certificate.

Cited in notes (15 L. R. A. 352) on changing description in benefit certificate otherwise than in prescribed method; (49 L. R. A. 755) on power of insured to destroy rights of beneficiary.

Distinguished in *Shuman v. Ancient Order*, U. W. 110 Iowa, 645, 82 N. W. 331, holding irregular attempt to change beneficiary, known to insurer after insured's death, ineffective.

Criticized in *Carpenter v. Knapp*, 101 Iowa, 729, 38 L. R. A. 133, 70 N. W. 764, holding requirement of beneficiary's consent in case of "assignment," inapplicable to change of beneficiary.

9 L. R. A. 844, *VILAS v. BUTLER*, 123 N. Y. 440, 20 Am. St. Rep. 771, 25 N. E. 941.

Relief from judgment.

Approved in *Lyster v. Pearson*, 7 Misc. 99, 27 N. Y. Supp. 399, holding motion to vacate, proper remedy where judgment entered by default after service on one whose designation was invalid; *Post v. Charlesworth*, 66 Hun, 258, 21 N. Y. Supp. 168, holding that relief against judgment rendered upon unauthorized appearance of attorney may be sought by motion in the action; *New York v. Smith*, 48 N. Y. S. R. 588, 20 N. Y. Supp. 666, holding that one against whom unjust judgment rendered on appearance of unauthorized attorney may seek relief by motion in action unless circumstances require resort to equity; *Re White*, 52 App. Div. 233, 65 N. Y. Supp. 168, refusing to vacate decree because party disagreed with his attorneys and dismissed them without substituting others or informing his adversaries of the fact; *Smith v. Johnson*, 44 W. Va. 284, 29 S. E. 509, holding that bill in equity to set aside judgment rendered without service of process and on unauthorized appearance of attorney must be sustained by preponderance of evidence.

Cited in *Bush v. O'Brien*, 164 N. Y. 221, 58 N. E. 106 (dissenting opinion), majority holding that taxpayer may maintain action to restrain collection of judgment entered against city on unauthorized offer of corporation counsel.

Cited in note (21 L. R. A. 850) on effect of judgment obtained on unauthorized appearance by attorney.

Want of jurisdiction.

Approved in *Myers v. Prefontaine* 40 App. Div. 604, 58 N. Y. Supp. 70, holding that judgment *in rem* against nonresident remaining without state, on appearance by unauthorized attorney, will be set aside as granted without jurisdiction; *Re Stephani*, 75 Hun, 190, 26 N. Y. Supp. 1089, holding that court acquires no jurisdiction by unauthorized appearance of attorney for a nonresident; *McKenna v. Duffy*, 64 Hun, 598, 19 N. Y. Supp. 248, holding that purchaser, on sale in partition, cannot be compelled to take title where nonresident parties, not served with process, appeared by attorneys whose authority is not shown.

Cited in *Tyler v. Registration Court Judges*, 175 Mass. 88, 51 L. R. A. 440, 55 N. E. 812 (dissenting opinion), majority holding jurisdiction of proceeding *in rem* acquired without personal service or notice, not a violation of constitutional provisions for due process of law.

Direct or collateral attack.

Approved in *Donohue v. Hungerford*, 1 App. Div. 530, 37 N. Y. Supp. 628, holding that unauthorized appearance of attorney cannot be attacked in collateral proceeding, but that relief should be sought by motion in the action; *O'Connor v. Felix*, 87 Hun, 186, 33 N. Y. Supp. 1074; *Washbon v. Cope*, 144

N. Y. 294, 39 N. E. 388, holding that objection that judgment is without jurisdiction because of unauthorized appearance of attorney cannot be taken in collateral proceeding or action.

Cited in O'Donoghue v. Boies, 159 N. Y. 99, 53 N. E. 537, holding judgment rendered by court without jurisdiction a nullity which may be attacked directly or collaterally; Kahn v. Lesser, 28 Abb. N. C. 79, 18 N. Y. Supp. 98, holding presumption of jurisdiction of superior court of other state and recital of defendant's appearance in record not *per se* overcome by defendant's uncorroborated oath that he did not authorize an appearance.

Delay in application.

Approved in Abbett v. Blohm, 54 App. Div. 425, 46 N. Y. Supp. 838, holding that court will vacate unauthorized appearance and set aside judgment only where application is made promptly or adverse party has lost no rights by the delay; Quinn v. Jenks, 88 Hun, 436, 34 N. Y. Supp. 962, refusing to set aside sale and foreclosure, where rights of purchasers in good faith for value and without notice of plaintiff's equities, had interfered.

Cited in McEachern v. Brackett, 8 Wash. 656, 40 Am. St. Rep. 922, 36 Pac. 690, holding that judgment rendered against party not served with process on unauthorized appearance of attorney will be set aside as a nullity when application is made promptly although innocent third parties may suffer.

Presumption of authority.

Approved in Briggs v. Gardner, 60 Hun, 545, 15 N. Y. Supp. 335, holding that where defense of pendency of former suit is interposed, it will be presumed, until its discontinuance, that attorney bringing it was authorized to do so.

Cited in People *ex rel.* Allen v. Murray, 2 Misc. 153, 23 N. Y. Supp. 160, to point that authority of attorney appearing in court of record will be presumed.

Regularity of judgment.

Approved in Post v. Charlesworth, 66 Hun, 258, 21 N. Y. Supp. 168, holding judgment rendered on unauthorized appearance of attorney regular; New York v. Smith, 48 N. Y. S. R. 588, 20 N. Y. Supp. 666, holding judgment rendered against resident by court of general jurisdiction upon unauthorized appearance of attorney, neither void nor irregular.

Contradicting recital in judgment.

Cited in Cooper v. Newell, 173 U. S. 569, 43 L. ed. 812, 19 Sup. Ct. Rep. 506, holding evidence admissible to contradict recital in judgment that defendant was resident, and to show he was not served with process, and that attorney who appeared was unauthorized.

Authority of attorney.

Cited in Herbert v. Lawrence, 21 N. Y. Civ. Proc. Rep. 338, 42 N. Y. S. R. 407, 18 N. Y. Supp. 95, holding attorney abandoning action for want of funds, without power to withdraw answer.

9 L. R. A. 850, *MAYER v. HEIDELBACH*, 123 N. Y. 332, 25 N. E. 416.

Discharge of indebtedness.

Cited in Dykman v. Keeney, 16 App. Div. 134, 45 N. Y. Supp. 137, holding acceptance by bank of notes given by other parties in payment of note surrendered to debtor whose account is marked paid, discharges old debt.

Who are bona-fide holders.

Approved in *First Nat. Bank v. Dean*, 137 N. Y. 118, 32 N. E. 1108, holding that one who takes warehouse receipts for value without knowledge of equities between original parties, makes advances of money, and takes renewal note, is bona-fide holder; *Chapman v. Ogden*, 37 App. Div. 358, 56 N. Y. Supp. 73, holding that one who accepts notes in payment of indebtedness and releases remedies against debtors, is bona-fide holder; *Western Nat. Bank v. Flannagan*, 14 Misc. 318, 35 N. Y. Supp. 848, holding surrender of collaterals and extension of time of payment, sufficient consideration to constitute pledgee bona-fide holder of new note given as collateral security; *Spring Brook Chemical Co. v. Dunn*, 39 App. Div. 131, 57 Am. St. Rep. 100, holding that receipt by bank of draft and application and credit of it in payment of existing indebtedness, does not, in absence of express agreement extinguishing debt, make bank holder for value; *Skinner Engine Co. v. Old Staten Island Dyeing Establishment*, 12 Misc. 72, 33 N. Y. Supp. 82, holding creditor, accepting indorsed note for old debt without surrendering any security or evidence of indebtedness, not bona-fide holder; *Button v. Rathbone*, 126 N. Y. 192, 27 N. E. 266, holding prior unfiled chattel mortgage not void against purchaser who has given credit for goods covered by mortgage upon pre-existing debt not extinguished by the transaction.

— Valuable consideration.

Approved in *Central Trust Co. v. West India Improv. Co.* 48 App. Div. 179, 63 N. Y. Supp. 853, to point that notes taken in absolute payment and extinguishment of debt are taken for value; *New York County Nat. Bank v. American Surety Co.* 69 App. Div. 157, 74 N. Y. Supp. 692, holding surrender and extinguishment of unsecured note and acceptance of secured note, a valuable consideration within statute as to bona-fide purchasers; *Weaver v. Farrington*, 6 Misc. 55, 26 N. Y. Supp. 78, holding part payment and taking note for lesser amount good consideration for indorsement and transfer of the note taken; *Carter, R. & Co. v. Howard*, 17 Misc. 383, 39 N. Y. Supp. 1060, holding discharge of precedent debt or forbearance to collect on receipt of indorsed note adequate consideration for its indorsement; *Schloss v. Feltus*, 103 Mich. 526 note, holding pre-existing debt not such consideration or payment for transfer of goods as will defeat replevin by original vendor who sets up fraud.

Cited in *Blair v. Hagemeyer*, 26 App. Div. 224, 49 N. Y. Supp. 965, to point that satisfaction of judgment is good consideration for transfer of note.

— Exclusion of equities.

Approved in *Sixth Nat. Bank v. Lorillard Brick Works Co.* 46 N. Y. S. R. 236, 18 N. Y. Supp. 861, holding discount of diverted note by bank which credits proceeds without parting with them, does not make it bona-fide holder so as to exclude existing equities between parties; *Sutherland v. Mead*, 80 App. Div. 107, 80 N. Y. Supp. 504, holding actual payment and discharge of pre-existing debt valuable consideration for transfer of diverted commercial paper and sufficient as against accommodation indorsers to shut off prior equities.

Cited in *Rock Springs Nat. Bank v. Luman*, 6 Wyo. 153, 42 Pac. 874 (dissenting opinion), to point that transfer of negotiable paper in payment of existing debt, is for value under rule barring undisclosed equities, whether payment absolute or conditional.

9 L. R. A. 853, *STATE v. TAMLER*, 19 Or. 528, 25 Pac. 71.

Appeals from trial courts.

Followed in *State v. Robinson*, 32 Or. 52, 48 Pac. 357, holding motion to acquit for failure of proof in any respect must specify grounds.

Cited in *State v. Fiester*, 32 Or. 264, 50 Pac. 561, holding that motion to acquit must specify where evidence is insufficient except on total failure of proof; *Watson v. Southern Oregon Co.* 39 Or. 485, 65 Pac. 985, holding misconduct or improper remarks of counsel, not connected with judicial error in respect thereto, not reviewable; *State v. Foot You*, 24 Or. 67, 32 Pac. 103, holding that in order to raise question on appeal, objection must be made, ruling obtained, and exception taken; *State v. Schuman*, 36 Or. 22, 47 L. R. A. 155, 78 Am. St. Rep. 754, 58 Pac. 661, holding that claim of immunity under state law must be asserted in trial court to be considered on appeal; *State v. Hyde*, 22 Wash. 563, 61 Pac. 719, holding nonsuit impossible in criminal case; *State v. Haines*, 35 Or. 382, 58 Pac. 39, holding that circuit court has jurisdiction only to review city court's action respecting violation of municipal ordinances; *State v. Sally*, 41 Or. 368, 70 Pac. 396, holding that insufficiency of proof as to taking animal should have been brought to attention of court, on motion for direction of verdict in prosecution for larceny.

9 L. R. A. 856, *LAW v. BUTLER*, 44 Minn. 482, 46 N. W. 53.

Sale or mortgage of homestead.

Cited in *Weitzner v. Thingstad*, 55 Minn. 247, 56 N. W. 817, holding contract of husband alone to convey homestead, void.

Cited in footnote to *Wallace v. Travelers' Ins. Co.* 26 L. R. A. 806, which holds recorded power of attorney to husband insufficient showing of consent to mortgage of homestead.

9 L. R. A. 859, *GOFF v. STOUGHTON STATE BANK*, 78 Wis. 106, 47 N. W. 190.

Report of second appeal, in 84 Wis. 370, 54 N. W. 732.

Admissibility of declarations in party's favor.

Cited in *Grisim v. Milwaukee City R. Co.* 84 Wis. 22, 54 N. W. 104, holding declaration as part of *res gestæ* only admissible when made contemporaneously with the transaction.

Admissibility of account books.

Cited in footnote to *Re Fulton*, 35 L. R. A. 133, which holds book containing charges against one person only, inadmissible.

9 L. R. A. 861, *SWEET v. OHIO COAL CO.* 78 Wis. 127, 47 N. W. 182.

Assumption of risks of employment.

Cited in *Erdman v. Illinois Steel Co.* 95 Wis. 12, 60 Am. St. Rep. 66, 69 N. W. 993, holding servant negligent in working at cracked, high-speed saw, cutting iron, on master's promise to repair; *Burnell v. West Side R. Co.* 87 Wis. 392, 58 N. W. 772, holding danger from unguarded gear wheels of electric car in cleaning commutator, risk of motorman's employment; *Paule v. Florence Min. Co.* 80 Wis. 356, 50 N. W. 189, holding that "trammer" in mine assumes risk of ore and rock falling from roof; *Yerkes v. Northern P. R. Co.* 112 Wis. 188, 88 Am. St. Rep. 961, 88 N. W. 33, holding servant not guilty of contributory negligence,

as matter of law, in continuing to use defective apparatus on promise to repair; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 558, 65 N. W. 186, denying right of recovery for death of rivet heater killed by fall from stringer to ground while at work; *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 655, 68 N. W. 1057, denying right of recovery for injury due to closeness of building to railroad tracks, danger being known to plaintiff; *Reed v. Stockmeyer*, 20 C. C. A. 383, 34 U. S. App. 727, 74 Fed. 189, holding servant knowing danger of more hazardous employment, outside of that for which he had engaged, assumes risks thereof; *Hennesey v. Chicago & N. W. R. Co.* 99 Wis. 121, 74 N. W. 554 (concurring opinion), holding it question for jury whether switchman observed danger of open ditch between tracks, and assumed risk thereof.

9 L. R. A. 863, *LINDEN STEEL CO. v. IMPERIAL REF. CO.* 138 Pa. 10, 20 Atl. 867.

Description of property covered by mechanics' lien.

Cited in *Linden Steel Co. v. Rough Run Mfg. Co.* 158 Pa. 245, 33 W. N. C. 247, 27 Atl. 895, holding lien notice describing land, buildings, and machinery, with accurate map of premises appended, sufficient; *Hassenfus v. Philadelphia Packing & Provision Co.* 15 Pa. Co. Ct. 660, holding mechanics' lien describing as separate building, a part of single building, defective.

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